HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

MINISTER FOR IMMIGRATION AND BORDER PROTECTION APPELLANT

AND

YOGESH KUMAR & ORS RESPONDENTS

Minister for Immigration and Border Protection v Kumar
[2017] HCA 11
8 March 2017
P49/2016

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2-4 of the orders of the Federal Court of Australia made on 23 February 2016 and, in their place, order that:*

   (a) *order 2 of the orders of the Federal Circuit Court of Australia made on 14 September 2015 be set aside; and*

   (b) *the appeal to that Court otherwise be dismissed.*

3. *The appellant pay the first, second and third respondents' costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

G R Kennett SC with P M Knowles for the appellant (instructed by Australian Government Solicitor)

M D Howard SC with D V Blades for the first to third respondents (instructed by Cathal Smith Legal Pty Ltd)

Submitting appearance for the fourth respondent

CATCHWORDS

Minister for Immigration and Border Protection v Kumar

Statutes – Interpretation – *Acts Interpretation Act* 1901 (Cth), s 36(2) – Where first respondent's application for visa received and taken to be made on Monday 13 January – Where first respondent able to meet visa criteria in Migration Regulations 1994 (Cth) if first respondent held valid second visa at time of application – Where first respondent's second visa expired on Sunday 12 January – Whether s 36(2) of *Acts Interpretation Act* allowed application to be assessed as if it had been made before expiry of first respondent's second visa.

Words and phrases – "an Act requires or allows", "last day", "prescribed or allowed by an Act", "state of affairs", "thing to be done", "time of application".

Acts Interpretation Act 1901 (Cth), s 36(2).
Migration Act 1958 (Cth), ss 31, 45, 46, 47, 65.
Migration Regulations 1994 (Cth), Sched 2, cl 572.211.

1 BELL, KEANE AND GORDON JJ. Section 36(2) of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") provides that if an Act "requires or allows a thing to be done" and "the last day" for the doing of the thing is a Saturday, a Sunday or a holiday then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday. The issue in the appeal is whether the *Migration Act* 1958 (Cth) ("the Act") and the Migration Regulations 1994 (Cth) ("the Regulations"), governing the first respondent's application for a specified class of visa, provide a "last day" for the application to be made.

The statutory scheme

2 The Act requires a non-citizen who wants a visa to apply for a visa of a particular class[1]. An application is only valid if it is an application for a visa of a class that is prescribed and conforms to the requirements of the Regulations[2]. Schedule 1 to the Regulations sets out the requirements for the making of a valid application for a visa. Schedule 2 to the Regulations contains the criteria for the grant of visas of specified classes[3].

3 The appellant, the Minister for Immigration and Border Protection ("the Minister"), is required to consider a valid application for a visa[4]. After considering a valid application, if the Minister is satisfied that any charges payable have been paid, the prescribed criteria for the visa have been satisfied and the grant is not prevented by law, he or she is to grant the visa. If the Minister is not so satisfied, he or she is to refuse to grant the visa[5].

4 The Regulations prescribe a class of visa known as a Subclass 572 (Vocational Education and Training Sector) visa ("a 572 visa"). Clause 572.211 of Sched 2 to the Regulations specifies the criteria that must be satisfied at the time of making an application for a 572 visa. In the case of an application that is made in Australia, the applicant may meet the requirements of cl 572.211 if he or she is the holder of a visa of a class or subclass specified in sub-cl (2). The Subclass 485 (Temporary Graduate) visa ("a 485 visa") is a subclass specified for

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1 *Migration Act* 1958 (Cth), s 45.

2 *Migration Act* 1958 (Cth), s 46(2).

3 *Migration Act* 1958 (Cth), s 31(3).

4 *Migration Act* 1958 (Cth), s 47(1).

5 *Migration Act* 1958 (Cth), s 65(1).

the purposes of sub-cl (2)(d)[6]. An applicant who is in Australia may also meet the requirements of cl 572.211, notwithstanding that he or she does not hold a substantive visa, provided his or her last substantive visa was one of the classes or subclasses specified in sub-cl (3).

The first and second respondents' visa application

5 The first and second respondents are married and the third respondent is their son ("the respondents")[7]. The first respondent applied for a 572 visa as the primary applicant and the second respondent applied for a 572 visa as his dependent spouse. Their application was required to be made to an office of the Department of Immigration and Border Protection ("the Department")[8]. The application was received at the Department's Perth office on Monday, 13 January 2014. The first respondent's 485 visa expired on Sunday, 12 January 2014.

6 On 16 May 2014, a delegate of the Minister refused to grant the 572 visas to the first and second respondents because at the date the application was made the first respondent did not meet the criteria specified in cl 572.211. On Monday, 13 January 2014, the first respondent was not the holder of a substantive visa within one of the classes or subclasses specified in cl 572.211(2), his 485 visa having expired on Sunday, 12 January 2014, nor was his previous substantive visa of one of the classes or subclasses specified in cl 572.211(3).

7 The first and second respondents applied to the Migration Review Tribunal ("the Tribunal") for a review of the delegate's decision. The Tribunal agreed with the delegate's conclusion that the first respondent did not satisfy the criteria specified in cl 572.211. On 29 January 2015, the Tribunal affirmed the delegate's decision.

The Federal Circuit Court

8 The respondents sought judicial review of the Tribunal's determination in the Federal Circuit Court of Australia (Judge Street). The respondents submitted that the Tribunal erred by failing to apply s 36(2) of the Interpretation Act, which provides:

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6 Migration Regulations 1994 (Cth), Sched 2, cl 572.211(2)(d)(iia).

7 The fourth respondent is the Administrative Appeals Tribunal, which entered a submitting appearance.

8 Migration Regulations 1994 (Cth), reg 2.10(2A)(b) and reg 1.03 definition of "Immigration".

"If:

(a) an Act requires or allows a thing to be done; and

(b) the last day for doing the thing is a Saturday, a Sunday or a holiday;

then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.

Example: If a person has until 31 March to make an application and 31 March is a Saturday, the application may be made on Monday 2 April."

9 It was the respondents' case before the Federal Circuit Court that "the requirements of cl 572.211(2)" were a thing that the Act and the Regulations "allowed" to be done for the purposes of s 36(2)[9]. The respondents drew an analogy with the statutory example of the operation of s 36(2)[10]. It is to be observed that unlike the example, the Act and the Regulations impose no time limit on the making of an application for a 572 visa. Nonetheless, the respondents submitted that s 36(2) operated such that the first respondent continued to meet the requirements of cl 572.211(2)(d)(iia) on Monday, 13 January 2014. The argument called in aid Burchett J's dissenting reasons in *Zangzinchai v Millanta* for the proposition that it is not necessary that an Act or regulations prescribe in terms that something shall be done within a particular period in order to engage s 36(2)[11].

10 Judge Street considered that cl 572.211(2) does not prescribe or allow anything to be done, but rather identifies a state of affairs that must exist as a criterion for the making of a valid application[12]. It followed that s 36(2) of the Interpretation Act had no application, a conclusion which his Honour considered to be in line with the majority's reasons in *Zangzinchai*[13].

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9 *Kumar v Minister for Immigration* [2015] FCCA 2573 at [9].

10 *Kumar v Minister for Immigration* [2015] FCCA 2573 at [4].

11 *Kumar v Minister for Immigration* [2015] FCCA 2573 at [8] citing *Zangzinchai v Millanta* (1994) 53 FCR 35 at 42, 48.

12 *Kumar v Minister for Immigration* [2015] FCCA 2573 at [11].

13 *Kumar v Minister for Immigration* [2015] FCCA 2573 at [12] citing *Zangzinchai v Millanta* (1994) 53 FCR 35 at 38-39 per Neaves and Beazley JJ.

Zangzinchai

11 The decision of the Full Court of the Federal Court of Australia in *Zangzinchai* considered the scope of s 36(2) of the Interpretation Act as it stood before amendment in 2011 ("the 2011 amendments")[14]. At the time, s 36(2) provided:

> "Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place."

12 In *Zangzinchai*, an unsuccessful applicant for an extended eligibility (economic) entry permit sought a review of the decision before the Immigration Review Tribunal. The Migration (Review) Regulations 1989 (Cth) conditioned eligibility for a review on the lawful presence in Australia of the applicant for review when he or she lodged that application. The applicant had lodged his application on Monday, 2 March 1992. The Immigration Review Tribunal declined to review the decision not to grant the entry permit, holding that the applicant had ceased to be lawfully present in Australia on the expiration of his temporary entry permit on 1 March 1992, a Sunday.

13 Upholding the Immigration Review Tribunal's decision, Neaves and Beazley JJ said[15]:

> "The regulations did not prescribe or allow a time in which an application for an extended eligibility (economic) entry permit might be made. Rather, different consequences flowed depending upon whether the application was made while the applicant was or was not the holder of a temporary entry permit. If a person made an application after a temporary entry permit had expired, the person had to satisfy different criteria before being eligible for the grant of a further entry permit, than was the case if the person was the holder of an entry permit at the time of application."

14 Burchett J, in dissent, would have allowed the appeal. His Honour favoured imputing to the legislature the intention of giving s 36(2) "the widest

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14 *Acts Interpretation Amendment Act* 2011 (Cth), Sched 1, item 93.

15 *Zangzinchai v Millanta* (1994) 53 FCR 35 at 39.

possible scope"[16]. His Honour considered that s 36(2) applied "where the *effect* of an Act is to prescribe or allow 'anything' to be done on a Sunday etc, whether or not that effect arises out of a direct and precise prescription"[17]. What his Honour did not explain was how s 36(2) operated in the circumstances to deem the applicant in *Zangzinchai* to be lawfully present in Australia on Monday, 2 March 1992.

The respondents' appeal to the Federal Court of Australia

15 The respondents appealed to the Federal Court of Australia (North J)[18]. His Honour found that the primary judge erred by asking whether s 36(2) of the Interpretation Act applied to the criteria specified in cl 572.211(2) when the thing that the Act "allows" to be done is for a non-citizen to apply for a visa[19]. His Honour distinguished *Zangzinchai* on the basis that it was concerned with the earlier form of s 36(2) of the Interpretation Act.

16 North J observed that the earlier form of the provision applied where a period was "prescribed or allowed by an Act", while the current provision applies where an Act "requires or allows" a thing to be done. His Honour considered the latter formulation gives the provision a broader operation[20]. His Honour held that s 36(2) does not say it operates only as an extension of time; rather, it "allows the thing … to be done … on the later date as if it were being done on the earlier

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16 *Zangzinchai v Millanta* (1994) 53 FCR 35 at 47-48.

17 *Zangzinchai v Millanta* (1994) 53 FCR 35 at 48 (emphasis in original).

18 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146. North J at 147 [4]-[6] noted that there was some confusion as to the parties to the appeal. The first and second respondents applied for 572 visas. It does not appear that an application was made on behalf of their son, the third respondent. The first and second respondents applied for review to the Tribunal. The first to third respondents sought judicial review of the Tribunal's decision in the Federal Circuit Court and on appeal from that Court to the Federal Court. It was accepted by the parties in the Federal Court that the determination of the first respondent's appeal would determine the outcome of the appeals brought by the second and third respondents.

19 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 149 [16].

20 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 151 [24].

date"[21]. As a matter of fact, his Honour said, the last day for the first respondent to apply for the 572 visa was Sunday, 12 January 2014[22]. It followed that s 36(2) operated to allow the application for the 572 visa to be made on Monday, 13 January 2014[23]. In order for "the thing" to be "done", the circumstances existing on Sunday, 12 January 2014 were, by operation of the sub-section, to be regarded as existing on Monday, 13 January 2014[24]. The respondents' appeal was allowed, the decision of the Tribunal quashed and the matter remitted for determination in accordance with law[25].

17 Special leave to appeal was granted by Kiefel and Nettle JJ on 2 September 2016. The Minister appeals to this Court contending that the Federal Court erred in holding that s 36(2) of the Interpretation Act had the effect that the first respondent's application for a 572 visa was to be assessed as if that application had been made before the expiry of his 485 visa. As a condition of the grant of special leave, the Minister agreed to pay the respondents' costs in this Court regardless of the outcome of the appeal and not to disturb the costs order below. For the reasons to be given, the appeal must be allowed.

The submissions

18 The Minister's short point is that the Act and the Regulations do not impose a time limit on the making of an application for a 572 visa. Section 36(2) operates to extend time in a case in which the last day for doing a thing that is required or allowed by an Act falls on a Saturday, a Sunday or a holiday. The first respondent's application for a 572 visa, made on 13 January 2014, was not time-barred. It was accepted as a valid application. The first respondent's circumstances on 13 January 2014 were such that he did not satisfy the criterion specified in cl 572.211(2)(d)(iia) or any other of the criteria for the grant of a 572

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21 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 149 [15].

22 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 149 [12].

23 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 149 [13].

24 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 149 [14].

25 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 151 [28].

visa. The Minister submits that the vice in North J's analysis is that cl 572.211(2)(d)(iia) is found to be met even though at the time the first respondent made his application he did not hold a 485 visa.

19 The respondents submit that under the Act and the Regulations the first respondent was allowed to apply for a 572 visa as the holder of a 485 visa. The last day on which he could make an application for a 572 visa that was capable of being granted was Sunday, 12 January 2014. As the last day for making that application was a Sunday, the respondents contend that s 36(2) is engaged to allow it to be made on Monday, 13 January 2014. The respondents disavow North J's analysis that s 36(2) operates to allow the thing in question to be effectuated on the later date as if the thing were being done on the earlier date[26]. And the respondents disavow that s 36(2) operates to alter the criteria in cl 572.211. Nonetheless they contend that "if the application could be made on a Sunday if the Department was open – the Department was not open – it can be made on the Monday, the next working day". They submit that North J was correct to distinguish *Zangzinchai* on the basis that the current provision has a broader operation than the provision it replaced. In the alternative, they submit that *Zangzinchai* was wrongly decided.

The 2011 amendments

20 Had the object of the 2011 amendments been to substantively alter s 36(2), giving it a broader operation than the operation of its predecessor as explained by the majority in *Zangzinchai*, it is to be expected that that intention would have been clearly expressed. Contrary to North J's analysis, there is no material difference between the former and the current provisions: nothing turns on the use of the past tense of the verb "prescribe" in the former provision and the use of the present tense of the verb "require" in the current provision. As the Minister submits, the breaking-up of a single sentence into sub-paragraphs in the current provision is in line with modern drafting conventions. Where an Act has expressed a particular idea in a form of words and a later Act appears to express the same idea in a different form of words for the purpose of using a clearer style, the ideas are not to be taken to be different merely on that account[27]. The Explanatory Memorandum to the Bill for the 2011 amendments supports the conclusion that the amendment of s 36(2) was not intended to substantively alter

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26 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 149 [15].

27 *Acts Interpretation Act* 1901 (Cth), s 15AC.

the operation of the provision, but rather was to make the provision more "user friendly"[28].

21 North J extracted the following passage from the Explanatory Memorandum[29]:

> "Section 36, which deals with how time periods are to be calculated, is being modernised by use of a table to show how different scenarios are to be interpreted in Commonwealth Acts and provides examples for each of the items in the table. It is intended to capture a broader range of situations that are likely to arise from time to time – such as where an Act specifies a period for doing something and the place for doing the thing is closed on the first or last day of doing that thing."

22 The reference to capturing a broader range of situations is to be understood as the introduction of the table in sub-s (1)[30] in place of the former

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28 Australia, House of Representatives, Acts Interpretation Amendment Bill 2011, Explanatory Memorandum at 35 [225].

29 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 151 [25] citing Australia, House of Representatives, Acts Interpretation Amendment Bill 2011, Explanatory Memorandum at 35 [224].

30 Section 36(1) provides (examples omitted):

> A period of time referred to in an Act that is of a kind mentioned in column 1 of an item in the following table is to be calculated according to the rule mentioned in column 2 of that item:

Calculating periods of time

Item	Column 1 If the period of time:	Column 2 then the period of time:
1	is expressed to occur between 2 days	includes both days.
2	is expressed to begin at, on or with a specified day	includes that day.
3	is expressed to continue until a specified day	includes that day.
4	is expressed to end at, on or with a specified day	includes that day.
5	is expressed to begin from a specified day	does not include that day.

(Footnote continues on next page)

provision, which provided that where any period of time was dated from a day, act or event, the time was to be reckoned exclusive of that day, act or event. It also is to be understood as a reference to the introduction of sub-s (3), which defines "holiday" in relation to the time for doing a thing so as to include both public holidays and, in the case of a thing that is to be done at a particular place or office, a day on which the place or office is closed for the whole day. The Explanatory Memorandum also stated that "[the amendment] does not substantively change the existing policy"[31]. It is true, as North J observed, that the Explanatory Memorandum does not identify that policy[32]. Nonetheless, such as it is, the Explanatory Memorandum provides no support for a conclusion that the 2011 amendments broadened the scope of s 36(2).

23 The operation of s 36(2) as it then stood was touched upon in *Associated Dominions Assurance Society Pty Ltd v Balmford*[33]. The issue raised by *Zangzinchai* and by the present appeal was not addressed in *Balmford*; however, the statements in *Balmford* are consistent with the majority's analysis in *Zangzinchai* in reading s 36(2) as an interpretive rule serving to extend time in the stated circumstances and not to otherwise alter or affect rights or obligations under the Act[34].

Conclusion

24 It is not in question that s 36(2) is not confined to statutory provisions that expressly stipulate a "last day" for a thing to be done. As the Minister submits, the last day for doing something under an Act may be calculated by reference to

6	is expressed to begin after a specified day	does not include that day.
7	is expressed to end before a specified day	does not include that day.

31 Australia, House of Representatives, Acts Interpretation Amendment Bill 2011, Explanatory Memorandum at 35 [225].

32 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 151 [27].

33 (1950) 81 CLR 161; [1950] HCA 30.

34 *Associated Dominions Assurance Society Pty Ltd v Balmford* (1950) 81 CLR 161 at 181 per Williams J, 181-182 per Webb J, 186-187 per Fullagar J.

an event such as the service of a statutory notice[35], the presentation of a bankruptcy petition[36], the accrual of a cause of action[37] or other circumstance. Where an Act "requires or allows a thing to be done", whether expressly or by necessary implication, and the last day for doing the thing is a Saturday, a Sunday or a holiday, s 36(2) allows that the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.

25 As earlier explained, no time limit is imposed expressly or by necessary implication under the Act and the Regulations on the making of an application for a 572 visa. It is common ground that the first and second respondents' application was validly made on 13 January 2014. On that day the first respondent was not the holder of a 485 visa. He did not meet any of the criteria specified in cl 572.211(2) or (3) for the grant of a 572 visa. The last day on which the first respondent might have applied for a 572 visa relying on his status as the holder of a 485 visa was Sunday, 12 January 2014[38]. However, recognition of that fact does not engage s 36(2). Section 36(2) states a rule with respect to the time for the doing of a thing which an Act requires or allows to be done. It does not otherwise alter the rights or obligations conferred or imposed by the Act. The language of s 36(2) cannot be read as deeming the thing to be done as if it were being done on the earlier date, nor as deeming a state of affairs that existed on the earlier date to be in existence on the later date.

Orders

26 For these reasons the following orders should be made.

1. Appeal allowed.

2. Set aside orders 2-4 of the orders of the Federal Court of Australia made on 23 February 2016 and in their place order that:

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35 *Associated Dominions Assurance Society Pty Ltd v Balmford* (1950) 81 CLR 161.

36 *Roskell v Snelgrove* (2008) 246 ALR 175.

37 *Price v J F Thompson (Qld) Pty Ltd* [1990] 1 Qd R 278.

38 Since the first and second respondents' application was validly made, one avenue to the grant of 572 visas remained: following unsuccessful review before the Migration Review Tribunal (now the Administrative Appeals Tribunal), the Minister was empowered under s 351 of the *Migration Act* 1958 (Cth) to substitute a decision more favourable to the applicant whether or not the Tribunal had the power to make that other decision.

(a) order 2 of the orders of the Federal Circuit Court of Australia made on 14 September 2015 be set aside; and

(b) the appeal to that Court otherwise be dismissed.

3. The appellant pay the first, second and third respondents' costs of the appeal to this Court.

27 GAGELER J. Section 36(2) of the *Acts Interpretation Act* 1901 (Cth) is a straightforward extension of time provision. The sub-section applies if an Act requires or allows a thing to be done and if the last day for doing the thing is a Saturday, a Sunday or a holiday. Where it applies, the sub-section allows the thing to be done on the next day that is not a Saturday, a Sunday or a holiday.

28 The example of its operation given in the sub-section itself is instructive. The example is of a person having until 31 March to make an application and of 31 March being a Saturday. The example explains that the sub-section allows the person to make the application on Monday 2 April.

29 Other examples of the operation of the sub-section can be given by reference to cases which have concerned its operation or the operation of cognate provisions. If an Act allows an instrument attracting stamp duty to be stamped without penalty within a month of execution and the month expires on a Sunday, the effect of the sub-section is to allow the instrument to be stamped without penalty on the following Monday[39]. If an Act allows a mortgagor to remedy a default by a date specified in a notice given to the mortgagor by a mortgagee in order to avoid foreclosure and the date so specified is a Sunday, the effect of the sub-section is to allow the mortgagor to remedy the default on the following Monday so as to avoid foreclosure[40]. If an Act requires an action for damages to be commenced within three years after a cause of action accrues and the three years expires on a holiday, the effect of the sub-section is to allow an action to be commenced on the next day that is not a Saturday, a Sunday or another holiday[41]. If an Act allows for the making of an order by a court extending the period at the expiration of which a creditor's petition will lapse at any time before the expiration of the period of 12 months from the date of presentation of the petition and that latter period expires on a holiday, the court can make the order on the next day that is not a Saturday, a Sunday or another holiday[42].

30 Those examples do not exhaust the operation of the sub-section. They do illustrate when and how the sub-section operates. The sub-section operates when an Act expressly or by implication requires or allows something to be done within a period of time and where that period expires on a Saturday, a Sunday or a holiday. The sub-section then operates to extend the period within which the thing might be done to the next day that is not a Saturday, a Sunday or a holiday:

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39 Eg *Wall v Commissioner of Stamps* (1899) 18 NZLR 74.

40 Eg *Price v Williams* [1979] 2 NZLR 374 at 376-377.

41 Eg *Thomson v Les Harrison Contracting Co* [1976] VR 238. Cf *Price v J F Thompson (Qld) Pty Ltd* [1990] 1 Qd R 278.

42 Eg *Roskell v Snelgrove* (2008) 246 ALR 175.

it gives to the thing if done on that next day the same legal effect as the thing would have had if the thing had been done within the period required or allowed by the Act. That is the long and the short of it.

31 The first respondent seeks to make the sub-section do more. He seeks to make the sub-section applicable to his circumstances by characterising, as a thing which the *Migration Act* 1958 (Cth) allowed to be done, the making by him under s 45 of an application for a Student (Temporary) (Class TU) Subclass 572 (Vocational Education and Training Sector) visa that was capable of being granted by the Minister under s 65(1). The visa the subject of the application could only be granted if the Minister were able to be satisfied under s 65(1)(a)(ii) of the criteria prescribed under s 31(3) by cl 572.211 of Sched 2 to the Migration Regulations 1994 (Cth). The last day on which he could make an application capable of being so granted on the basis of the Minister's satisfaction of the criterion prescribed by cl 572.211(2) was the last day on which he still held his Subclass 485 (Temporary Graduate) visa. The first respondent argues that, as that day was a Sunday, s 36(2) of the *Acts Interpretation Act* operated to allow him to make the application on the following Monday.

32 The problem with the argument is that it conflates the thing allowed to be done by the first respondent with the things required to be done by the Minister. The thing allowed to be done by the first respondent was the making of a valid application for the visa under s 45. The things required to be done by the Minister, following the making of a valid application, were consideration of the application under s 47 and the making of a decision under s 65(1) either to grant the visa under s 65(1)(a), if satisfied relevantly that the criteria prescribed by cl 572.211 were met, or to refuse to grant the visa under s 65(1)(b) if not so satisfied.

33 Nothing in the *Migration Act* imposed any limit on the time for the making by the first respondent of a valid application under s 45 for a Subclass 572 (Vocational Education and Training Sector) visa. Irrespective of whether the first respondent made it on the Sunday on which he still held his Subclass 485 (Temporary Graduate) visa or on the following Monday, the making by him of a valid application had the same legal effect. The making of the application required the Minister to consider the application under s 47 and to make a decision under s 65(1). The circumstance of the application having been made on the Monday meant that the criterion prescribed by cl 572.211(2) could not be met and the Minister was obliged by s 65(1)(b) to refuse to grant the visa. Section 36(2) was not engaged, and had no relevant operation.

34 *Zangzinchai v Millanta*[43], in my opinion, was quite a different case. Section 36(2) in an earlier form was there held by majority to be inapplicable to a

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43 (1994) 53 FCR 35.

provision addressed to when an applicant for a visa might apply to the Immigration Review Tribunal for review of a decision to refuse a visa[44]. The provision was not addressed to the criteria for the grant of a visa. The correctness of the conclusion of the majority in that case is contestable. To reject it would be to say nothing of the correct conclusion in this case.

35 For these reasons, I would allow the appeal and make the consequential orders proposed by the plurality.

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44 Regulation 21(3)(a) of the Migration (Review) Regulations 1989 (Cth).

36 NETTLE J. Section 65 of the *Migration Act* 1958 (Cth) provides, inter alia, that, if the Minister for Immigration and Border Protection (the appellant in this Court, hereinafter "the Minister") is satisfied that a visa application satisfies the criteria prescribed by the *Migration Act* or the Migration Regulations 1994 (Cth) ("the Regulations"), the Minister is to grant the visa or, if not so satisfied, to refuse the visa. Clause 572.211 of Sched 2 to the Regulations relevantly provides that the criteria to be satisfied at the time of application for a Subclass 572 (Vocational Education and Training Sector) visa include that the applicant is the holder of a Subclass 485 (Temporary Graduate) visa.

37 The first respondent ("Mr Kumar") was the holder of a Subclass 485 visa that expired on Sunday, 12 January 2014. On Friday, 10 January 2014, Mr Kumar posted an application for a Subclass 572 visa to the Department of Immigration and Border Protection. The application was not received by the Department until Monday, 13 January 2014, one day after Mr Kumar's Subclass 485 visa had expired. It was common ground between the parties that the date Mr Kumar's application was made for the purposes of the *Migration Act* and the Regulations was the date that it was received by the Department, that is, Monday, 13 January 2014.

38 On 16 May 2014, a delegate of the Minister refused Mr Kumar's application for a Subclass 572 visa on the ground that, because his Subclass 485 visa had expired one day before the Department received the application, Mr Kumar was not the holder of a Subclass 485 visa at the time of application for a Subclass 572 visa. Mr Kumar's wife, whose visa application was practically dependent on that of her husband, and their son are also respondents to this appeal[45].

39 The question for decision is whether s 36(2) of the *Acts Interpretation Act* 1901 (Cth) operated so as to extend, until Monday, 13 January 2014, the time in which Mr Kumar was allowed to make an application for a Subclass 572 visa that was capable of being granted under s 65 of the *Migration Act*. For the reasons which follow, that question should be answered, yes.

History of the litigation

40 Mr Kumar applied to the Migration Review Tribunal for review of the delegate's decision to refuse his application for a Subclass 572 visa. After a

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45 Mr Kumar and his wife applied to the Migration Review Tribunal for review of the delegate's decision. Mr Kumar, his wife and their son sought judicial review of the Tribunal's decision in the Federal Circuit Court of Australia, and then appealed the Federal Circuit Court's decision to the Federal Court of Australia. It will be convenient throughout to only refer to Mr Kumar.

hearing, the Tribunal affirmed the delegate's decision. The Tribunal made no reference to s 36(2) of the *Acts Interpretation Act*.

41 Mr Kumar applied for judicial review of the Tribunal's decision in the Federal Circuit Court of Australia. Judge Street concluded[46] that he was bound by the decision of the Full Court of the Federal Court of Australia in *Zangzinchai v Millanta*[47] to hold that cl 572.211 of Sched 2 to the Regulations is not a provision that requires or allows a thing to be done within the meaning of s 36(2) of the *Acts Interpretation Act*, but is rather a provision that identifies a state of affairs that must exist at the time of application for a visa, and thus a provision to which s 36(2) of the *Acts Interpretation Act* has no application. His Honour accordingly dismissed Mr Kumar's application.

42 Mr Kumar then appealed to the Federal Court of Australia. North J allowed the appeal, holding[48] that, as a result of amendments to s 36 of the *Acts Interpretation Act* since *Zangzinchai* was decided, s 36(2) so operated in this case as to allow Mr Kumar to lodge his application for a Subclass 572 visa on Monday, 13 January 2014, as if he had lodged it the day before. By grant of special leave, the Minister appeals to this Court.

Relevant legislation[49]

43 Section 29(1) of the *Migration Act* empowers the Minister to grant visas permitting non-citizens to travel to and enter Australia and/or remain in Australia. Section 31(3) of the *Migration Act* provides that the Regulations may prescribe criteria for a visa or a specified class of visa. Section 45 provides that, generally, a non-citizen who wants a visa must apply for a visa of a particular class.

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46 *Kumar v Minister for Immigration* [2015] FCCA 2573 at [13]-[14].

47 (1994) 53 FCR 35.

48 *Kumar v Minister for Immigration and Border Protection* (2016) 243 FCR 146 at 149 [15], 151 [24].

49 Notwithstanding this judgment's use of the present tense, the description of the operation of the legislation is of its operation as at January 2014.

44 Section 65 provides, so far as is relevant, as follows:

"**Decision to grant or refuse to grant visa**

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; ...

...

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa."

45 Schedule 2 to the Regulations relevantly provides as follows:

"**572.21—Criteria to be satisfied at time of application**

572.211

(1) If the application is made in Australia, the applicant meets the requirements of subclause (2) ...

(2) An applicant meets the requirements of this subclause if the applicant is:

...

(d) the holder of a visa of one of the following subclasses:

...

(iia) Subclass 485 (Temporary Graduate)".

The decision in *Zangzinchai*

46 At the time of the decision in *Zangzinchai*, s 36(2) of the *Acts Interpretation Act* was as follows:

> "Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place."

47 In *Zangzinchai*, the applicant was the holder of a temporary entry permit that expired on Sunday, 1 March 1992. He applied for an extended entry permit the following day. His application was refused and he sought a review of that decision. Under the terms of the applicable legislation, an applicant for an entry permit could apply for review of a decision only if the applicant was "lawfully present in Australia, when he or she lodged the application"[50]. The majority of the Full Court (Neaves and Beazley JJ) held that the decision was not a reviewable decision because the applicant's existing temporary entry permit had expired on the Sunday, one day before he lodged the application for an extended entry permit, and, therefore, because the applicant was not lawfully present in Australia when he lodged the application[51]. Their Honours endorsed a passage from an earlier decision of the Immigration Review Tribunal to the effect that s 36(2) of the *Acts Interpretation Act* did not apply because[52]:

> "its application depends, according to the terms of the section, upon the prescription of a period for the doing of something and the Act and Regulations do not contain any such prescription of time for the making of an application for an entry permit. An application for a further temporary entry permit may be made at any time, even if, as in the present case, the applicant is an illegal entrant in which case however certain further criteria must be satisfied. The lawful status of a non-citizen cannot exist without, and is a quality arising from, the possession of an entry permit. Therefore lawful status is lost by a temporary resident as a passive act through the expiry of an entry permit and can only be regained or maintained by the *grant* of, and not the application for, a further temporary entry permit in respect of which, as already noted, there is no time prescription in the Act or Regulations." (emphasis in original)

48 Burchett J dissented. His Honour held[53] that the application of s 36(2) was not confined to cases in which legislation "prescribed" a period for the doing

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50 *Zangzinchai* (1994) 53 FCR 35 at 36-37.

51 *Zangzinchai* (1994) 53 FCR 35 at 38-39.

52 *Re Sekido* unreported, Immigration Review Tribunal, 6 March 1992 at 9 per Senior Member L Certoma, quoted in *Zangzinchai* (1994) 53 FCR 35 at 39.

53 *Zangzinchai* (1994) 53 FCR 35 at 42, 44.

of a thing but extended also to instances where legislation "allowed" a period of time for the doing of a thing. In his Honour's view, legislation could be said to "allow" a period of time for the doing of a thing, even if it did not in terms precisely prescribe such a period, so long as it indirectly established a period in which the thing was to be done. So construed, his Honour concluded[54], s 36(2) was to be understood as permitting the application for an extended entry permit to be lodged "as an effective application, on the Monday or other applicable day".

The reasoning of the Court below

49 In 2011[55], s 36 of the *Acts Interpretation Act* was amended to its present form, such that it now reads, relevantly, as follows:

> "**Calculating time**
>
> ...
>
> (2) If:
>
> (a) an Act requires or allows a thing to be done; and
>
> (b) the last day for doing the thing is a Saturday, a Sunday or a holiday;
>
> then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.
>
> Example: If a person has until 31 March to make an application and 31 March is a Saturday, the application may be made on Monday 2 April.
>
> (3) In this section:
>
> ***holiday***, in relation to the time for doing a thing, means:
>
> (a) a day that is a public holiday in the place in which the thing is to be or may be done; and

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54 *Zangzinchai* (1994) 53 FCR 35 at 48.

55 *Acts Interpretation Amendment Act* 2011 (Cth), Sched 1, item 93.

(b) if the thing is to be or may be done at a particular office or other place – a day on which the place or office is closed for the whole day."

50 In the Federal Court, North J held that the reasoning of the majority in *Zangzinchai* does not apply to the amended form of s 36(2), because[56]:

> "[t]he previous version of the section operated on a period prescribed, or allowed, by an Act, whereas the current version operates on a broader set of circumstances where an Act requires or allows a thing to be done."

His Honour concluded that the amended form of s 36(2) "allows the thing in question to be done; that is to say, it allows for the thing to be effectuated on the later date as if it were being done on the earlier date"[57].

The Minister's contentions

51 Before this Court, the Minister contended that North J's construction of s 36(2) is plainly wrong. In the Minister's submission, the Explanatory Memorandum relating to the 2011 amendment leaves no room for doubt that the purpose of the amendment was "not substantively [to] change the existing policy" of the provision but rather only to make it "more user friendly"[58]. It follows, in the Minister's submission, that s 36(2) in its amended form is to be construed just as it was construed by the majority in *Zangzinchai* in its pre-amendment form.

52 In the Minister's submission, North J's construction of s 36(2) should further be rejected because it would radically alter the criteria applicable to the grant of a Subclass 572 visa. It would mean that, despite the express statutory requirement that an applicant for a Subclass 572 visa be the holder of a Subclass 485 visa at the time of application, an applicant could succeed in an application for a Subclass 572 visa without being the holder of a Subclass 485 visa at the time of application. In the Minister's submission, it cannot be supposed that that is the purpose or effect of s 36(2).

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56 *Kumar* (2016) 243 FCR 146 at 151 [24].

57 *Kumar* (2016) 243 FCR 146 at 149 [15].

58 Australia, House of Representatives, Acts Interpretation Amendment Bill 2011, Explanatory Memorandum at 35 [225].

53 The Minister also contended that North J's construction of s 36(2) is contrary to the way in which s 36(2) was construed in *Re Tavella*[59] and by this Court in *Associated Dominions Assurance Society Pty Ltd v Balmford*[60].

Consideration

The effect of the 2011 amendment to s 36(2)

54 With respect, there appears to be some force in North J's conclusion that the 2011 amendment brought about a substantive change to the operation of s 36(2). Standard dictionary definitions of "prescribe"[61] and "require"[62] suggest that *prescription* involves a more explicit stipulation than *requirement*; the distinction deriving in part from the etymological root of "prescribe", *praescribere*, connoting a direction in writing[63]. It appears also to be of significance that the provision as amended no longer refers to a "period" allowed by an Act. As amended, it presents as capable of application to a situation in which an Act has the practical effect of requiring or allowing a thing to be done by a particular "last day" without necessarily setting out a last day before which the thing is to be done. There is some support for that notion, too, in the example of the intended operation of the provision, which appears in the Act immediately below sub-s (2), and particularly in the general phrasing of the imperative:

> "Example: If a person *has* until 31 March to make an application and 31 March is a Saturday, the application may be made on Monday 2 April." (emphasis added)

55 Admittedly, as the Minister submitted, the Explanatory Memorandum states that the amendment did "not substantively change the existing policy"[64].

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59 (1953) 16 ABC 166.

60 (1950) 81 CLR 161; [1950] HCA 30.

61 See, for example, *The Oxford English Dictionary*, 2nd ed (1989), vol 12 at 390-391; *The Australian Oxford Dictionary*, 2nd ed (2004) at 1020; *Black's Law Dictionary*, 10th ed (2014) at 1373.

62 See, for example, *The Oxford English Dictionary*, 2nd ed (1989), vol 13 at 681-682; *The Australian Oxford Dictionary*, 2nd ed (2004) at 1095; *Black's Law Dictionary*, 10th ed (2014) at 1498.

63 Partridge, *Origins: A Short Etymological Dictionary of Modern English*, 4th ed (1966) at 598 [17]-[18].

64 Australia, House of Representatives, Acts Interpretation Amendment Bill 2011, Explanatory Memorandum at 35 [225].

But considered changes to the text of a legislative provision cannot be overridden by an executive pronouncement[65]. And, far from supporting the Minister's preferred construction, the Explanatory Memorandum also records that the amendment was "intended to capture a broader range of situations"[66]. Accordingly, as at present advised, I would not exclude the possibility that the changes made by the 2011 amendment were sufficient reason to depart from the reasoning in *Zangzinchai*.

56 For present purposes, however, it is unnecessary to decide that point, because, even if the 2011 amendment did not alter the substantive effect of s 36(2), there are compelling reasons to depart from the reasoning in *Zangzinchai* as to the application of s 36(2) to ss 45 and 65 of the *Migration Act*.

The application of s 36(2)

57 As was earlier recorded, s 36(2) of the *Acts Interpretation Act* applies where an Act requires or allows a thing to be done and the last day for doing the thing is a Saturday, a Sunday or a holiday. Relevantly, s 45 of the *Migration Act* allows a thing to be done, namely, a non-citizen to apply for a visa of a particular class, in this case a Subclass 572 visa. Section 45 does not specify the last day for making such an application, but cl 572.211 of Sched 2 to the Regulations, coupled with s 65 of the *Migration Act*, relevantly mandates that the Minister cannot grant an application for a Subclass 572 visa unless *at the time of application* the applicant is the holder of a Subclass 485 visa. Axiomatically, a "Subclass 485 (Temporary Graduate)" visa is only ever issued on a temporary basis and thus for a period of time that must expire. It follows that it is a criterion for acceptance of an application for a Subclass 572 visa that "at time of application" the applicant's most recently issued Subclass 485 visa has not expired. As will be explained later in these reasons, that is a sufficient basis to conclude that, within the meaning of s 36(2) of the *Acts Interpretation Act*, the *Migration Act* (specifically ss 45 and 65, combined with cl 572.211 of Sched 2 to the Regulations) allows an applicant to make an application for a Subclass 572 visa that is capable of being granted under s 65 only if the application is made before the applicant's most recently issued Subclass 485 visa expires.

58 It will be recalled that the majority in *Zangzinchai* held that s 36(2) in its pre-amendment form did not apply to an application for an entry permit because

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65 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ; [1987] HCA 12; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 598 [61] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

66 Australia, House of Representatives, Acts Interpretation Amendment Bill 2011, Explanatory Memorandum at 35 [224].

"its application depends, according to the terms of the section, upon the prescription of a period for the doing of something and the [*Migration Act*] and Regulations do not contain any such prescription of time for the making of an application for an entry permit"[67]. So to approach the construction of s 36(2) is unduly limited. Section 36(2) in its pre-amendment form was not limited only to cases in which a section of an Act *prescribed* a period for the doing of a thing. It applied also where an Act *allowed* a period for the doing of a thing and, as Burchett J observed, what an Act allows is a broader concept than what it prescribes. As his Honour put it[68]:

> "On the face of the provision, the use of the expression, 'or allowed by an Act', makes it clear that s 36(2) applies where, according to the true construction of an Act, a period is allowed for the doing of something; it is not necessary to find a provision prescribing in terms that something shall be done within a particular period. That the subsection is not concerned with the formulation of a prescription is also made clear by the way it operates. It does not say that a statement of a period shall be read as extending to the day after a Sunday etc. It is not so tied to the manner in which an Act may be drafted. (That could have been seen as involving possibly fortuitous limitations upon the scope of the *Acts Interpretation Act*.) Instead, it goes to the substance, providing that 'the thing may be done on the first day following …'. I think this provision must be construed as meaning 'done *effectively*', and that it should be given its full impact upon the substance of what other legislation, to be interpreted in the light of the *Acts Interpretation Act*, may allow." (emphasis in original)

59 At the time of the enactment of the *Acts Interpretation Act* in 1901, there were provisions comparable to s 36(2) in several of the Australian States and in New Zealand. As Burchett J observed[69], and the margin notes of the *Acts Interpretation Act* recorded, s 36 was closely based on s 35 of the *Interpretation Act* 1897 (NSW)[70]. It was also similar in form to s 24(1) of the *Interpretation Act* 1888 (NZ). The latter provision fell for consideration in *Wall v Commissioner of Stamps*[71]. The question in that case was whether s 24(1) of the *Interpretation Act* 1888 had the effect of extending the time in which an

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67 *Zangzinchai* (1994) 53 FCR 35 at 39, quoting with approval from *Re Sekido* unreported, Immigration Review Tribunal, 6 March 1992 at 9.

68 *Zangzinchai* (1994) 53 FCR 35 at 42.

69 *Zangzinchai* (1994) 53 FCR 35 at 41.

70 See also *Acts Shortening Act* 1858 (NSW), s 11.

71 (1899) 18 NZLR 74.

instrument could be stamped without penalty under the *Stamp Act 1882 Amendment Act* 1885 (NZ) ("the Stamp Act"). Section 24(1) of the *Interpretation Act* 1888 provided that:

> "If the time limited by any Act for any proceeding, or the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on, the day next following which is not a holiday ..."

Section 4 of the Stamp Act relevantly provided that:

> "any unstamped or insufficiently-stamped instrument may be stamped or further stamped by the Commissioner after the first execution thereof, on payment of the unpaid duty and fine in addition to the duty as follows:–
>
> (1) When such instrument is presented to be stamped more than one month and less than three months after execution, a fine of twenty-five per centum on the amount of duty payable.
>
> (2) When such instrument is presented to be stamped more than three months after execution, a fine of one hundred per centum on the amount of the duty payable ..."

Stout CJ concluded that s 4 of the Stamp Act could be regarded as a provision which limited the time for the doing of a thing under the statute, namely, stamping an instrument without penalty, and that s 24(1) of the *Interpretation Act* 1888 "applies just as much as in any other case of the time limited for the doing of an act expiring on a Sunday"[72]. Although s 4 of the Stamp Act did not provide in terms that an instrument had to be, or could only be, stamped within a specified period of time – it was permissible to stamp an instrument at a later time on payment of a penalty as specified in sub-s (1) or sub-s (2) – the effect of s 4 of the Stamp Act was, in substance, to allow an instrument to be stamped without penalty, or with a lesser penalty, within a specified period of time and that was enough to qualify the provision as one which limited the time for the doing of anything within the meaning of s 24(1) of the *Interpretation Act* 1888.

60 As Burchett J also observed in *Zangzinchai*[73], a later version of s 24(1) of the *Interpretation Act* 1888 was similarly construed by the New Zealand Court of Appeal in *Price v Williams*[74]. The issue there was whether s 25(a) of the *Acts*

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72 *Wall* (1899) 18 NZLR 74 at 77.

73 (1994) 53 FCR 35 at 46-47.

74 [1979] 2 NZLR 374.

Interpretation Act 1924 (NZ) applied to a notice of default given under s 92 of the *Property Law Act* 1952 (NZ). Section 25(a) of the *Acts Interpretation Act* 1924 provided that, if the time limited by any Act for the doing of anything under its provisions expired or fell upon a holiday, the time so limited should be extended to the day next following which was not a holiday. Section 92 of the *Property Law Act* provided that a power under a mortgage to sell land or enter into possession of land was not to become exercisable unless and until the mortgagee served a notice of not less than one month, specifying the default and a date on which the power would become exercisable and requiring the owner to remedy the default. The New Zealand Court of Appeal held that, although s 92 of the *Property Law Act* did not directly impose a time limit, it did so indirectly by providing for a date to be fixed in the notice and by stipulating that the power of sale could only be exercised on or after that date[75]. In substance, the provision required that the remedying of the default be done before that date, and in that way it limited the time in which the default could be remedied. Accordingly, because the time limit for remedying the default fell on a Sunday, the mortgagor in that case could, perforce of s 25(a) of the *Acts Interpretation Act* 1924, effectively remedy the default on the following Monday.

61 In *Thomson v Les Harrison Contracting Co*[76], Harris J applied similar reasoning to the application of s 31A(1) of the *Acts Interpretation Act* 1958 (Vic) to s 5(6) of the *Limitation of Actions Act* 1958 (Vic). Section 31A(1) of the *Acts Interpretation Act* 1958 provided in terms that: "Where the time limited by any Act for the doing of any act or thing expires or falls upon a holiday the act or thing may be done on the day next following that is not a holiday." Section 5(6) of the *Limitation of Actions Act* provided in terms that: "No action for damages ... shall be brought after the expiration of three years after the cause of action accrued." On the facts in *Les Harrison Contracting*, the three years provided for in s 5(6) expired on a holiday. Hence, the question was whether s 31A(1) of the *Acts Interpretation Act* 1958 could be relied upon to extend the time for the issue of a writ to the next day following that was not a holiday. Harris J held[77] that, although s 5(6) of the *Limitation of Actions Act* did not in terms provide for "the time limited" for the bringing of an action, it would be artificial to confine the application of s 31A(1) only to provisions which expressly provide for "the time limited". It accorded with the evident purpose of the provision to construe it as applying also to provisions which, not in terms or directly, but in substance or indirectly, limited the time in which something was to be done.

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75 *Price v Williams* [1979] 2 NZLR 374 at 376-377.

76 [1976] VR 238.

77 *Les Harrison Contracting* [1976] VR 238 at 242-243.

62 Parity of reasoning dictates that ss 45 and 65 of the *Migration Act*, and cl 572.211 of Sched 2 to the Regulations, should be approached in the same way. By allowing a non-resident to make an application for a visa of a particular class, and by providing that an application not be capable of grant under s 65 unless it satisfies the criteria prescribed by the Regulations (one of which was, in this case, that the applicant be the holder of a current Subclass 485 visa), ss 45 and 65 together "allow" a non-citizen who is the holder of a current visa as required by the Regulations to make a visa application and indirectly limit the time in which that may be done to the period during which the applicant's current visa remains in force.

63 Significantly, in this case, the Minister did not attempt to confront the reasoning in *Wall*, *Price v Williams* or *Les Harrison Contracting*. Instead, counsel for the Minister asserted, without explanation, that s 36(2) has no work to do in circumstances where a statutory provision attaches a particular consequence to the existence of certain facts at a particular time. So to contend is to divert attention from the enquiry required by s 36(2). If the statutory imposition of such consequences serves to require or allow a thing to be done by a particular time, s 36(2) may be engaged.

64 There are also textual indications in cl 572.211 of Sched 2 to the Regulations that support that approach. The criteria in cl 572.211(2) and (3) may be seen as, in effect, directed towards two alternatives, one where an applicant's visa is still in force and the other where an applicant's visa has expired. Clause 572.211(2)(d)(iii) provides that an applicant for visa satisfies the conditions of that sub-clause if, "at time of application", the applicant is the holder of a Subclass 497 (Graduate – Skilled) visa, which is a substantive visa. Clause 572.211(3)(a), (b)(v) and (c)(i), taken together, provide that an applicant also satisfies the conditions of the sub-clause[78] if, at time of application, the applicant is no longer the holder of a substantive visa, but the application is made within 28 days of the day when the last substantive visa ceased to be in effect. The former provision provides in terms for the criteria of acceptability where an application for visa is made while the last substantive visa remains current. The latter provisions provide in terms for the criteria of acceptability where an application for visa is made within 28 days of the last substantive visa ceasing to be current. Both provide for the time in which an acceptable application for visa may be made. And, since cl 572.211(2)(d)(iia) is in form identical to cl 572.211(2)(d)(iii), except that the former refers to a "Subclass 485 (Temporary Graduate)" visa and the latter to a "Subclass 497 (Graduate – Skilled)" visa, it is natural to conceive of cl 572.211(2)(d)(iia) as applying to a Subclass 485 visa in the same way that cl 572.211(2)(d)(iii) applies to a Subclass 497 visa; which is to

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78 Migration Regulations, Sched 2, cl 572.211(1).

say, by providing for the period in which an acceptable application for visa may be made.

A deeming or fiction?

65 It was contended on behalf of the Minister that to construe ss 45 and 65 of the *Migration Act*, for the purpose of s 36(2) of the *Acts Interpretation Act*, as allowing a thing to be done and as providing for the time in which that thing is to be done would involve a deeming or fiction that an applicant for visa whose previous Subclass 485 visa has in fact expired at the time of application is still the holder of a current Subclass 485 visa at the time the application is received on the next following business day.

66 That submission is unpersuasive. Treating ss 45 and 65 of the *Migration Act* as providing for a time in which something is to be done involves no more deeming or fiction than characterising the express requirement that an applicant be the holder of a Subclass 485 visa at the time of application as a necessarily implied requirement that the application for visa be made before the expiry of the applicant's last issued Subclass 485 visa. In principle, that is no different from, and no more forced a construction of the criterion specified in cl 572.211(2)(d)(iia) than, characterising a prohibition against a mortgagee entering into possession of mortgaged premises before expiration of a specified period of notice as a provision which allows the mortgagor to remedy a default within the specified period of notice[79]. It is no more an artificial exercise in deeming or fiction than treating a provision that a cause of action shall not be brought more than a specified number of years after the accrual of the cause of action as a provision which allows an action to be brought within that time[80]. Nor is it any more an artificial exercise in deeming or fiction than to say of a provision that a class of instrument may be stamped without penalty, or with a lesser penalty, within a specified period of time following execution, that it is a provision which allows a thing to be done and limits the time in which it may be done[81].

67 Granted, the above examples involve statutory provisions which specifically identified a period of time in which something could be done with particular consequences. Sections 45 and 65 of the *Migration Act* and cl 572.211 of Sched 2 to the Regulations do not do that in terms. But they do specifically refer to criteria that must be satisfied at the time of application in order to attract a particular consequence, namely, that the application is capable of being granted

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79 See and compare *Price v Williams* [1979] 2 NZLR 374.

80 See and compare *Les Harrison Contracting* [1976] VR 238.

81 See and compare *Wall* (1899) 18 NZLR 74.

by the Minister under s 65. One of those criteria, and the one enlivened in this case, is that an applicant be the holder of a Subclass 485 visa "at time of application". As previously observed, a Subclass 485 visa is a temporary visa which is issued for a finite period of time. Relevantly, therefore, the criterion of an application for visa that is capable of being granted under s 65 is that the application be made before the applicant's last issued Subclass 485 visa has expired. It follows – to adopt and adapt the language of de Jersey J in *Price v J F Thompson (Qld) Pty Ltd*[82] – that, although ss 45 and 65 and cl 572.211 are cast in the form of a criterion of acceptability, they no less prescribe a period of time. By providing that it is a criterion of acceptability that an applicant be the holder of a Subclass 485 visa at the time of application, ss 45 and 65 and cl 572.211 carry with them the ineluctable corollary that an application for visa which is capable of being granted must be made before the expiration of the applicant's most recently issued Subclass 485 visa. That is the necessary implication of the criterion of acceptability and so it must be regarded as part of what ss 45 and 65 and cl 572.211 provide. To say otherwise is to deny the natural and ordinary effect of the provisions.

68 The Minister further contended that, even so, it would be improper to characterise the operation of ss 45 and 65 as such because deeming an applicant who is not in fact the holder of a Subclass 485 visa at the time of application to have been the holder of a Subclass 485 visa at the time of application would work a radical change to the operation of the statutory criteria of acceptability. That submission is also unpersuasive.

69 As is illustrated in part by the examples already given, in truth most applications of s 36(2) of the *Acts Interpretation Act* or cognate provisions involve a coordinate degree of deeming or fiction which affects the operation of the subject statutory criteria. In the case of provisions for the stamping of instruments without penalty, application of s 36(2) or a cognate provision involves the fiction that an instrument, which is in fact not lodged for stamping until after the expiration of the penalty-free period, is lodged for stamping before the expiration of the penalty-free period. That affects the subject statutory criteria by extending the period for stamping. In the case of provisions prohibiting the entry of a mortgagee into possession until after a specified period of notice of default has been given, application of s 36(2) or a cognate provision involves the fiction that, despite the requisite period of notice having been given, the mortgagee is to be taken as having not given the requisite period of notice until the business day next following the Saturday, Sunday or public holiday on which the requisite period of notice expired. That affects the subject statutory criteria by extending the period for rectification. In the case of provisions for the limitation of actions, application of s 36(2) or a cognate provision involves the

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82 [1990] 1 Qd R 278 at 286.

fiction that a limitation period that in fact expires on a Saturday, Sunday or public holiday is as yet still unexpired on the next business day. And that affects the subject statutory criteria by extending the period in which action may be brought. The effect upon subject statutory criteria of such deeming or fiction as results from the operation of s 36(2) or a cognate provision on each of those provisions cannot be regarded an unlikely or unintended consequence. Mutatis mutandis, the same holds for the effect upon statutory criteria of such deeming or fiction as results from the operation of s 36(2) on ss 45 and 65 and cl 572.211.

Decisions in Re Tavella and Balmford

70 A good deal was made in the Minister's written submissions before this Court, as it was before the Court below, of the decision of Clyne J in *Re Tavella* as to the inapplication of s 36(2) of the *Acts Interpretation Act* to the legislative predecessor to s 44(1)(c) of the *Bankruptcy Act* 1966 (Cth). In similar terms to s 44(1)(c), the predecessor provision[83] forbade the presentation of a bankruptcy petition unless "the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition". Clyne J held[84] that the provision did not prescribe a day for presenting a petition, and accordingly that, although the day six months after the act of bankruptcy was a Sunday, s 36(2) of the *Acts Interpretation Act* did not operate so as to extend the date for presentation of the petition to the following Monday. *Re Tavella* does not have the significance which the Minister sought to attribute to it. As Burchett J noticed in *Zangzinchai*[85], the reasoning in *Re Tavella* is problematic in that it was based on decisions[86] that have since been doubted or in some instances expressly disapproved[87]; and, indeed, counsel for the Minister in this Court conceded that the reasoning in *Re Tavella* is at best opaque.

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83 *Bankruptcy Act* 1924 (Cth), s 55(1)(c).

84 *Re Tavella* (1953) 16 ABC 166 at 168.

85 (1994) 53 FCR 35 at 44-45.

86 *Déchène v City of Montreal* [1894] AC 640; *Gelmini v Moriggia* [1913] 2 KB 549; *M'Niven v Glasgow Corporation* 1920 SC 584.

87 See *Hodgson v Armstrong* [1967] 2 QB 299 at 319-321 per Davies LJ, cf at 323-324 per Russell LJ dissenting; *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336 at 349 per Lord Denning MR, 353, 355 per Megarry J; *Price v J F Thompson* [1990] 1 Qd R 278 at 284 per Moynihan J, cf at 282 per Carter J dissenting. See also *Marren v Dawson Bentley & Co Ltd* [1961] 2 QB 135 at 141-143; *The Clifford Maersk* [1982] 1 WLR 1292; [1982] All ER 905.

71 More importantly, however, there is no reason in principle to confine the application of s 36(2) of the *Acts Interpretation Act* to legislation which in terms, or, in other words, "directly", allows for a thing to be done within a specified period of time. Although the central aim of statutes like the *Acts Interpretation Act* is the facilitation of consistency in statutory construction[88] and the avoidance of unnecessary repetition[89], it does not follow that a particular provision within such a statute may not have a particular, different purpose.

72 In order to appreciate the particular purpose of s 36(2), it is necessary to have regard to the legislative history of the provision and ultimately to the common law rule of statutory interpretation from which it derives. Once that historical context is understood, it can be seen that the provision is essentially remedial in nature and thus aptly described as providing a "safeguard"[90] for persons required or allowed to do a thing by the operation of an Act. Remedial legislation like s 36(2) should be construed in a manner that gives effect to the remedy and secures the result which it is the purpose of the legislation to achieve[91]. It follows, as is demonstrated by the decision of the New Zealand Court of Appeal in *Price v Williams*, that a provision like s 36(2) is logically to be understood as applying as much to legislation that in substance, or "indirectly"[92], allows for a thing to be done within a specified period of time as to a provision which in terms, or directly, allows for a thing to be done within a specified period of time. That point is further emphasised by the decision of the Full Court of the Supreme Court of Queensland in *Price v J F Thompson*[93].

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88 See *Hands v Law Society* (1890) 17 Ont App 41 at 57, where Burton JA observed: "I think the passing of such an Act may be regarded as a gentle intimation by the Legislature to the Courts that it understands what it is saying and means what it says." Cf *In the Matter of The Fourth South Melbourne Building Society* (1883) 9 VLR (E) 54 at 58.

89 *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 492 [7] per Gleeson CJ; [2002] HCA 42.

90 *Elan Copra Trading Pty Ltd v JK International Pty Ltd* (2005) 226 ALR 349 at 359 [36] per White J (Doyle CJ and Perry J agreeing at 350 [1], [2]).

91 *Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149 at 178-179 per Lord Shaw of Dunfermline; *Mathews v Foggitt Jones Ltd* (1926) 37 CLR 455 at 464 per Isaacs J; [1926] HCA 13.

92 *Price v Williams* [1979] 2 NZLR 374 at 376, 377.

93 [1990] 1 Qd R 278. See also *Re Eid and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2013) 138 ALD 180 at 188-189 [25]-[28].

73 Possibly, there may be some reason in policy to adopt a different approach in the case of bankruptcy legislation[94]. Depending on its terms, character and any necessary implication[95], it may be that such legislation evinces an intention to displace s 36(2)[96]. Alternatively, it may be that the purpose of 36(2) should be seen as confined to conferring an advantage on persons required or permitted to do something within a period of time, as opposed to persons having power to impose duties or obligations on other persons[97]. Leastways, that is how some scholars have understood the holding in *Balmford*[98] and it accords with the rationale of the common law rule of construction from which s 36(2) derives[99]. The result in *Re Tavella*, albeit not Clyne J's reasoning, is consistent with that sort of approach. By contrast, however, there is nothing in principle or policy about ss 45 and 65 of the *Migration Act* that warrants a restrictive approach to the application of s 36(2) of the *Acts Interpretation Act*. Sections 45 and 65 do not in any sense provide for a visa applicant to impose a duty on another person. They allow an applicant to make an application for visa that is capable of being granted under s 65 during the currency of the applicant's most recently issued visa. There is no reason in principle or policy why s 36(2) should not apply.

74 The Minister's reliance on the decision of this Court in *Balmford* is equally misplaced. In *Balmford*, the question was whether s 36(2) so operated as to validate an invalid notice served by the Insurance Commissioner on an insurance company under s 55(1) of the *Life Insurance Act* 1945 (Cth). Section 55(2) of the *Life Insurance Act* provided that, if the company failed to show cause within the period of not less than 14 days specified in the notice, the

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94 Cf *Roskell v Snelgrove* (2008) 246 ALR 175 at 182-183 [44]-[47].

95 *Pfeiffer v Stevens* (2001) 209 CLR 57 at 73-74 [56] per McHugh J; [2001] HCA 71. See also *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651 at 656; [1970] AC 827 at 846.

96 *Acts Interpretation Act*, s 2(2).

97 *Wignalls Smallgoods Pty Ltd v Kent* (2002) 10 Tas R 460 at 465 [18] per Slicer J (Crawford J agreeing at 461 [1], Evans J agreeing at 465 [22]). See and compare *Pritam Kaur* [1973] QB 336 at 353 per Megarry J.

98 Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 299 [6.50].

99 See, for example, *In re North; Ex parte Hasluck* [1895] 2 QB 264 at 270 per Lord Escher MR; *Pritam Kaur* [1973] QB 336 at 353-356 per Megarry J; *Mucelli v Government of Albania* [2009] 1 WLR 276 at 298 [84] per Lord Neuberger of Abbotsbury; [2009] 3 All ER 1035 at 1058; *R (Modaresi) v Secretary of State for Health* [2013] 4 All ER 318 at 329 [33] per Baroness Hale of Richmond.

Commissioner could proceed to make an investigation of the company's business. The notice in fact given provided a period of less than 14 days expiring on a Sunday. The Commissioner argued that, although the period of notice given was only 13 days, the notice was not invalid because s 36(2) extended the time for compliance to the next following Monday, and thereby extended the period of notice to 14 days[100]. The argument was rejected. Williams, Webb and Fullagar JJ reasoned[101] separately, but to similar effect, that, if the notice had been of at least 14 days expiring on a Saturday, Sunday or other holiday, s 36(2) would have operated to extend the time for compliance to the next business day. But, because the notice was of less than 14 days, it did not comply with the mandatory statutory requirement that it be of not less than 14 days, and thus it was invalid. And, being invalid, it was not something to which s 36(2) could apply[102].

75 By contrast, ss 45 and 65 of the *Migration Act* do not specify a minimum period of notice and they do not provide for one person to impose a duty on another. They allow an applicant for visa to make an application that is capable of being granted under s 65 right up to the moment that the applicant's current visa expires. There is also nothing about ss 45 and 65 which implies that an application made after the expiration of an applicant's existing visa is invalid. An application which satisfies the requirements of Sched 1 to the Regulations (which the application in this case did) is a valid application, notwithstanding that it may not satisfy the requirements of Sched 2. It is just that, although validly made, an application cannot be granted under s 65 unless the requirements of Sched 2 are met.

The re-enactment rule

76 Finally, it should be mentioned that underlying the Minister's written submissions was the suggestion that this Court should not depart from the construction of s 36(2) of the *Acts Interpretation Act* adopted by the majority in *Zangzinchai* because s 36(2) was re-enacted in 2011 in substantially the same form after the provision had been so construed.

77 That submission is not persuasive either. Granted, where legislation is re-enacted after being judicially interpreted, there is something of a presumption

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100 *Balmford* (1950) 81 CLR 161 at 175-176 per Latham CJ.

101 *Balmford* (1950) 81 CLR 161 at 181 per Williams J, 181-182 per Webb J, 186-187 per Fullagar J.

102 *Balmford* (1950) 81 CLR 161 at 181 per Williams J, 181-182 per Webb J, 186-187 per Fullagar J.

that the legislature has thereby approved the interpretation[103]. But, as was observed in *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation*[104], the presumption should not lead the court to perpetuate a construction of a statutory provision which it considers to be erroneous. Over time and with changes in the "mechanics of law-making", the importance of the presumption has declined[105]. Accordingly, as was stated in *Flaherty v Girgis*[106], the rule is nowadays of much less use as a guide and will not be permitted to prevail over an interpretation otherwise appearing to be correct[107]. It is to be observed, too, that the rule has typically been confined in its application to the re-enactment of a provision in identical terms[108]. It is, therefore, particularly inapposite in a case like this where the legislature has deliberately employed different wording from the earlier form of the provision. Possibly, the change in format made by dividing the provision into paragraphs was essentially only stylistic, seeking to make the form of the provision align more closely with modern drafting techniques without necessarily changing its substantive effect. But the change from "prescribe" to "require" cannot be dismissed on that basis. In the absence of other explanation, it presents as bringing the operation of the provision more closely into line with Burchett J's reasoning in *Zangzinchai*.

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103 *Ex parte Campbell; In re Cathcart* (1870) LR 5 Ch App 703 at 706 per Lord James; *Pillar v Arthur* (1912) 15 CLR 18 at 22 per Griffith CJ; [1912] HCA 51; *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 at 412 per Viscount Buckmaster, 442 per Lord Russell of Killowen; *Platz v Osborne* (1943) 68 CLR 133 at 141 per Rich J; [1943] HCA 39.

104 (1952) 85 CLR 159 at 174 per Dixon, Williams and Webb JJ; [1952] HCA 4.

105 *R v Reynhoudt* (1962) 107 CLR 381 at 388 per Dixon CJ; [1962] HCA 23.

106 (1987) 162 CLR 574 at 594 per Mason ACJ, Wilson and Dawson JJ; [1987] HCA 17.

107 See also *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329 per Toohey, McHugh and Gummow JJ; [1996] HCA 31; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 75 [63] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2007] HCA 56.

108 *Ex parte Campbell* (1870) LR 5 Ch App 703 at 706 per James LJ; *Pillar v Arthur* (1912) 15 CLR 18 at 22 per Griffith CJ (where weight is placed on "identical language"); *Thompson v Smith* (1976) 135 CLR 102 at 109 per Gibbs J (Mason J and Aickin J agreeing at 109); [1976] HCA 56; *Quality Bakers v Australian Liquor, Hospitality and Miscellaneous Workers Union, NSW Branch* (2004) 139 IR 416 at 430 [40]. Cf *Te v Minister for Immigration and Ethnic Affairs* (1999) 88 FCR 264 at 272 [29]-[30].

78 In the result, for the reasons already stated, the construction of s 36(2) adopted by the majority in *Zangzinchai* does not appear to be correct. It unnecessarily limits the operation of the sub-section in a way that is not supported by the text, purpose or context of the provision, and which is inconsistent with the balance of authority as to the proper construction of comparable provisions. Such presumption as there may be because of the re-enactment of s 36(2) after the decision in *Zangzinchai* is not a sufficient reason to prefer the majority's reasoning in that case to the construction of s 36(2) which otherwise appears to be correct.

Conclusion

79 It follows that I would dismiss the appeal, but it is unnecessary to make an order as to costs in light of the Minister's undertaking to pay the first, second and third respondents' costs in this Court.