MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS.. ..... APPELLANT;
RESPONDENT,

AND

NYSTROM.. ..... RESPONDENT.
APPLICANT,

[2006] HCA 50

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC of A 2006

April 12; *Nov* 8 2006

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ

Immigration — Visas — Cancellation — Minister — Decision to cancel transitional (permanent) visa — Failure to satisfy character test — Substantial criminal record — Absorbed person visa held by non-citizen — Whether non-citizen also held transitional (permanent) visa — Whether Minister cancelled correct visa — Whether Minister required to take into account absorbed person visa — Whether power to cancel restricted by limits on power to deport — Migration Act 1958 (Cth), ss 34, 200, 201, 501(2), (6), (7), 501F(3) — Migration Reform (Transitional Provisions) Regulations (Cth), reg 4(1).

Section 501(2) of the *Migration Act 1958* (Cth) conferred power on the Minister to cancel a visa granted to a person if the Minister reasonably suspected that the visa holder did not pass a test known as the "character test", and the visa holder did not satisfy the Minister that he or she passed that test. Section 501(6) provided that a visa holder did not pass the character test if he or she had a "substantial criminal record" as defined by s 501(7). Section 501F(3) provided that if the Minister decided to refuse or cancel a person's visa, and the person held another visa that was not a protection visa or a visa specified in the regulations, the Minister was taken to have decided to cancel the other visa. Sections 200 and 201 empowered the Minister to order the deportation of a non-citizen who was convicted of certain offences committed when the non-citizen had been in Australia for less than ten years.

Section 34 of the Act provided that a non-citizen who was in Australia on 2 April 1984, had ceased to be an immigrant before that date, and had not left Australia after that date, was taken to have been granted an "absorbed person visa" on 1 September 1994. Regulation 4(1) of the *Migration Reform (Transitional Provisions) Regulations* (Cth) (the Transitional Regulations) provided that if, immediately before 1 September 1994, a non-citizen was in Australia as the holder of a permanent entry permit, the entry permit continued in effect on and after 1 September 1994 as a "transitional (permanent) visa" that permitted the holder to remain indefinitely in Australia.

A non-citizen (N) was born in Sweden in December 1973 and travelled to Australia with his mother and sister in January 1974. On his arrival in Australia, N was granted a permanent entry permit as an accompanying dependent. N remained in Australia after his arrival. He was subsequently convicted of a number of criminal offences and received sentences of imprisonment, as a result of which he had a substantial criminal record within the meaning of s 501(7) and did not pass the character test under s 501(6) of the Act. However, the offences were committed by N more than ten years after he arrived in Australia, so that he was not liable to deportation under ss 200 and 201.

In August 2004, pursuant to s 501(2) of the Act, the Minister cancelled N's transitional (permanent) visa. N challenged the validity of the Minister's decision, contending the Minister had failed to identify the correct visa held by N or had failed to take into account the existence of the absorbed person visa held by N. Further, N contended that the power to cancel a visa under s 501(2) was restricted or qualified by the power conferred by ss 200 and 201 of the Act.

Held, (1) that N held both an absorbed person visa by operation of s 34(2) and a transitional (permanent) visa by the operation of reg 4(1) of the Transitional Regulations.

(2) That the Minister had not failed to take into account relevant considerations by failing to advert to N's absorbed person visa or the effect of s 501F(3) when cancelling N's transitional (permanent) visa.

(3) That the power to cancel a visa conferred by s 501(2) was not restricted by reference to the circumstances which would engage the exercise of the power of deportation under s 200 of the Act.

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1; *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400 at 408-409; and *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 535, considered.

Decision of the Federal Court of Australia (Full Court): *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, reversed.

APPEAL from the Federal Court of Australia.

Stefan Nystrom was born on 31 December 1973 in Sweden, while his mother and sister were on holiday. His parents had migrated from Sweden to Australia in 1966. Nystrom's mother obtained a Swedish passport for him and they travelled to Australia and entered on 27 January 1974. On his arrival, Nystrom was granted a K51R(G) entry permit. He was later convicted of a range of offences and sentenced to substantial terms of imprisonment. On 12 August 2004, pursuant to s 501(2) of the *Migration Act 1958* (Cth) the Minister for Immigration and Multicultural and Indigenous Affairs decided to cancel a transitional (permanent) visa held by Nystrom on the ground that she reasonably suspected that he did not pass the character test and he had not satisfied her that he passed the character test. On 8 December 2004, Nystrom commenced proceedings in the Federal Magistrates Court under s 39B of the *Judiciary Act 1903* (Cth) and s 475 of the *Migration*

Act, claiming orders in the nature of certiorari to quash the Minister's decision and mandamus to require his release from immigration detention. On 16 March 2005, Hartnett FM dismissed the application. On 1 July 2005, a Full Court of the Federal Court by a majority (Moore and Gyles JJ, Emmett J dissenting) allowed an appeal by Nystrom and, in lieu of the orders of the Federal Magistrates Court, declared that Nystrom held an absorbed person visa and ordered that the Minister's decision to cancel Nystrom's transitional (permanent) visa be quashed. On 16 December 2005, Hayne and Heydon JJ granted the Minister special leave to appeal to the High Court from the decision of the Federal Court, limited to the following grounds: (i) that the Full Court erred in holding that the cancellation power under s 501 of the *Migration Act* was subject to an implied obligation to ascertain the existence of, and take into account the qualifications for, any absorbed person visa that would be cancelled either directly or indirectly by reason of the Minister's decision; (ii) that the Full Court erred in holding that the cancellation power under s 501 was subject to an implied obligation to ascertain the existence of, and take into account the qualifications for, every substantive visa that would be cancelled either directly or indirectly by reason of the Minister's decision; and (iii) that the Full Court erred in holding that the cancellation power under s 501 was unavailable or restricted in the case of criminal conduct in Australia by persons the period of whose residence in Australia precludes the application to them of Div 9 of Pt 2 of the *Migration Act*. By a notice of contention filed on 18 January 2006, Nystrom contended that the Full Court should have decided that he was only granted an absorbed person visa and the Minister had purported to cancel a visa that he did not hold and should have decided that the power in s 501(2) could not be exercised in respect of a person to whom s 200 did not apply by reason of s 201(b)(i).

A L Cavanough QC (with him *S P Donaghue*), for the appellant. The Minister is not obliged to identify and consider the nature of any substantive visa, including any absorbed person visa, that would be cancelled either directly or indirectly as a consequence of the decision under s 501(2) of the *Migration Act*. The discretion conferred by s 501(2) is unfettered. It is for the Minister to determine the factors she regards as relevant to the exercise of the power (1). The clear purpose of s 501F(3) is to enable decision-makers not to consider every visa that a person holds when making a cancellation decision (2). Absorbed person visas are not in a special category for that purpose. The fact that the respondent had been absorbed into the Australian community and was beyond the reach of the power conferred by s 51(xxvii) of the *Commonwealth Constitution* did not prevent the operation of s 501(2)

(1) *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 378.
(2) *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 389 at [24].

in relation to him (3). Section 501(2) is primarily supported by the power conferred by s 51(xix) of the *Constitution* in relation to "naturalisation and aliens".

The power conferred by s 501(2) should not be read down by reference to Div 9 of Pt 2 of the Act. The view that ss 200 and 201 limit s 501(2) is contrary to a substantial body of authority (4). The principle turns on whether the powers are separate and parallel and not whether the person falls within s 201. The powers are governed by different criteria and produce different consequences. Section 201 is a limit on the scope of a particular power. It did not give the respondent any right or substantive protection from removal once he had lived in Australia for ten years without conviction.

The grant of an absorbed person visa pursuant to s 34 of the Act did not preclude the simultaneous grant of a transitional (permanent) visa by reg 4(1) of the *Migration Reform (Transitional Provisions) Regulations*, which was authorised by s 40(5) of the *Migration Reform Act 1992* (Cth). Nothing in the *Migration Act* prevents the holding of two visas at the same time if they are created at the same time. Section 82(2) of the *Migration Act* does not operate when two substantive visas are granted simultaneously. Further, s 82(2) contemplates that a visa granted pursuant to regulations may prevail over an earlier statutory visa. It will frequently be difficult to determine whether a person holds an absorbed person visa, so that it is unlikely that the Parliament would have intended that the grant of an absorbed person visa would preclude the grant of a transitional (permanent) visa. The origins of s 34 lie in an attempt to confirm the lawful status of people who had been absorbed into the Australian community but who were unintentionally caught by s 8(2) of the *Migration Amendment Act 1983* (Cth). The object of the Parliament was to ensure that there were no unintended gaps by which people were made illegal or unlawful, so it is not surprising that there may be some overlap. Accordingly, reg 4 of the Transitional Regulations should be given effect in accordance with its terms, irrespective of whether the person was also granted an absorbed person visa on 1 September 1994.

Alternatively, even if the respondent was not granted a transitional (permanent) visa, the Minister's decision was effective to cancel his

(3) *Pochi v MacPhee* (1982) 151 CLR 101 at 111; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 179-180, 186-187; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 176, 193-194; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 44.

(4) *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400 at 408-409; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 535, 547-548; *Bridges v Minister for Immigration and Multicultural Affairs* (2001) 114 FCA 456 at 465; *Moran v Minister for Immigration and Multicultural Affairs* (2006) 151 FCR 1 at 31-33 [139]-[144].

absorbed person visa because the characteristics of the two forms of visa are identical (5). The cancellation of an absorbed person visa does not require the consideration of any matters different from those which are required to be considered in relation to the cancellation of a transitional (permanent) visa.

D S Mortimer SC (with her *L G De Ferrari*), for the respondent. Where the power to deport a person under ss 200 and 201 is not available, the power to cancel that person's visa by reason of non-satisfaction of the character test under s 501(6)(a) should be held not to be available. Each power deals with the same subject matter, exclusion from Australia. There is no distinction in substance between removal following cancellation of a visa and deportation under Div 9 of the Act. Sections 200 and 201 deal with exclusion from Australia by reason of conviction for general criminal offences resulting in a substantial term of imprisonment and protect certain persons from such exclusion after they have been in Australia for a specified and lengthy period. Section 501 deals with exclusion from Australia on character grounds, including having a "substantial criminal record". The specific statutory protection from exclusion conferred by s 201 cannot be impliedly repealed by the subsequent conferral of an additional and general method of exclusion in s 501 (6). There is repugnancy between ss 200 and 201 and s 501. The decisions in *Gunner* (7) and *Jia Legeng* (8) do not resolve the issue. Unlike the present case, in those cases both the power conferred by s 200 and the power conferred by s 501 were available to be exercised. The argument was that ss 501 and 502 should not be construed as conferring on the Minister a power to set at nought a previous decision by the Tribunal (9). The Transitional Regulations were intended to ensure that those non-citizens residing in Australia at 1 September 1994 and not given statutory visas did not become unlawful non-citizens. There is no reason to construe the *Migration Act* and the Transitional Regulations as resulting in two visas being granted at the same time to the same person. Absorbed person visas were granted by statute and it was intended that they not be interfered with by the regulations. A correct identification of the visa being considered for cancellation by the Minister is a necessary precondition to the exercise of the power in s 501(2). If the Minister

(5) cf *Minister for Immigration and Multicultural and Indigenous Affairs v Schwart* [2003] FCAFC 229 at [15], [33].

(6) *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29-30; *R v Wallis; Ex parte Employers' Association of Wool-Selling Brokers* (1949) 78 CLR 529 at 550-551.

(7) *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400.

(8) *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

(9) *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 534-535, 547, 561, 591-592.

purported to cancel a non-existent visa, the decision is vitiated by jurisdictional error. Further, if the respondent held two visas, the Minister was required to identify and consider the absorbed person visa which was also held by the respondent and which was to be cancelled. [HAYNE J. What considerations should the Minister have taken into account?] The fact that the respondent held an absorbed person visa and the special nature of that visa. [HEYDON J. The Minister considered various facts that underlay the existence of an absorbed person visa. What material argument could have been put on behalf of the respondent to the Minister?] It only relates to the special nature of being an absorbed person.

A L Cavanough QC, in reply.

Cur adv vult

8 November 2006

The following written judgments were delivered: —

1 GLEESON CJ. I have had the advantage of reading in draft form the reasons for judgment of Heydon and Crennan JJ. I agree with the orders proposed by their Honours, and with their reasons for those orders.

2 As to the issue concerning the effect, if any, upon s 501(2) of the *Migration Act 1958* (Cth) of ss 200 and 201 of that Act, I would make the following comment. The contention that ss 200 and 201 give a person in the position of the respondent a protection or immunity from the exercise of the power conferred by s 501 is a statement of a conclusion, rather than an expression of a reason for reaching that conclusion. If there is such a reason, it must be found in a process of statutory construction. The provisions of s 501(2), on the one hand, and ss 200 and 201 on the other, are not repugnant, in the sense that they contain conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations. They create two sources of power, by which a person in the position of the respondent may be exposed, by different processes, and in different circumstances, to similar practical consequences. There is nothing novel, or even particularly unusual, about that. It does not of itself mean that only one source of power is available. If, however, by reason of the apparent exhaustiveness with which one provision, or group of provisions, dealt with the position of a person such as the respondent, there were an incompatibility of a kind that required a conclusion that only one provision or group of provisions was intended to apply, then that would be a reason for accepting the respondent's contention (10). Again, if one provision, or group of provisions, were directed with particularity to the case of a person such as the respondent, and the other were

(10) *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130.

merely of general application, the same could be said (11). As explained by Heydon and Crennan JJ, and also by Gummow and Hayne JJ, neither proposition can be made good when regard is had to the legislative history and context. In the result, the respondent's contention amounts to an assertion; a statement of an outcome that would be supportive of his freedom to remain in Australia, and in that sense protective of his interests, but without a convincing argument of statutory construction which sustains that outcome. Therefore, it fails.

3 GUMMOW AND HAYNE JJ. The facts and the course of the litigation are recounted in the reasons of Heydon and Crennan JJ and only a brief reference to them is required here. The respondent is in a similar position to the applicant in *Shaw v Minister for Immigration and Multicultural Affairs* (12). He is a constitutional alien, and a citizen of Sweden, who has resided in Australia since 27 January 1974. This was four weeks after his birth. He has a substantial and serious criminal record. On 12 August 2004, the appellant (the Minister) made a decision pursuant to s 501(2) of the *Migration Act 1958* (Cth) (the Principal Act) to cancel the respondent's visa on character grounds. This rendered him an "unlawful non-citizen" and liable to removal from Australia pursuant to s 198 of the Principal Act.

4 Section 501(2) is in the following terms:

> "The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and
>
> (b) the person does not satisfy the Minister that the person passes the character test."

Section 501(6) provides inter alia that a person does not pass the character test if he or she "has a substantial criminal record (as defined by subsection (7))". The respondent had such a record, and the Minister cancelled his visa in reliance solely upon that circumstance.

5 The Minister's decision was a privative clause decision for the purposes of s 474 of the Principal Act and can only be set aside for jurisdictional error. The respondent was successful in establishing jurisdictional error before the Full Court of the Federal Court (13). The Minister now appeals to this Court.

The issues on appeal

6 The alleged jurisdictional error arises as follows. Both parties now agree that the respondent held an "absorbed person visa". However, the Minister, in exercising the power under s 501(2) of the Principal Act, believed herself to be cancelling a different class of visa, namely a

(11) *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation [No 2]* (1980) 44 FLR 455 at 468-469.

(12) (2003) 218 CLR 28.

(13) *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420 (Moore and Gyles JJ; Emmett J dissenting).

"transitional (permanent) visa". The respondent claims he never held such a visa. The Minister claims that he did, and that the decision to cancel it took effect, by reason of s 501F(3) of the Principal Act, also as a decision to cancel the absorbed person visa. Section 501F relevantly provides:

> "(1) This section applies if the Minister makes a decision under section 501, 501A or 501B to refuse to grant a visa to a person or to cancel a visa that has been granted to a person.
>
> …
>
> (3) If:
>
> (a) the person holds another visa; and
>
> (b) that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection;
>
> the Minister is taken to have decided to cancel that other visa."

The absorbed person visa was not within the classes of visa excluded by s 501F(3)(b) from the operation of that section.

7 Several related issues arise from this situation. The first issue is whether the Principal Act permits a person to hold simultaneously an absorbed person visa and a transitional (permanent) visa. The second issue is whether the respondent held a transitional (permanent) visa in addition to his absorbed person visa. If the respondent did so, the third issue arises, namely, whether in the light of s 501F(3) of the Principal Act the Minister fell into jurisdictional error in failing to consider the existence of *both* the visas he held. On the other hand, if the respondent did not consider both visas, the fourth issue arises, namely, whether the Minister's decision was nevertheless unaffected by jurisdictional error because she understood the nature of the visa she was cancelling although she misdescribed it.

8 In the Full Court, the majority (Moore and Gyles JJ) did not decide the first and second issues; they held that in any event the respondent succeeded on the third and fourth issues. Emmett J would have given an affirmative answer on the first two issues and resolved the third issue in favour of the Minister (with no need to consider the fourth issue). The appeal to this Court was presented in a fashion which makes it impossible to skirt the first two issues; the respondent by notice of contention asserts that, as a matter of construction of the Principal Act, only one visa could be granted, and that was the absorbed person visa.

9 There is a fifth distinct issue, also arising from the respondent's notice of contention. This is whether the power under s 501(2) is unavailable in the circumstances that obtained in this case where there was no power to deport the respondent under ss 200 and 201 of the Principal Act. The fifth issue was not considered in detail in the Full Court, although the majority did appear to consider that it favoured the respondent's case (14).

(14) (2005) 143 FCR 420 at 427, 429.

The legislative history concerning visas

10 The first two issues may be considered together. They stem from the tortuous legislative history, and in particular from the intersection in the Principal Act of two separate but related sets of amendments. The first shifted the constitutional foundation of the Principal Act from s 51(xxvii) of the *Constitution* (immigration and emigration) to s 51(xix) (naturalisation and aliens), and commenced with the *Migration Amendment Act 1983* (Cth) (the 1983 Amendment Act). The second set of amendments was a suite of legislation between 1992 and 1994 which saw the evolution of the Principal Act from a permit-based system to one entirely visa-based.

11 The respondent had entered Australia before either of these changes had occurred, but the Minister made her determination after they had been carried into effect under what was a substantially different legislative regime. The difficulties in this case arise from the operation of what may in general terms be described as the transitional arrangements enacted with these changes.

12 When the respondent arrived on 27 January 1974, the right to enter Australia depended upon an immigrant holding an "entry permit" (s 6), unless exempt (s 8). An entry permit could take one of a number of forms, depending upon whether it authorised the holder to enter Australia, to remain in Australia, or both, and upon whether it was specified to operate for a specified period only (15). The holding of a visa, which was an entitlement to travel to Australia, did not obviate the requirement to obtain an entry permit to enter Australia (s 11). An entry permit was endorsed upon the respondent's Incoming Passenger Card on the day he arrived in Australia. This was not a temporary entry permit, and it authorised him to enter and to remain in Australia indefinitely, although subject to the Principal Act. The respondent has never left Australia.

13 This basic structure of the Principal Act remained unchanged until 2 April 1984, when the 1983 Amendment Act commenced, thereby shifting the constitutional foundation of the Principal Act to s 51(xix) of the *Constitution*. For present purposes, it is necessary to note two features. First, whereas under the old s 6 only "immigrants" were required to hold entry permits in order to enter and to remain in Australia (thereby excluding persons who, by absorption into the Australian community, had ceased to be immigrants in the constitutional sense), the amendments required all "non-citizens" to hold an entry permit. This did not affect the respondent, who, although a "non-citizen", already held an entry permit. Secondly, s 8(1)(b) of the 1983 Amendment Act repealed s 7(4) of the Principal Act. This had provided that persons who overstayed their entry permits ceased to be liable to deportation five years after that permit expired or was cancelled. Section 8(2) of the 1983 Amendment Act deemed such

(15) See *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 173.

persons to be "prohibited non-citizens". Although these amendments did not directly affect the respondent, it will be necessary to have further regard to s 7(4) of the Principal Act and s 8(2) of the 1983 Amendment Act later in these reasons.

14 The *Migration Legislation Amendment Act 1989* (Cth) (the 1989 Amendment Act), which commenced on 19 December 1989, made certain repeals and substitutions and also renumbered the sections of the Principal Act. In particular it repealed the apparatus dealing with entry permits and visas (Divs 1 and 1A of Pt 2), and enacted a new dual system. Under this new system, although permission to enter and to remain in Australia was primarily dependent upon the non-citizen holding a "valid entry permit" (s 14(1)), in some circumstances an "entry visa" would suffice and was then treated as an entry permit (ss 14(2), 17, 18). Any non-citizen who did not hold an entry permit (or entry visa treated as such) was an "illegal entrant", unless exempted. Illegal entrants were guilty of an offence (s 77), could be required by the Minister to leave Australia (s 82), and were subject to potential arrest and detention pending departure from Australia (s 92). The terminology of the new provisions classed the respondent as the holder of a "valid entry permit" (16), which, since it was not subject to any limitation as to time, was also a "valid permanent entry permit".

15 The next and most significant change occurred following the flurry of legislative activity from 1992 to 1994 which resulted in the replacement of the dual system with a system where the right to enter and to remain in Australia depended upon possession of a visa. This new system was designed to simplify travel and entry arrangements, and involved removing any legal distinction between arrival in Australia and entry to Australia (17). The critical amendments repealed substantially all of the provisions of Divs 1 to 4 of Pt 2 of the Principal Act. They were made by the *Migration Reform Act 1992* (Cth) (the 1992 Reform Act). That Act did not come fully into force until 1 September 1994. On the same date, the *Migration Legislation Amendment Act 1994* (Cth) (the 1994 Amendment Act) commenced. The 1994 Amendment Act amended both the Principal Act and the 1992 Reform Act (18), as well as effecting a renumbering of the Principal Act as amended. Following all these amendments, any non-citizen who was not a "lawful non-citizen" was an "unlawful

(16) The respondent fulfilled the criteria set out in the definition of "valid entry permit", as the holder of an entry permit granted before the 1989 Amendment Act came into effect which neither had been cancelled nor had expired (s 4(1)).

(17) See *Migration Reform Bill 1992* (Cth), House of Representatives, Explanatory Memorandum, pp 2, 15.

(18) Section 2 of the 1994 Amendment Act provided that, in so far as it amended the 1992 Reform Act, it was taken to have commenced immediately after that Act received the Royal Assent. However, the commencement of the 1992 Reform Act was deferred from 1 December 1993 to 1 September 1994 (see *Migration Laws Amendment Act 1993* (Cth)).

non-citizen" liable to mandatory detention (s 189) and removal (s 198). A person could only be a lawful non-citizen if he or she held a visa that was in effect (s 13(1)).

16 These changes necessitated the enactment of transitional arrangements. Section 15(2) of the Principal Act as amended specifically provided that all persons who were "illegal entrants" prior to 1 September 1994 were to be "unlawful non-citizens" from that date. However, of present relevance are the transitional arrangements intended to deal with the situation of permit-holders (such as the respondent) and other groups who had *not* been "illegal entrants" under the previous statutory regime. These transitional arrangements were not straightforward. There were numerous groups of people of varying rights and status under the old legislation whom it was necessary to accommodate within the new system, and in accordance with its policy. The manner in which the Parliament attempted to resolve these problems leads directly to the first issue in this appeal, namely, the controversy concerning which visa or visas were held by the respondent.

17 Since 1 September 1994, the central provision in the Principal Act concerning classes of visas has been s 31; visa classes now were primarily to be prescribed by the Regulations. When it commenced, s 31 relevantly provided:

> "(1) There are to be prescribed classes of visas.
>
> (2) *As well as* the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37 and 38."

(Emphasis added.)

The classes of visa created by the Principal Act in s 31(2) were "special category visas" (s 32), "special purpose visas" (s 33), "absorbed person visas" (s 34), "ex-citizen visas" (s 35), "protection visas" (s 36), "bridging visas" (s 37) and "criminal justice visas" (s 38). Special purpose visas, ex-citizen visas and, importantly, absorbed person visas were not created by the 1992 Reform Act. They were inserted into the Principal Act contemporaneously with the 1992 Reform Act coming into effect by operation of the 1994 Amendment Act.

Absorbed person visas

18 As remarked earlier in these reasons, there is now no dispute that the respondent was deemed to have been granted an "absorbed person visa" on 1 September 1994. This was brought about by sub-ss (1) and (2) of s 34 of the Principal Act as amended, which provided:

> "(1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as absorbed person visas.
>
> (2) A non-citizen in the migration zone who:
>
> (a) on 2 April 1984 was in Australia; and
>
> (b) before that date, had ceased to be an immigrant; and

(c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and

(d) immediately before 1 September 1994 was not a person to whom section 20 of this Act as in force then applied;

is taken to have been granted an absorbed person visa on 1 September 1994."

19 It would appear that the rationale of these provisions in s 34 was to confirm the legal status of certain persons who had unintentionally been rendered prohibited non-citizens by s 8(2) of the 1983 Amendment Act (19). The purpose of s 8(2) was to render prohibited non-citizens those persons who, notwithstanding that they had overstayed their visas, would have escaped the status of illegal entrants by dint of s 7(4) of the Principal Act (also repealed by the 1983 Amendment Act). Section 7(4) removed the status of "prohibited immigrant" from a person who had acquired it by reason of the expiration or cancellation of a permit under s 7(3) after five years had elapsed where no deportation order was then in force. However, the purpose (as is made clear by the Second Reading Speech) was not to affect those whose permanent residence had been regularised (20). That is, persons who had overstayed their visas for more than five years would be rendered prohibited non-citizens only if they had not been absorbed into the Australian community prior to 2 April 1984. After that date the status of "immigrant" was to become irrelevant for the structure of the Principal Act.

20 However, the text of s 8(2) of the 1983 Amendment Act also captured all persons who had ever benefited from s 7(4), including those who had become absorbed and who had therefore ceased to be immigrants. Section 16 of the *Migration Laws Amendment Act (No 2) 1992* (Cth) (the 1992 Amendment Act) was designed to remedy this oversight. It did so by limiting s 8(2) retrospectively so that the sub-section never applied to persons who had ceased to be immigrants prior to 2 April 1984, and had not left Australia since that time. It would appear that s 34 (as introduced by the 1994 Amendment Act) was intended to confirm the lawful status of those persons following the further reforms of 1992 to 1994.

21 As has previously been remarked, the statutory genesis of s 34 is found in the 1994 Amendment Act. This statute omitted from the 1992

(19) Section 8(2) of the 1983 Amendment Act had provided: "Where a person who, upon the commencement of this Act: (a) is a non-citizen within the meaning of the Principal Act as amended by this Act; and (b) is not the holder of an entry permit (not being a temporary entry permit); had, at a time before that commencement, ceased to be a prohibited immigrant within the meaning of the Principal Act by virtue of the operation of sub-section 7(4) of that Act, that person becomes, upon that commencement, a prohibited non-citizen for the purposes of the Principal Act as amended by this Act."

(20) See Australia, Senate, *Parliamentary Debates* (Hansard), 7 September 1983, p 375.

Reform Act the third sub-section of what became (following renumbering) the new s 13 of the Principal Act. That sub-section would have exempted those persons who fulfilled the conditions of s 34 from the universal visa requirement. However the Parliament changed its position and instead decided that those people should be brought within the visa system rather than form an exception to it (21). Accordingly, the 1994 Amendment Act inserted the provisions which created the absorbed person visa as a class of visa within s 31(2) of the Principal Act.

22 Although the Explanatory Memorandum (22) characterises the group of people to whom the new s 34 was to apply as "a small number of absorbed persons, who are lawfully in Australia as permanent residents despite not holding an entry permit" (23), the words adopted were broader than that. Those words were capable of applying, and did apply, equally to absorbed persons who did hold an entry permit. The respondent was such a person.

Transitional (permanent) visas

23 The Minister submits that the respondent was also granted a "transitional (permanent) visa" at exactly the same time. This was a class of visa prescribed for the purposes of s 31(1) of the Principal Act by regulation made pursuant to s 504. The relevant regulation was reg 2.01 of the *Migration Regulations 1994* (Cth):

> "For the purposes of section 31 of the Act, the prescribed classes of visas are:
>
> (a) such classes (other than those created by the Act) as are set out in the respective items in Schedule 1; and
>
> (b) the following classes:
>
> (i) transitional (permanent); and
>
> (ii) transitional (temporary)."

The content of the various transitional visas was contained in Pt 2 of the *Migration Reform (Transitional Provisions) Regulations* (Cth) (the Transitional Regulations). The Explanatory Statement to those Regulations described them as "designed to ensure that, from 1 September 1994, all visas and entry permits held immediately before that date are converted into one of two transitional visa classes by operation of law" (24).

24 Regulation 4(1) of the Transitional Regulations dealt with transitional (permanent) visas and was in the following terms:

(21) See *Migration Legislation Amendment Bill 1994* (Cth), Senate, Explanatory Memorandum, paras [25]-[27].

(22) *Migration Legislation Amendment Bill 1994* (Cth), Senate, Explanatory Memorandum, para [25].

(23) That is, those persons who had been prohibited non-citizens by reason of s 8(2) of the 1983 Act but who had been saved by the retrospective operation of s 16 of the 1992 Amendment Act.

(24) *Migration Reform (Transitional Provisions) Regulations 1994*, Explanatory Statement, Attachment, Pt 2.

> "Subject to regulation 5 [(25)], if, immediately before 1 September 1994, a non-citizen was in Australia as the holder of a permanent entry permit, that entry permit continues in effect on and after 1 September 1994 as a transitional (permanent) visa that permits the holder to remain indefinitely in Australia."

"Permanent entry permit" was defined by reg 3 to mean "an entry permit the effect of which is not subject to a limit as to time" (with one exception not presently relevant). As the previous discussion of the respondent's situation following the 1983 Amendment Act illustrates, he was the holder of such a permit. Prima facie, therefore, he was within the scope of reg 4(1).

25 It is necessary, however, to consider the power under which the Transitional Regulations were made. Ultimately, essentially for the reasons which follow, the respondent accepted that reg 4(1) was within power so far as concerned his situation.

26 The Transitional Regulations were made pursuant to ss 40 and 42 of the 1992 Reform Act. Those regulation-making powers were the subject of amendments made by the 1994 Amendment Act prior to their commencement. The relevant provision is s 40(5), which ultimately came to be in the following terms:

> "The regulations may provide that, from 1 September 1994, visas or permits in a specified Principal Act class and held by specified persons immediately before that date are to continue in effect as visas in a specified amended Act class."

27 Regulation 4 could therefore only apply to the respondent if both (a) the respondent's permanent entry permit was a permit in a specified "Principal Act class" and (b) the transitional (permanent) visa granted was a visa in a specified "amended Act class". Those terms were defined by s 40(1) (26). The first criterion was satisfied. This was because, and as emerged in the course of argument critically for the purposes of this appeal, s 40(1A) broadened the scope of the definition of "Principal Act class" in such a way as *specifically* to deem the respondent's permit to be within it (27). The second criterion was satisfied because, as described earlier, the transitional (permanent) visa was prescribed by reg 2.01(b) of the *Migration Regulations* as a class of visa for the purposes of s 31 of the Principal Act. As such it satisfied the definition in s 40(1).

(25) This concerned permanent entry permits granted on or after 1 September 1992, and is not relevant to the respondent.

(26) Section 40(1) provided that: "'*amended Act class*' means a class of visas that is provided for by, or by regulations under, the Principal Act as amended by this Act; '*Principal Act class*' means a class of visas or permits that is provided for by regulations under the Principal Act."

(27) Section 40(1A) was inserted into the 1992 Reform Act by s 84 and Sch 2 Item 3 of the 1994 Amending Act, and relevantly provided: "For the purposes of the definition of 'Principal Act class': (a) permits granted before 19 December 1989 are taken to be a class of permits provided for by regulations under the Principal Act."

28 Subject to the respondent's argument that it is not possible as a matter of construction of the legislation for the respondent to hold the two visas concurrently, it must be accepted that he did hold both the absorbed person visa and the transitional (permanent) visa. We turn now to consider that issue.

The respondent's visa status

29 At least three prior cases in this Court have proceeded on the basis that a person in an analogous position to the respondent held a transitional (permanent) visa (28), and the litigation in one of these was conducted on the basis that the applicant held both visas (29). However this case is the first occasion on which the point has directly arisen for consideration in this Court.

30 The respondent's argument was that the Principal Act reflected a policy that a person should not hold two "substantive visas" at the one time. That argument is framed too broadly. The question is not whether the Principal Act evinces a general policy against a person concurrently holding two "substantive visas". The question is more narrowly focused upon the two visas in question.

31 It is for that reason that the respondent's particular reliance upon s 82(2) is not helpful. Section 82(2), which is said to support the respondent's case, is in the following terms:

> "A substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect."

Both absorbed person visas and transitional (permanent) visas are within the meaning of "substantive visa" as that term is defined in s 5(1) of the Principal Act. However, as Emmett J pointed out in the Full Court (30), s 82(2) had no sensible operation in this case since both visas came into existence together by operation of law. Section 82(2) may evince an intention that only one substantive visa be held at any one time, but it does not accommodate the situation in this case.

32 The respondent's second submission sought to accord primacy to visas granted by the Principal Act, as distinct from visas granted by the Regulations. However, as noted previously, the language and structure of s 31 of the Principal Act contradict any such supposed priority. Section 31(1) was the primary provision providing for the classes of visas. It required Regulations to be made prescribing classes of visas. The classes specified directly by the Principal Act were expressed by s 31(2) to be "as well as" (that is, in addition to) those classes so

(28) *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

(29) *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 445 [162]. In that case McHugh J at 422 [92] regarded it as "clear" that the applicant held both an absorbed person visa and a transitional (permanent) visa.

(30) (2005) 143 FCR 420 at 432.

prescribed. There is no reason to suppose that the transitional (permanent) class of visa (prescribed by the *Migration Regulations*) was intended to fall outside this structure.

33 When regard is had to the manner in which s 34 was introduced to the Principal Act by the 1994 Amendment Act, as described earlier in these reasons, it is clear that that section served an analogous purpose to reg 4(1) of the Transitional Regulations. Both provisions were of a transitional nature, intended to bring groups of people within the universal visa system being erected by the 1992 Reform Act. In those circumstances it is unsurprising that a degree of overlap may have occurred. Indeed it would be more remarkable if transitional arrangements of this nature were *not* drafted with some margin of tolerance to ensure that no one accidentally slipped through the net and so became an unlawful non-citizen.

34 It is beside the point to emphasise, as the respondent did, that a person with an absorbed person visa would not need a transitional (permanent) visa. That assumes the answer to the inquiry. Indeed, the history of s 34 indicates that the section was primarily directed at persons to whom the scheme of the Transitional Regulations would *not* apply, namely persons who were lawfully in Australia prior to 1 September 1994 without a permit (31). However the language adopted was wider than was necessary to achieve that result. All the reforms commenced on 1 September 1994 as one legislative "package". There is no reason to conclude that the Transitional Regulations were designed only to supplement the visas conferred directly by the Principal Act itself.

35 The respondent contends that it was an anomalous result for him to receive both an absorbed person visa and a transitional (permanent) visa. However, that state of affairs is not surprising when regard is had to the fundamentally transitional nature of *both* those visa classes. It is not to the point that there may be no other circumstances in which a person may be granted two visas. If that be so (and it is not necessary in this case to decide), it would merely indicate that the legislative drafting succeeded in minimising overlap, but did not completely eliminate it.

36 The first and second issues must therefore be resolved by concluding that, on 1 September 1994, the respondent received both an absorbed person visa and a transitional (permanent) visa, and that this was by operation of law. The consequence is that, if valid, the Minister's decision to cancel the transitional (permanent) visa also took effect, by reason of s 501F(3), as a decision to cancel the absorbed person visa.

(31) See *Migration Legislation Amendment Bill 1994* (Cth), Senate, Explanatory Memorandum, paras [25]-[27].

Jurisdictional error in failure to have regard to the absorbed person visa

37 This leads to consideration of the third issue identified at the commencement of these reasons, namely, whether the Minister's decision was vitiated by jurisdictional error because she failed to have regard to the existence or nature of the absorbed person visa. (The conclusion reached above also means it is unnecessary to consider the fourth issue, namely, whether the Minister's decision could be saved because she did not misunderstand the substance of the visa being cancelled.)

38 It was upon this third issue that the respondent was successful in the Full Court of the Federal Court. The majority (Moore and Gyles JJ) found jurisdictional error, on the assumption that both visas were held by the respondent, in the failure of the Minister to "identify and consider the fact that the [respondent] held an absorbed person visa that would be directly affected by s 501F(3)" (32). The gravamen of the majority reasoning was the following proposition (33):

> "The width of the potential application of s 501 makes it necessary, at the very least, for there to be proper identification and consideration of the nature of a visa to be cancelled directly or by force of s 501F(3)."

Given the conclusion that the Minister correctly identified the respondent as holding a transitional (permanent) visa, the question is whether the majority was correct in holding that the Minister was required to consider the nature of a visa to be cancelled "by force of s 501F(3)". The respondent supports the majority decision. He submits that, on a proper construction of the Principal Act, the Minister was bound to consider the existence and nature of any visa that would be taken to be cancelled by s 501F(3) (34).

39 There have been a number of decisions in the Federal Court on this and related points, some of which are inconsistent with the decision of the majority of the Full Federal Court in this case. These are considered in the reasons of Heydon and Crennan JJ. That divergence of opinion in the Full Court emphasises the need to approach as a matter of principle the third issue on this appeal. A proper construction of the Principal Act does not suggest that the Minister is bound to act as the respondent submits.

40 It is not sufficient in this regard to treat the Principal Act in a general sense as creating a system whereby each visa constitutes a permission under the Principal Act to remain in Australia which continues until it expires by effluxion of time or is consciously revoked. Such an approach in construing s 501(2) pays insufficient regard to the terms

(32) *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420 at 426.

(33) (2005) 143 FCR 420 at 427.

(34) See the statement of general principle by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

and legislative purpose of s 501F(3). Section 501F was introduced by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) (the 1998 Strengthening Amendment Act), which also introduced the character test and brought s 501 into its current form. In its terms, s 501F(3) provides that a decision to cancel a visa where a person fails the character test under s 501 "is taken" to be a decision to cancel any other visa held by the person. There is no room for discretion in the matter. The only exception applies if the other visa is within s 501F(3)(b), namely, a protection visa or a visa specified in the Regulations.

41 Nothing in the text of s 501 or s 501F provides any support for reading into s 501(2) a requirement to consider the possible effect of s 501F on the respondent. Nor do the extrinsic materials provide any support for this contention (35). The evident purpose of s 501F, at least in part and as Emmett J indicated in his dissenting judgment (36), is to ensure that a person who fails the character test is liable to be removed from Australia, notwithstanding any other permission that person might have to remain here.

42 The majority of the Full Court erred in concluding otherwise. Accordingly, subject only to the fifth issue (raised by the respondent's notice of contention), the Minister's appeal to this Court must be allowed.

Cancellation of a visa under s 501(2) and deportation under Pt 2, Div 9 of the Principal Act

43 Counsel for the respondent contended in the written submissions that, because the respondent was not liable to deportation by exercise of the power conferred on the Minister by ss 200 and 201 of the Principal Act, the power of visa cancellation conferred upon the Minister by s 501(2) could not be exercised in respect of his visa or visas. It was said s 201 conferred upon the respondent a "specific statutory protection from exclusion from Australia" and that "on ordinary principles" that protection could not "be impliedly repealed by the subsequent conferral of an additional and general method of exclusion in s 501".

44 In support of that submission various authorities were cited. They began with the statement by Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (37):

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it

(35) See *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill* (Cth), Senate, Explanatory Memorandum, p 2.
(36) (2005) 143 FCR 420 at 433.
(37) (1932) 47 CLR 1 at 7.

> excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for *the same power*."

(Emphasis added.)

45 It was common ground that the respondent was not liable to deportation under s 200 of the Principal Act. Section 200 provides that "[t]he Minister may order the deportation of a non-citizen to whom this Division [Pt 2, Div 9] applies". Section 201 is one of a number of provisions defining classes of persons to whom Div 9 applies. It creates a class broadly being non-citizens who are convicted of crimes committed at a time when they had been in Australia for less than ten years (38). The respondent was not in that class because his s 201(c) offence had been committed more than ten years after he arrived in Australia; he did not satisfy s 201(b)(i). The respondent submits that he was "protected" from deportation by s 201. This use of language is liable to mislead. The correct description of his position is that he was not an object of the s 200 power to deport. However, the respondent seeks to characterise that circumstance as a "restriction" of the kind referred to in *Anthony Hordern*.

46 Senior counsel for the respondent, during the course of the hearing, distilled her broad submission into the proposition that, at least in the facts of this case where the Minister made her s 501 determination solely upon the basis of s 501(6)(a) and the respondent's "substantial criminal record", the "restriction" referred to above was flouted. Repugnancy between the two sets of provisions is therefore said to arise in the application of s 501 to the particular facts of this case. Counsel here introduced a citation of *Goodwin v Phillips* (39). However, that case concerned implied repeal of an earlier by a later statute. Nevertheless, the alternate submission for the respondent is that, where the Minister proposes to rely solely upon para (a) of s 501(6) in making a s 501 determination, that power must be read subject to the "proviso" that it does not apply where the respondent is not within the objects of the s 200 power. That submission should be rejected.

Implied repeal

47 The respondent contends that his "protection" could not be "impliedly repealed" by the conferral by s 501 of another method of

(38) Section 201 relevantly provides: "Where: (a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence; (b) when the offence was committed the person was a non-citizen who: (i) had been in Australia as a permanent resident: (A) for a period of less than 10 years; or (B) for periods that, when added together, total less than 10 years; … and (c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year; section 200 applies to the person."

(39) (1908) 7 CLR 1.

exclusion. That invocation, supported by citation of *Goodwin v Phillips* (40), of the doctrine of implied repeal must fail and for several reasons.

48 First, there is some difficulty, given the tortuous legislative history, of fixing one or other of the two sets of provisions with the temporal character required by the doctrine. The doctrine requires that actual contrariety be clearly apparent and that the later of the two provisions be not capable of sensible operation if the earlier provision still stands (41). If that temporal character is to be determined, then, as will appear, it is s 501 which is the later provision. The result, if the doctrine otherwise applied, would be to displace ss 200 and 201 so that they could not provide the "protection" asserted by the respondent (42). In any event, there is no actual contrariety between the two sets of provisions, which are capable of a sensible concurrent operation. That aspect of the case is considered further later in these reasons.

49 Secondly, there is a confusion of ideas in compounding the doctrine of implied repeal and what was said in *Anthony Hordern*. That case, and the cases in this Court which have considered it, were concerned with questions of construction of two provisions, both of which remained effective in their terms, with no abrogation, by repeal, of the one by the other.

50 Something, however, should be said respecting observations by Dixon J in another authority relied upon by the respondent, *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (43). His Honour referred to cases which construed general words in taxing statutes so as not to remove privileges or exemptions in earlier special or private Acts (44). These cases reflected a principle relating to implied repeal by subsequent enactment. But Dixon J added that the principle expressed in the maxim generalia specialibus non derogant (the express mention of one thing implies the exclusion of another) had been applied also "to the interpretation of a single statute containing a special and a general provision" (45).

51 However, to read one statute as abrogated by other than express words in a later statute is a large step, different in character from the construction of parts of a subsisting whole. It is one thing to treat an earlier statutory provision as repealed by a subsequent enactment, and another to say that, as a matter of construction, whilst both provisions

(40) (1908) 7 CLR 1 at 7.
(41) See *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 275; *Saraswati v The Queen* (1991) 172 CLR 1 at 17-18; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at 7 [14], 13-14 [43]; *Putland v The Queen* (2004) 218 CLR 174 at 189 [40].
(42) cf *Cobiac v Liddy* (1969) 119 CLR 257 at 268.
(43) (1948) 77 CLR 1.
(44) (1948) 77 CLR 1 at 30. See also at 16-17 per Latham CJ; at 35-36 per Williams J.
(45) (1948) 77 CLR 1 at 29.

remain in force the power conferred by one of them is insusceptible of exercise in certain factual circumstances (46).

Anthony Hordern

52 If the respondent's case is understood as based upon *Anthony Hordern* (47), then it must fail also on that account.

53 However, something first should be said of *Minister for Immigration and Multicultural Affairs v Gunner* (48). There, the Full Court of the Federal Court rejected the argument that ss 200 and 201 limited s 501, saying:

> "Sections 501 and 502 are quite separate sources of power. The criteria for the exercise of those respective powers are by no means co-extensive, although there is an overlap. The fortuitous circumstance that two separately-sourced powers might be exercised in respect of the same collocation of facts cannot affect the construction of the relevant statutory provisions, which must be given a meaning as at the time of their enactment."

The decision in *Gunner* has been affirmed both in the Federal Court (49) and in this Court in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (50). The respondent correctly submits that *Jia* and its endorsement in *Gunner* (both of which considered an antecedent version of s 501) do not preclude his argument, because there both powers were available, whereas in this case only s 501 was available. The earlier cases held that the availability of s 200 did not mean that the Minister could not have recourse to s 501. In this case, the respondent submits that the *unavailability* of s 200 affects the ambit of s 501.

54 Underlying *Anthony Hordern* and later cases is the notion "that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise". This statement was made by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia* (51) and applied to Ch III of the *Constitution* as a "very evident example". Counsel for the Minister, in oral argument, invoked the maxim expressum facit cessare tacitum (when there is express mention of certain things, then anything not mentioned is excluded), and its affinity with the above statement will be apparent. But, whilst "rules" or principles of construction may offer reassurance, they are no

(46) cf the remarks of Stephen J in *Reseck v Federal Commissioner of Taxation* (1975) 133 CLR 45 at 53-54.

(47) (1932) 47 CLR 1.

(48) (1998) 84 FCR 400 at 408.

(49) *Lu v Minister for Immigration and Multicultural Affairs* (2000) 176 ALR 79. See also *Bridges v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 456 at 465, which considered whether s 501 justified the reading down of s 200.

(50) (2001) 205 CLR 507 at 535 [85], 547 [130], 561 [176].

(51) (1956) 94 CLR 254 at 270. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 409 [241].

substitute for consideration of the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose.

55 *Anthony Hordern* (52) concerned the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (the Conciliation and Arbitration Act) which apparently contained two powers for the making of an award with respect to union preferences. Section 40 empowered the Court of Conciliation and Arbitration by award to give preferential employment to members of unions over other persons, subject to certain conditions, including that such an award was to be made only "other things being equal". The power in s 40 was not expressly confined to the situation where there was an industrial dispute about preference. However a judge of the Court, acting under the general powers in ss 24(2) and 38(a) to hear and determine industrial disputes, made an order unconditionally requiring certain employers to give preference to union members in employing female workers. This Court by majority (Gavan Duffy CJ and Dixon J, McTiernan J, Starke and Evatt JJ dissenting) held that those general powers did not authorise the judge to make an award which "ignored the exception[s]" (53) contained in s 40. McTiernan J concluded as follows (54):

> "Reading the Act as a whole, there does not appear to me to be any reason for holding that Parliament intended to give to the Court two powers, entirely different in scope, to order 'preference.' I do not think that the Legislature intended that, in a case in which preference was in dispute, the Court should be free to make any award it deemed fit and that the award might be entirely unconditional, whereas, in a case in which preference was not in dispute, the Court should be fettered and its award moulded by the provisions of s 40."

This is a rather more compendious expression of what was said by Gavan Duffy CJ and Dixon J in the passage set out earlier in these reasons. As a matter of construction (and not as one of implied repeal) there was only one power which could be relied upon to make awards giving preferential employment to union members.

The cases after Anthony Hordern

56 *R v Wallis (Wool Stores Case)* (55) also concerned the power to make awards under the Conciliation and Arbitration Act. A union applied to a conciliation commissioner, charged with preventing and settling industrial disputes, for insertion of a compulsory unionism clause in an award. An employer sought prohibition on the basis that the commissioner had no power to make such an award because s 56 of the Act empowered the Court only to make awards giving preferential

(52) (1932) 47 CLR 1.
(53) (1932) 47 CLR 1 at 8.
(54) (1932) 47 CLR 1 at 20.
(55) (1949) 78 CLR 529.

employment (as distinct from monopoly employment) to union members. Section 56 was the descendant of s 40, considered in *Anthony Hordern*. This Court made absolute the order nisi for prohibition. Dixon J described s 56 as a "specific power, of a limited nature" (56). Accordingly it was improper to infer in the general powers "a much more comprehensive and drastic power upon the same subject matter or upon matters ejusdem generis" (57) than that contained in s 56. Dixon J expressed his conclusion as according (58):

> "with the general principles of interpretation embodied in the maxim expressum facit cessare tacitum and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course."

57 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (59) turned upon the powers of the Australian Film Development Corporation to make loans. Section 20 of the *Australian Film Development Corporation Act 1970* (Cth) provided that the functions of the Corporation were to "encourage the making of Australian films and to encourage the distribution of Australian films both within and outside Australia". Section 21(1)(a) of that Act provided that "without limiting the generality of the foregoing" the Corporation had power to make loans "to producers of Australian films". The Corporation lent money to a borrower which was not a producer of Australian films "to assist in the production" of an Australian film. Mason J referred to *Anthony Hordern* and held that, but for the presence of the words "without limiting the generality of the foregoing" in s 21(1), the restrictions in that specific power to make loans would qualify the general power in s 20 (60). However the presence of those words meant it was proper to regard s 21 as setting out particular examples of the general power in s 20. Again, the issue was one of construction of the two provisions in question.

58 *Downey v Trans Waste Pty Ltd* (61) concerned the power of Victorian Conciliation and Arbitration Boards to refer certain matters to the Industrial Relations Commission. Section 44(4) of the *Industrial Relations Act 1979* (Vic) provided that a Board seized of an "industrial dispute" might apply to the President for an order referring "the matter of the dispute" to the Commission for hearing and determination. However s 44(7) provided that, in respect of matters referred by the Board, the Commission was to have all the powers of the Board under s 34. That section included certain restrictions of a privative nature

(56) (1949) 78 CLR 529 at 552.
(57) (1949) 78 CLR 529 at 553.
(58) (1949) 78 CLR 529 at 550.
(59) (1979) 141 CLR 672.
(60) (1979) 141 CLR 672 at 678-680.
(61) (1991) 172 CLR 167.

affecting the way in which questions in an industrial dispute concerning unfair dismissal could be determined. Section 37(8) of the Act empowered the Board to apply to the President for an order referring any "matter" before it to the Commission for hearing and determination. Although the meaning of industrial matter was broader than that of "industrial dispute", there was no provision analogous to s 44(7) applicable in the case of referrals under s 37(8). Dawson J considered that s 44(4) excluded the more general s 37(8) where the industrial dispute concerned whether a dismissal was harsh, unjust or unreasonable (62). This was because, based upon a detailed consideration of the statutory history, it was proper to infer that the Commission was not intended to exercise a jurisdiction free from the limitations that would have been imposed upon the Board in determining a dispute of that kind.

59 *Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the "same power" (63), or are with respect to the same subject matter (64), or whether the general power encroaches upon the subject matter exhaustively governed by the special power (65). However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions.

Conclusion respecting the Anthony Hordern submission

60 The respondent's submission on the present appeal depends upon the proposition that in the circumstances of this case both s 501 and ss 200 and 201 deal with the same subject matter, namely, the removal of persons from Australia who have been convicted of offences. The respondent points to the circumstance that a deportation order made under s 200 results in mandatory removal from Australia by the terms of the order followed by cancellation of any visa under s 82(2). An order cancelling a visa results in mandatory removal from Australia pursuant to s 198 of the Principal Act.

61 The defect in that submission is that it fixes upon only one practical consequence of the respective orders. It does not address whether the subject matter of the power is in law substantially the same. However,

(62) (1991) 172 CLR 167 at 180, 182-183.
(63) *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.
(64) *Wool Stores Case* (1949) 78 CLR 529 at 550.
(65) *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678; *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation [No 2]* (1980) 44 FLR 455 at 468-469.

for the reasons which follow, the two powers do not deal with the same subject matter so as to attract the operation of the maxim expressum facit cessare tacitum and the reasoning which underpins *Anthony Hordern* and other decisions. The scheme of the Principal Act does not treat as having the one identity deportation and cancellation of a visa. This is so notwithstanding that, by reason of other provisions of the Principal Act, the exercise of both powers may well result in the same practical outcome. The ambit of the power to deport is not wholly subsumed within the ambit of the power to cancel a visa by reference to the character test in s 501(2).

62 A review of the Principal Act reveals the distinct and different provenances of the powers of deportation and cancellation. That of ss 200 and 201 predates that of s 501. At the time of the respondent's arrival, an entry permit of the kind granted to him could not be cancelled, unlike a temporary entry permit which was liable to cancellation in the Minister's discretion (s 7). However, the Minister had various qualified powers under Div 2 of Pt 2 of the Principal Act to order the deportation of "aliens" (66) as defined (ss 12, 14(1)) and "immigrants" as defined (67) (ss 13, 14(2)) in specified circumstances and an unqualified power to deport "prohibited immigrants" (68) (s 18).

63 The 1983 Amendment Act, which shifted the constitutional foundation of the Principal Act, altered the scope of the deportation powers contained in Div 2 of Pt 2 by giving the Minister the power to deport "non-citizens" (regardless of whether they were immigrants or absorbed persons) in certain circumstances (ss 12, 14), together with the unqualified power to deport "prohibited non-citizens" (s 18). Section 12 was the analogue of the present ss 200 and 201; it did not apply to all non-citizens. Deportation did not occur by cancellation of the entry permit. This occurred in the same way it previously had, upon the person departing Australia (s 9); that is, when the deportation order was carried into effect.

64 The deportation regime remained essentially unaltered from this time until its present form in Div 9 of Pt 2 of the Principal Act, but the cancellation powers were progressively expanded. The amendments made by the 1989 Amendment Act, which allowed "entry visas" to function as entry permits in some circumstances, contained provisions allowing for the cancellation of both visas (s 26) and temporary entry

(66) Section 5(1) of the Principal Act provided that "'alien' means a person who is not — (a) a British subject; (b) an Irish citizen; or (c) a protected person [with the same meaning as in the *Nationality and Citizenship Act 1948-1958* (Cth)]."

(67) Section 5(1) of the Principal Act extended the constitutional meaning of "immigrant" to include certain others.

(68) "Prohibited immigrants" included any immigrant who entered Australia without an entry permit (s 6(1)) and any immigrant prescribed by s 16 notwithstanding that he or she held an entry permit.

permits (s 35). These powers of cancellation were distinct from the deportation regime (Pt 2, Div 5).

65 The particular cancellation power under consideration, s 501, was originally a special power of cancellation introduced by the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth). Its life began on 24 December 1992 as s 180A of the Principal Act. It applied to both visas and entry permits, and it entered into force before the amendments made by the 1992 Reform Act which set up the universal visa system. Those amendments made the now universal visas generally susceptible of cancellation (Pt 2, Div 3, Subdivs C-H), so depriving s 180A (now renumbered to be s 501) of its exceptional nature. Critically, it was only after these reforms that persons whose visas were cancelled (under any of the various powers of cancellation) became unlawful non-citizens liable to mandatory removal pursuant to Pt 2, Div 8 of the Principal Act. It was only that amendment which caused the cancellation powers generally to attain broader scope for removing persons from Australia than the deportation power.

66 However s 501 only assumed its current form after the amendments made by the 1998 Strengthening Amendment Act. Prior to the commencement of that Act, s 501 had required the Minister to be "satisfied" that a person was not of good character, having regard to a number of factors (including past criminal conduct) and be satisfied that the person would engage in further undesirable conduct. The 1998 Strengthening Amendment Act introduced the character test in a more absolute form. In its present form, s 501(6)(a) provides that a person automatically fails the character test if he or she has a "substantial criminal record". But the definition of "substantial criminal record" in s 501(7) is broader than the concept of offence seen in s 200(c).

67 The powers in ss 501(2) and 200 have different provenances, and persons in respect of whom a deportation order has been made have a different status and different rights under the Principal Act. Those differences cannot be ignored by an ellipsis which regards ss 200 and 501 as directed to the same practical outcome. Two examples will suffice. First, whereas a person whose visa is cancelled is subject to mandatory detention pursuant to s 189 prior to removal pursuant to s 198, a deportee is not subject to mandatory detention. Such a person may be detained pending deportation under s 253(8), but the Minister has a general discretion at any time to order that person's release under s 253(9). This difference arises from the circumstance that a deportee is not an "unlawful non-citizen"; a deportee is a lawful non-citizen in respect of whom a deportation order is in force (s 5(1)). That difference may be important where avenues of judicial review are being pursued in respect of the Minister's decision. Secondly, a person whose visa is cancelled has the opportunity of applying for a protection visa (s 501E(2)) which, if granted, will automatically take him or her outside the removal power in s 198 by removing his or her status as an unlawful non-citizen. Although a deportee is not precluded from

applying for a protection visa, a deportation order continues in force until executed, unless it is revoked by the Minister (s 206).

68 Even prior to the enactment of the 1998 Strengthening Amendment Act, a report of the Joint Standing Committee on Migration stated (69):

> "[T]he power of cancellation under s 501 also extends to permanent residents, and may be exercised even where a person becomes liable to deportation. It is, therefore, possible to cancel the permanent visas of non-citizens convicted of crimes in Australia and to have such persons removed, rather than deported, from the country. Furthermore, as the cancellation power is not limited by the time a non-citizen has spent in Australia, criminals who can no longer be deported because of the ten year rule remain subject to visa cancellation and removal unless they obtain citizenship."

The Committee noted that the Bill which became the 1998 Strengthening Amendment Act was intended to strengthen those powers in s 501 (70).

69 Section 501(2) and ss 200 and 201 have different consequences for the status of individuals in the context of the Principal Act. Where a deportation order is made, the individual has the status of a lawful non-citizen who is subject to deportation. If an order under s 501(2) be made, the status of the individual changes to that of an unlawful non-citizen. The Principal Act attaches significance to each status.

70 Accordingly it is not open to characterise the powers as dealing with the same subject matter in the sense of the *Anthony Hordern* line of cases. In the circumstances of this case, the inapplicability of s 200 (by reason of non-satisfaction of s 201(b)(i)) cannot deny the application of s 501(2) by reference to s 501(6)(a).

Orders

71 The appeal should be allowed, and orders made as proposed by Heydon and Crennan JJ.

72 HEYDON AND CRENNAN JJ. This is an appeal against a decision of the Full Court of the Federal Court of Australia (Moore and Gyles JJ, Emmett J dissenting) (71) which set aside a decision made by the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) pursuant to s 501(2) of the *Migration Act 1958* (Cth) (Reprint 9, with amendments up to Act No 2, 2004) (the Act), purporting to cancel Mr Nystrom's transitional (permanent) visa.

(69) Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, June 1998, para [7.15] (footnotes omitted).

(70) Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, June 1998, para [7.17].

(71) *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420.

Issues

73 In the Full Court the majority held that the Minister had made one or more jurisdictional errors. The nature of the errors identified, and thus the issues which arise on this appeal, can be conveniently identified by describing the arguments advanced by the respondent, Mr Nystrom. He contended that: (1) he held an absorbed person visa other than, or in addition to, the transitional (permanent) visa which the Minister purported to cancel; (2) if, however, he held both visas, the Minister's failure to consider the holding of an absorbed person visa was a failure to take into consideration a relevant matter; or (3) if, as was his preferred submission, he held only an absorbed person visa, the Minister's cancellation of the transitional (permanent) visa was a misdescription of the visa held; and (4) in any event the Minister's power, under s 501(2) of the Act, to cancel a visa is restricted by the limitation upon the power under ss 200 and 201 to deport a person, such that, having been a permanent resident for ten years prior to the commission of specified crimes, he was not liable to removal from Australia on cancellation of his visa.

74 The asserted jurisdictional errors were not made out. From 1 September 1994, by operation of s 34(2) of the Act, Mr Nystrom held an absorbed person visa. From the same date, by operation of reg 4(1) (72) of the *Migration Reform (Transitional Provisions) Regulations* (Cth) and s 40 of the Act, he also held a transitional (permanent) visa. There was no difference in the substantive rights conferred by the two visas. That the Minister did not advert to the fact that Mr Nystrom held an absorbed person visa when cancelling his transitional (permanent) visa was not a failure to take a relevant consideration into account. The absorbed person visa was cancelled by operation of s 501F(3) of the Act, upon the Minister's cancellation of Mr Nystrom's transitional (permanent) visa. The power conferred on the Minister by s 501(2) to cancel a visa could be exercised in Mr Nystrom's case, and is not restricted by reference to the circumstances which would engage the exercise of the power of deportation under s 200 of the Act. Mr Nystrom's appeal to the Full Court should have been dismissed. The Minister's appeal to this Court should be allowed.

Background

75 Mr Nystrom was born in Sweden on 31 December 1973. When he was twenty-five days old he travelled to Australia on a Swedish passport with his mother and sister. He entered Australia two days later, on 27 January 1974. On arrival he was granted a K51R(G) entry permit (73).

(72) Entitled "Entry permits in force before 1 September 1994 to continue in effect".

(73) Evidence from the Department of Immigration (as it was then) shows that K51 designated migrant status, in the category of "Accompanying dependant". "R" indicated that "[t]he grantee is to be exempted from registration under the Aliens

76 Mr Nystrom's mother was born in Finland and migrated to Sweden in 1950 where she met and married his father. In 1966 the couple migrated to Australia. Their first child, a daughter, was born in Australia. In 1973, whilst pregnant a second time, Mr Nystrom's mother travelled back to Sweden with her daughter to visit family members. She stayed in Sweden for his birth when it became clear that it would be difficult to travel because of her advanced state of pregnancy.

77 Mr Nystrom's parents separated when he was about five years old and are now divorced. His mother, father and sister continue to live in Australia. His mother is a permanent resident and his sister was born here and is an Australian citizen. Mr Nystrom has remained in Australia since his arrival when he was twenty-seven days old as a lawful non-citizen up until the Minister's cancellation of his visa. Mr Nystrom accepts that he is an alien under the *Constitution* and has never contended to the contrary.

78 Mr Nystrom has few ties with Sweden. His mother deposed that she has returned to Sweden to visit family members since 1974, but Mr Nystrom has never accompanied her and has not had much contact with her family in Sweden. He has some distant cousins in Sweden, but his mother indicated that he does not know their names, where they live or what they do. Furthermore, he has never learnt the Swedish language.

79 Mr Nystrom has a "substantial criminal record" (74) within the meaning of s 501(7) of the Act. He appeared in the children's courts on ten separate occasions between 6 April 1984 and 19 December 1989, on charges including theft, burglary and criminal damage. During this period he was placed on good behaviour bonds, periods of probation and supervision orders. On 14 December 1990, at the age of sixteen, Mr Nystrom was convicted of aggravated rape and intentionally causing serious injury for which he was sentenced to nine years imprisonment, with a minimum term of seven years. He has subsequently been convicted of a large number of other offences, including arson and various offences relating to property damage; armed robbery, burglary and theft; various driving offences, including reckless conduct endangering life; and offences relating to the possession and use of drugs.

80 On 12 August 2004 the Minister cancelled Mr Nystrom's transitional (permanent) visa. The Minister's power to cancel that visa had been enlivened by Mr Nystrom's failure to pass the "character test" specified in s 501(6) of the Act by reference to his abovementioned "substantial criminal record".

(cont)

Act 1947-1966", and "G" designated that "[t]he grantee must be accompanied to Australia by the person specified in the visa", in this case Mr Nystrom's mother.

(74) Mr Nystrom now has over eighty-seven offences on his criminal record and has served a total of eight separate prison terms.

81 Following the Minister's decision, Mr Nystrom then sought relief in the Federal Magistrates Court pursuant to s 39B of the *Judiciary Act 1903* (Cth). There was no challenge to the Minister's conclusion that Mr Nystrom did not pass the character test. Instead, Mr Nystrom raised two of the four issues argued in this appeal. He maintained that, because he held an absorbed person visa under s 34(2) of the Act, other than, or in addition to, a transitional (permanent) visa under reg 4(1), the Minister had cancelled the wrong visa. It was argued that the Minister's failure to identify the correct visa was a jurisdictional error. In the alternative, it was submitted that if Mr Nystrom held both visas the Minister's failure to take into account the existence of the absorbed person visa was a failure to take into account a relevant consideration.

82 The Federal Magistrate dismissed the proceeding with costs (75), essentially on the basis that even if Mr Nystrom held an absorbed person visa (about which the Federal Magistrate was not persuaded), s 501F(3) (76) of the Act applied. The effect of s 501F(3) applied to the facts here is that if the Minister decided to cancel Mr Nystrom's transitional (permanent) visa, the Minister is taken to have also cancelled any other visa held by Mr Nystrom, being the claimed absorbed person visa. The Federal Magistrate also observed that considerations relevant to a decision to cancel a transitional (permanent) visa were no different from considerations relevant to the cancellation of an absorbed person visa.

83 On an appeal from that decision to the Full Court of the Federal Court, the Minister accepted that Mr Nystrom had ceased to be an immigrant by reason of his absorption into the Australian community before 2 April 1984 (77). However, the Minister argued that an absorbed person visa only applied to a limited class of immigrants, namely those who became absorbed persons prior to 1984 although they had originally been illegal immigrants, and Mr Nystrom was not such a person (78). The majority saw some support for this argument in the legislative history and relevant extrinsic materials. However they held that the ordinary meaning of s 34(2) was clear, and that therefore s 15AB of the *Acts Interpretation Act 1901* (Cth) did not permit the use of extrinsic material to arrive at the construction contended for by the Minister (79). The statute was held to operate according to its terms

(75) *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 305.

(76) Section 501F applies if the Minister decides to refuse or cancel a person's visa, and sub-s (3) provides: "If: (a) the person holds another visa; and (b) that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection; the Minister is taken to have decided to cancel that other visa."

(77) (2005) 143 FCR 420 at 424 [11].

(78) (2005) 143 FCR 420 at 425 [11].

(79) (2005) 143 FCR 420 at 425 [11].

and Mr Nystrom was taken to have been granted an absorbed person visa on 1 September 1994 (80).

84 The majority went on to consider the operation of s 82(2) of the Act. This section provides that:

> "A substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect."

The majority held that s 82(2) clearly reflects the policy that a person should not hold two substantive visas at the one time, but it did not "fit neatly" with the facts here because the two visas had been created at the same time (81).

85 The majority concluded that since Mr Nystrom met the criteria for holding an absorbed person visa, whether or not he held a transitional (permanent) visa, the fact that he held an absorbed person visa vitiated the Minister's decision. Therefore it was not necessary to decide whether Mr Nystrom held both visas (82).

86 Nevertheless, the majority recognised that Mr Nystrom's K51R(G) entry permit was a permanent entry permit in accordance with s 6(2) of the Act as it stood in January 1974 (83). It can also be noted that there had been no "entry permit terminations before 1 September 1994". Despite that the majority next found that if Mr Nystrom did not hold a transitional (permanent) visa then it was clear that the decision was affected by jurisdictional error, as cancelling a non-existent visa is not a valid exercise of statutory power (84). In the further alternative the majority found that if Mr Nystrom held both visas, when deciding to cancel the transitional (permanent) visa, the Minister committed a jurisdictional error by not identifying and considering the fact that Mr Nystrom also held an absorbed person visa which could be cancelled by the operation of s 501F(3) (85).

87 In dissent, Emmett J found that Mr Nystrom held two substantive visas at the time of the cancellation decision, both a transitional (permanent) visa and an absorbed person visa, because the two visas came into effect at the same time on 1 September 1994. The absorbed person visa arose by the operation of s 34 of the Act, which provides that there is a class of permanent visas to remain in, but not re-enter Australia, to be known as "absorbed person visas" (86), and the Minister accepted that Mr Nystrom satisfied (87) the four prerequisites for such a visa (88). The transitional (permanent) visa arose by operation of reg 4(1), which relevantly provides that if, immediately

(80) (2005) 143 FCR 420 at 426 [15].
(81) (2005) 143 FCR 420 at 425 [14].
(82) (2005) 143 FCR 420 at 426 [15].
(83) (2005) 143 FCR 420 at 425 [12].
(84) (2005) 143 FCR 420 at 426 [16].
(85) (2005) 143 FCR 420 at 426 [17].
(86) Section 34(1) of the Act.
(87) (2005) 143 FCR 420 at 431 [38].
(88) Section 34(2) of the Act.

before 1 September 1994, a non-citizen was in Australia as the holder of a "permanent entry permit" that entry permit continues in effect on and after 1 September 1994 as a "transitional (permanent) visa" (89). A consideration of the relevant legislative history showed that Mr Nystrom was a lawful non-citizen under that permit from his date of entry, 27 January 1974, until 1 September 1994.

88 Emmett J held that the Minister's failure to advert to the fact that, as at 12 August 2004, Mr Nystrom held an absorbed person visa in addition to the transitional (permanent) visa did not vitiate the exercise of the Minister's power under s 501(2) (90). This conclusion was supported by the fact that the characteristics of each visa are the same, and Mr Nystrom could not point to any considerations which would need to be taken into account by the Minister in deciding whether or not to cancel an absorbed person visa which were different from those which would need to be taken into account in respect of the transitional (permanent) visa (91). Emmett J was of the opinion that the content, form and intent of s 501F(3) also tended to confirm this conclusion (92).

89 Three of the issues arising on this appeal were dependent on Mr Nystrom's claim that he only held an absorbed person visa and did not hold a transitional (permanent) visa. Logically, the first issue was whether reliance by the Minister on a visa which Mr Nystrom alleged he did not hold (ie a transitional (permanent) visa) amounted to a jurisdictional error. This question turned on the interaction between s 34(2) of the Act and reg 4(1) (the correct visa issue). The second issue was whether a decision to cancel a visa is invalidated by a failure of the Minister to take into account all substantive visas likely to be cancelled by the decision, whether directly under s 501(2) or indirectly under s 501F(3) (the relevant considerations issue). The third and related issue, assuming Mr Nystrom did not hold a transitional (permanent) visa, was whether the decision purporting to cancel his transitional (permanent) visa was invalidated by an incorrect description of the visa held (the misdescription issue).

90 For the reasons which follow, we would allow the appeal on those first and second issues. The conclusion on the first issue renders it unnecessary to deal with the third issue.

91 A discrete fourth issue which emerged as the principal issue between the parties on this appeal was whether the power to cancel a visa conferred by s 501(2) of the Act is restricted or qualified by the operation of ss 200 and 201 of the Act, which confer a power to deport non-citizens who have been in Australia for less than ten years and are convicted of crimes (the power issue).

(89) (2005) 143 FCR 420 at 431 [41].
(90) (2005) 143 FCR 420 at 432 [45].
(91) (2005) 143 FCR 420 at 432 [46].
(92) (2005) 143 FCR 420 at 432 [47].

Correct visa

92 By the time of the appeal to this Court it was common ground between the parties that on 1 September 1994 Mr Nystrom had been granted an absorbed person visa pursuant to s 34(2) of the Act. The issue was whether Mr Nystrom had also been granted a transitional (permanent) visa on the same date by the operation of reg 4(1), since that was the visa which the Minister purported to cancel.

93 The Act provides that the Minister may grant a non-citizen permission, by visa, to travel to and enter Australia and/or remain in Australia (93). A visa to remain in Australia indefinitely is a permanent visa (94), whereas a visa for a specified period, or until a specified event happens, or while the holder has a specified status, is a temporary visa (95). Both visas relevant to this case, an absorbed person visa and a transitional (permanent) visa, are "permanent visas" and "substantive visas" (96) and neither existed until 1 September 1994. They are both deemed visas which apply by operation of law as discussed below.

Absorbed person visa

94 An absorbed person visa is conferred by the operation of s 34 of the Act and grants to the holder the right to remain in, but not to re-enter, Australia (97). Section 34(2) sets out four prerequisites for an absorbed person visa:

> "(2) A non-citizen in the migration zone who:
>
> (a) on 2 April 1984 was in Australia; and
>
> (b) before that date, had ceased to be an immigrant; and
>
> (c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and
>
> (d) immediately before 1 September 1994, was not a person to whom section 20 of this Act as in force then applied;
>
> is taken to have been granted an absorbed person visa on 1 September 1994."

95 The majority of the Full Court held that it was not necessary to decide whether Mr Nystrom held both an absorbed person visa and a transitional (permanent) visa because the fact that Mr Nystrom undoubtedly held an absorbed person visa vitiated the Minister's decision pursuant to s 501 (98).

(93) Section 29(1) of the Act.
(94) Sections 5(1) and 30(1) of the Act.
(95) Sections 5(1) and 30(2) of the Act.
(96) The Act defines a "substantive visa" in s 5(1) as a visa other than a bridging visa, a criminal justice visa or an enforcement visa. The provision in force on 1 September 1994 defined a "substantive visa" in s 5(1) as "a visa other than a bridging visa or a criminal justice visa".
(97) Section 34(1) of the Act.
(98) (2005) 143 FCR 420 at 426 [15].

96 The Minister submitted that the grant of an absorbed person visa would not preclude the simultaneous grant of a transitional (permanent) visa, the latter being the visa which the Minister purported to cancel.

97 Mr Nystrom essentially contended that as he was granted an absorbed person visa pursuant to s 34 of the Act, he could not also have been granted a transitional (permanent) visa, first, because the intention of the Act evinced by s 82(2) is that each person can hold only one visa, and secondly, because the statutory provision granting an absorbed person visa should prevail over reg 4(1) granting a transitional (permanent) visa.

98 Although Mr Nystrom sought to uphold the view of the majority in the Full Court that s 34 should be construed without reference to extrinsic materials, each party in argument referred to such materials exemplifying the current approach to statutory interpretation which "uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which … one may discern the statute was intended to remedy" (99) and recognises the importance of legislative history in construing amendments (100).

99 The *Migration Act 1958* (Cth) when first enacted (the 1958 Act) (101) contained a statutory distinction between "immigrants" and "aliens". An "immigrant" included (102):

> "a person intending to enter, or who has entered, Australia for a temporary stay only, where he would be an immigrant if he intended to enter, or had entered, Australia for the purpose of staying permanently."

The term "alien" was defined as a person who was not a British subject, an Irish citizen or a "protected person" (103).

100 The 1958 Act also distinguished between "entry permits" (104) and "visas" (105), and dealt with immigrants who held temporary entry permits differently from those who were entitled to stay in Australia

(99) *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

(100) *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568.

(101) This Act, entitled "An Act relating to Immigration, Deportation and Emigration", repealed both the *Immigration Act 1949* (Cth) and the *Aliens Deportation Act 1948* (Cth).

(102) See s 5(1) of the 1958 Act.

(103) A "protected person" was defined in s 5(1) of the 1958 Act as having the same meaning as in the *Nationality and Citizenship Act 1948* (Cth). British subjects, Irish citizens and protected persons were not aliens, but could be immigrants.

(104) "Entry permits" permitted persons to enter Australia or to remain in Australia or both (s 6(3)), and an immigrant who entered Australia without an entry permit was a "prohibited immigrant" (s 6(1)).

(105) Section 11 of the 1958 Act provided: "A visa or similar notation or a form of provisional authority to enter Australia issued to a person on behalf of the Commonwealth shall not be deemed to be an entry permit and does not entitle that person to enter Australia or to be granted an entry permit."

indefinitely. Such immigrants could only remain in Australia for a specified period (106). The Minister had an absolute discretion to cancel a temporary entry permit at any time (107). Upon the expiration or cancellation of a temporary entry permit the holder became a "prohibited immigrant" (108). However, s 7(4) provided that a person ceased to be a "prohibited immigrant" on the expiration of a five year period, unless a deportation order was in force in relation to the person at that time. Thus, an immigrant could cease to be an immigrant by being absorbed into the Australian community. These provisions remained in force in the *Migration Act 1958* (Cth) as consolidated on 19 December 1973, which was applicable to Mr Nystrom at the time of his entry into Australia on 27 January 1974.

101 Because the constitutional doctrine of absorption developed by this Court interpreting s 51(xxvii) of the *Constitution* (the immigration and emigration power) (109) was perceived to lead to problems in the administration of the Act (110), the constitutional basis of the Act was changed with effect from 2 April 1984 by the *Migration Amendment Act 1983* (Cth) (111) (the 1983 Act), to s 51(xix) (the naturalisation and aliens power).

102 The 1983 Act contained a number of amendments which were referable to the change to the constitutional basis of the Act. The definitions of "alien" and "immigrant" were deleted (112) and a definition of "non-citizen" was introduced (113). Provisions in which "immigrant" and "alien" appeared were amended to substitute "non-citizen" (114).

103 Section 8(2) provided:

> "Where a person who, upon the commencement of this Act —
> (a) is a non-citizen within the meaning of the Principal Act as amended by this Act; and
> (b) is not the holder of an entry permit (not being a temporary entry permit),
> had, at a time before that commencement, ceased to be a prohibited immigrant within the meaning of the Principal Act by

(106) Section 6(6) of the 1958 Act.
(107) Section 7(1) of the 1958 Act.
(108) Section 7(3) of the 1958 Act.
(109) Explained in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 472-473 [246]-[247] per Gummow and Hayne JJ.
(110) Explanatory Memorandum to the *Migration Legislation Amendment Bill 1994*, p 9 [24].
(111) Section 3 of the 1983 Act amended the Act's title to "An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons".
(112) Section 4(a) and (b) of the 1983 Act.
(113) Section 4(c) of the 1983 Act provided: "'[N]on-citizen' means a person who is not an Australian citizen."
(114) See, eg, s 4(b) and (c), and ss 6-9 in respect of "immigrant" and ss 4(a) and 11 in respect of "alien" in the 1983 Act.

virtue of the operation of sub-section 7(4) of that Act, that person becomes, upon that commencement, a prohibited non-citizen for the purposes of the Principal Act as amended by this Act."

Thus, s 8(2) deemed people to be "prohibited non-citizens" irrespective of whether they had been absorbed into the community.

104 In an apparent attempt to address this, s 16 of the *Migration Laws Amendment Act (No 2) 1992* (Cth) retrospectively limited the effect of s 8(2) as follows:

"Subsection 8(2) of the *Migration Amendment Act 1983* does not apply, and never has applied, to a person who:

(a) on the commencement of that Act, was in Australia; and

(b) before that commencement, had ceased to be an immigrant; and

(c) since that commencement, has not left Australia."

105 The Explanatory Memorandum stated (115):

"35. … Previously the view was taken that absorbed persons who were present in Australia on 2 April 1984 and had not left since were lawfully present here as permanent residents …

36. Before 2 April 1984, only 'immigrants' needed entry permits to enter and remain lawfully in Australia. If a person was absorbed, that is, ceased to be an immigrant, he or she did not need an entry permit to enter and remain lawfully in Australia. However, from 2 April 1984 the obligation to hold an entry permit applied to all non-citizens, rather than only immigrants. The effect of the amendments was that absorbed persons who did not hold entry permits lost their lawful resident status from the commencement of section 8(2) of the *Migration Amendment Act 1983* … [This clause] has the effect of restoring their lawful status from that date."

106 Following this, the *Migration Reform Act 1992* (Cth) (the 1992 Reform Act) inserted a new s 14 into the Act (116) which relevantly provided:

"(3) A non-citizen in the migration zone who:

(a) on 2 April 1984 was in Australia; and

(b) before that date, had ceased to be an immigrant; and

(c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 November 1993; and

(d) immediately before 1 November 1993, was not a person to whom section 20 of this Act as in force then applied;

is a lawful non-citizen."

107 It appears that this sub-section was intended to exclude from the universal requirement to hold a visa any person who had been

(115) See the Explanatory Memorandum to the *Migration Laws Amendment Bill (No 2) 1992*, p 9.

(116) Section 7 of the 1992 Reform Act.

excluded from the effect of s 8(2) of the 1983 Act by s 16 of the *Migration Laws Amendment Act (No 2) 1992* (Cth) (117).

108 However, s 14(3) never commenced operation because Parliament passed the *Migration Legislation Amendment Act 1994* (Cth) (the 1994 Amendment Act), which omitted s 14(3) and inserted instead s 26AB into the Act (118). Section 26AB reflected s 14(3) but provided that:

> "(1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as absorbed person visas.
>
> (2) A non-citizen in the migration zone who:
>
> (a) on 2 April 1984 was in Australia; and
>
> (b) before that date, had ceased to be an immigrant; and
>
> (c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and
>
> (d) immediately before 1 September 1994, was not a person to whom section 20 of this Act as in force then applied;
>
> is taken to have been granted an absorbed person visa on 1 September 1994.
>
> (3) Subdivisions AA, AB, AC (other than section 26ZK), AE and AH do not apply in relation to absorbed person visas."

This section was then renumbered to become s 34 (and the section in parentheses in s 26AB(3) was changed from s 26ZK to s 68), to arrive at the form in which the Act now stands.

109 The Explanatory Memorandum explained the purpose of s 34 as follows (119):

> "25. There remains a small number of absorbed persons, who are lawfully in Australia as permanent residents despite not holding an entry permit. The *Reform Act* provided that these persons were an exception to the universal visa requirement introduced by that Act (see subsection 14(3) of the *Migration Act* as amended by the *Reform Act*).
>
> 26. This section takes the further step of bringing absorbed persons within the visa system by deeming them to hold a permanent visa. They are thereby placed in the same position as all other permanent visa holders, eg their visas will be subject to the exercise of the cancellation power in section 180A [renumbered s 501 by the 1994 Amendment Act] of the *Migration Act*."

(117) See Explanatory Memorandum to the *Migration Reform Bill 1992*, pp 15-16 [10]. This indicates that s 14(3) inserted by the 1992 Reform Act was meant to be read in conjunction with s 16 of the *Migration Laws Amendment Act (No 2) 1992* (Cth).

(118) Section 8 of the 1994 Amendment Act.

(119) Explanatory Memorandum to the *Migration Legislation Amendment Bill 1994*, p 10.

Transitional (permanent) visa

110 Section 31(1) of the Act provides for "prescribed classes of visas". Section 31(2) provides for classes of visas provided for in specified sections of the Act (including s 34) as well as prescribed classes. Section 31(3) states that "[t]he regulations may prescribe criteria for a visa or visas of a specified class" and s 31(5) provides that "[a] visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class".

111 Transitional (permanent) visas are a prescribed class of visa under s 31(1) of the Act. Regulation 4(1) introduced this type of visa, providing relevantly:

> "… if, immediately before 1 September 1994, a non-citizen was in Australia as the holder of a permanent entry permit, that entry permit continues in effect on and after 1 September 1994 as a transitional (permanent) visa that permits the holder to remain indefinitely in Australia."

Whilst the qualifying criteria are different from the four prerequisites set out in s 34(2), a transitional (permanent) visa, like an absorbed person visa, permits the holder to remain indefinitely in Australia, but does not permit the holder to re-enter Australia.

112 The 1992 Reform Act and the 1994 Amendment Act commenced together on 1 September 1994 and created a regime by which all non-citizens within Australia who did not hold a visa became unlawful non-citizens. In order to prevent the reforms from operating so as to make large numbers of non-citizens unlawful, s 40 of the 1992 Reform Act made express provision for the making of transitional regulations in relation to the visas of people who had entered Australia prior to 1994. The provision affecting permanent residents, like Mr Nystrom, was s 40(5):

> "The regulations may provide that, from 1 November 1993, visas or permits in a specified Principal Act class and held by specified persons immediately before that date are to continue in force as visas in a specified amended Act class."

113 Section 40(1) defined the terms used in s 40(5) as follows:

> "'*amended Act class*' means a class of visas that is provided for by, or by regulations under, the Principal Act as amended by this Act;
>
> '*Principal Act class*' means a class of visas or permits that is provided for by regulations under the Principal Act;
>
> '*specified persons*' includes:
>
> (a) persons in a specified class; and
>
> (b) persons in specified circumstances; and
>
> (c) persons in a specified class in specified circumstances."

114 Section 40 was amended by Sch 2, cl 3 to the 1994 Amendment Act. Relevantly, a new s 40(1A) was inserted:

> "For the purposes of the definition of 'Principal Act class':

(a) permits granted before 19 December 1989 are taken to be a class of permits provided for by regulations under the Principal Act; and

(b) visas granted before 19 December 1989 are taken to be a class of visas provided for by regulations under the Principal Act."

It is clear that, in its amended form, s 40 specifically authorised reg 4(1) and ensured there was no lacuna in Mr Nystrom's presence in Australia as a lawful non-citizen pursuant to his original entry permit.

Operation of s 34 and reg 4(1)

115 Section 34(2) gives little indication of its complex legislative history. That history shows that over the period 1992 to 1994 the provision which became s 34 evolved from a provision, the purpose of which was to regularise the status of a subset of absorbed persons who were disadvantaged by s 8(2) of the 1983 Act to a provision, the purpose of which was to apply to "a small number of absorbed persons, who are lawfully in Australia as permanent residents despite not holding an entry permit" (120). This would have resulted in complementary operation of s 34 and reg 4(1). However, s 34 as enacted was not so confined and the words, as enacted, have paramount significance over "non-statutory words seeking to explain them" (121).

116 Section 34(2) sets out four prerequisites for an absorbed person visa without any reference to being limited to persons "not holding an entry permit". In the final result, s 34(2) and reg 4(1) overlap and confer identical rights. Section 34 covers all persons who satisfy the four prerequisites in s 34(2), irrespective of whether those persons hold an entry permit, and reg 4(1) covers all persons holding permanent entry permits irrespective of whether they could satisfy s 34(2).

117 There is nothing in the terms of s 34(2) or reg 4(1), or in the legislative history of either, which supports Mr Nystrom's contentions that s 34(2) covers the field or should prevail over reg 4(1), or that reg 4(1) is of doubtful validity or has no application to Mr Nystrom. The legislative history also shows that s 34 visas were to be subject to the power to cancel in s 501(2), contrary to Mr Nystrom's submission that s 501(2) should be read down by reference to ss 200 and 201, which will be dealt with more fully later.

118 Section 82(2) has no application to the situation here where two visas were granted simultaneously. Sections 15, 82(2), 82(3) and 501F(3) of the Act all recognise the potential for a person to hold multiple visas under the Act. As s 34 covers absorbed persons, whether or not they had entry permits, provided they satisfied the criteria in s 34(2), and reg 4(1) covers persons who held an entry permit of the

(120) Explanatory Memorandum to the *Migration Legislation Amendment Bill 1994*, p 10 [25].

(121) *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ and Gummow, Hayne and Heydon JJ.

kind which Mr Nystrom held, he qualified for and acquired simultaneously each of the deemed visas under s 34(2) and reg 4(1).

119 Accordingly, in deciding to cancel Mr Nystrom's transitional (permanent) visa, the Minister was not relying on a visa which Mr Nystrom did not have, as contended by Mr Nystrom. The third issue does not arise.

Relevant considerations

120 That conclusion leads to the second issue of whether the Minister's power to cancel a visa on character grounds under s 501(2) of the Act is subject to an implied obligation (enforceable by judicial review for jurisdictional error) to ascertain the existence of, and take into account the qualifications for, every substantive visa which would be cancelled either directly or indirectly by reason of the Minister's decision.

121 The majority of the Full Court held that the Minister was required to identify and consider the nature of the visa to be cancelled directly "or by force" of s 501F(3) (122).

122 The majority then held that jurisdictional error had been established because although it was clear that the Minister was prepared to cancel a permanent visa, being the transitional (permanent) visa that was cancelled, that does not mean that the "same decision will inevitably be come to when the Minister's attention is directed to the nature of the absorbed person visa that would also be cancelled" (123). The judgment in the Full Court can be understood as holding that the Minister is bound, when making a decision under s 501(2), to take into account the "nature" of every substantive visa that will be cancelled as a result of the decision, and failure to do so will be a jurisdictional error. Mr Nystrom sought to uphold this approach on appeal.

123 The Minister submitted that it is primarily for her to determine the factors she regards as relevant to the exercise of the power conferred on her by s 501(2), and that neither the text of s 501(2) nor its scope or purpose require her (124) to take into account the "nature" of the visa to be cancelled. Therefore, there is no foundation for the requirement imposed by the majority below.

124 Finn J explained in *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* (125):

"If a decision adverse to a particular visa applicant or holder was

(122) (2005) 143 FCR 420 at 427 [22].

(123) (2005) 143 FCR 420 at 429 [25].

(124) See *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 at 522-523 [71]-[74], where Kiefel and Bennett JJ held that the subject matter, scope and purpose of the Act confirmed the breadth of the Minister's discretion.

(125) [2003] FCA 389 at [24]. Finn J's decision was overturned on appeal, but no adverse comment was made by the Full Court in respect of this aspect of his Honour's reasoning: *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65 at [11]-[12], [14] per Lander J (with whom Carr and Sundberg JJ agreed).

made under s 501(1), but that person already held and was able to retain another visa (other than a visa saved for example by s 501F(3)(b)), the effect of that decision would be nullified to the extent that that person would remain a lawful non-citizen (see s 13(1) of the Act) not liable to be removed from Australia under s 198 of the Act. The function of s 501F(3), in my view, is to preclude such an outcome."

125 Emmett J in the Full Court reasoned in a similar way. His Honour held that the intent of s 501F(3) was to ensure that, subject to the exceptions referred to, when the Minister decides to cancel one visa she does not need to consider the cancellation of other visas (126). The Minister submitted that Finn J and Emmett J were correct in the purpose they ascribed to s 501F(3).

126 The discretion to cancel a visa conferred upon the Minister under s 501(2) of the Act is unfettered in its terms (127). In *Sean Investments Pty Ltd v MacKellar* (128) Deane J said:

> "… where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards."

127 In *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (129) the majority of the Full Federal Court held that, given the breadth of s 501, it is not possible to imply into the Act "some obligation on the Minister's part to consider specific factors, personal to the visa holder, such as the circumstances surrounding the offences they have committed".

128 Parliament has left it to the Minister to decide the matters which are relevant to whether a person who fails the character test should be permitted to remain in Australia. Considerations relevant to the exercise of the power depend on the nature, scope and purpose of the power, understood in its context in the Act. As Ministerial Direction No 21 makes clear, the Minister considers that two of the factors relevant to the exercise of the discretion are related to the protection of the Australian community and the expectations of the community.

129 In these circumstances where Mr Nystrom holds two visas, each of which confers the same substantive rights, in cancelling one the Minister is not bound to take into account the "nature" of the other. This is because there was no consideration relevant to Mr Nystrom's

(126) (2005) 143 FCR 420 at 433 [48].

(127) *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 at 523 [72]-[73]; *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at 309-310 [67]; see also *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580 at 595 [106].

(128) (1981) 38 ALR 363 at 375.

(129) (2004) 139 FCR 505.

absorbed person visa which was not relevant to and considered when the Minister cancelled his transitional (permanent) visa. Thus, there has been no failure to take account of relevant considerations. Section 501F(3) confirms that conclusion.

Power

130 The next issue to be determined is whether the power to cancel a visa in s 501(2) is restricted by the power to deport in s 200, as limited by s 201.

131 Section 200 provides: "The Minister may order the deportation of a non-citizen to whom [Div 9 of Pt 2 of the Act] applies."

132 Section 201 relevantly provides:

> "Where:
>
> (a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;
>
> (b) when the offence was committed the person was a non-citizen who:
>
> (i) had been in Australia as a permanent resident:
>
> (A) for a period of less than 10 years; or
>
> (B) for periods that, when added together, total less than 10 years; or…
>
> (c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year;
>
> section 200 applies to the person."

133 Mr Nystrom, having arrived in Australia on 27 January 1974 and not being convicted of a criminal offence which attracted a prison sentence of more than one year until 14 December 1990, was never liable to be deported under s 201 of the Act, or any of the earlier equivalents of s 201 (130).

134 The majority of the Full Federal Court held that s 501 of the Act should not be used to cancel the visas of long term Australian residents if those residents would not be susceptible to deportation under ss 200 and 201 of the Act. They said (131):

> "Section 501 should not be used to circumvent the limitations in s 201 … While it was not argued in these proceedings, it may be that the specific power conferred by s 201 to deport non-citizens who have committed crimes is the only source of power to deport (in a case such as the present) and not indirectly, the power conferred by s 501 to cancel a visa enlivening the power to remove under s 198: see *Anthony Hordern & Sons Ltd v Amalgamated*

(130) Nor was Mr Nystrom liable to be deported under any other provision in Div 9 of Pt 2 of the Act, or any earlier equivalent provisions.

(131) (2005) 143 FCR 420 at 429 [27].

Clothing and Allied Trades Union of Australia [(132)]; *Hoffman v Chief of Army* [(133)]."

135 By notice of contention, Mr Nystrom asserted that the Full Federal Court should have decided that the Minister's exercise of power under s 501(2) of the Act was invalid because s 200 of the Act did not apply to him and authorise his deportation. He had not committed any offence before he had been in Australia as a permanent resident for a period of more than ten years (s 201). This point was not argued in the Full Federal Court and that Court was not given the benefit of argument in respect of relevant legislative history or referred to authority, to which we will come, which holds that the powers referable to deportation and cancellation are separate and the criteria for each are different (134). In the reasons which follow the conclusion is reached that the Minister's exercise of the power to cancel Mr Nystrom's visa under s 501(2) was not invalidated because s 501(2) is not restricted in its operation by ss 200 and 201.

Legislative history of the deportation power

136 In the 1958 Act, provisions relating to deportation were contained in Div 2 of Pt II (135). Aliens could be deported under a broad Ministerial discretion contained in s 12 (136) and immigrants could be deported under s 13, although only in respect of matters occurring within the first five years of their residence (s 13(a)). Section 12 was enacted under the Commonwealth Parliament's long recognised power under s 51(xix) of the *Constitution* to make laws to deport aliens (137), whilst s 13 was enacted under s 51(xxvii). Section 16 also dealt with character issues at the time of entry by deeming certain persons to be "prohibited immigrants" (138). Section 18 provided that deportation of a prohibited immigrant could be ordered at any time (139).

137 Reflecting the changed constitutional basis of the Act, to which reference has already been made, the 1983 Act repealed ss 12 and

(132) (1932) 47 CLR 1.

(133) (2004) 137 FCR 520 at 528-532 [12]-[27].

(134) *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400; *Lu v Minister for Immigration and Multicultural Affairs* (2000) 176 ALR 79; *Bridges v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 456.

(135) Sections 12-22 of the 1958 Act.

(136) In addition, s 14 of the 1958 Act provided for the deportation of aliens after a report from a specially appointed Commissioner, reflecting the system in the repealed *Aliens Deportation Act 1948* (Cth).

(137) *Pochi v Macphee* (1982) 151 CLR 101 at 106 per Gibbs CJ; *Robtelmes v Brenan* (1906) 4 CLR 395 at 404 per Griffith CJ; at 415 per Barton J; at 420 per O'Connor J.

(138) This section continued until its repeal by the *Migration Legislation Amendment Act 1989* (Cth), when s 20 was inserted. Section 20 is a prerequisite for an absorbed person visa found in s 34(2)(d) of the Act.

(139) In contrast, s 10 of the 1958 Act provided for when a person ceased to be a prohibited immigrant.

13 (140) and substituted for these sections a new s 12 covering "Deportation of non-citizens present in Australia for less than ten years who are convicted of crimes". The new section provided that deportation could only be ordered by the Minister when a person had been sentenced to "death or to imprisonment for life or for a period of not less than one year" (s 12(c)) if that person had been present in Australia as a "permanent resident" for a period of less than ten years (s 12(b)(ii)) (141). This new s 12 was the forerunner of s 201 (142), and s 12(b)(ii) was the forerunner of s 201(b)(i).

138 In the Second Reading Speech for the *Migration Amendment Bill 1983*, Senator Button indicated (143):

> "The main purpose of the *Migration Amendment Bill 1983* is to reform the *Migration Act* to remove the discrimination between aliens and other immigrants contained in the criminal deportation provisions. Permanent resident aliens – persons not United Kingdom, Irish or 'Commonwealth' citizens – are treated differently from other immigrants in these provisions: in particular, in the period for which they are liable to deportation as criminals – aliens remain always liable, other immigrants cannot be deported after 5 years from entry; and in the types of crimes for which they may be ordered deported. This discrimination is totally unacceptable to the Government …
>
> Apart from removing the distinction and discrimination between non-Commonwealth and other overseas-born residents who are not Australian citizens, the Bill also limits liability for deportation, generally speaking, to those non-citizens who commit offences during the first 10 years of permanent residence and introduces a more exact measure of the seriousness of the crime, that being an actual penalty of imprisonment for 12 months or more.
>
> The introduction of a statutory liability period of 10 years authorised residence fulfils a pre-election commitment by the Government that non-citizens should be free from the threat of deportation after a certain period. Currently persons who are

(140) Section 10 of the 1983 Act.

(141) In addition, s 14 was amended at this time to allow for deportation within ten years for conduct constituting a threat to security, or at any time for conviction of certain serious offences. A new s 14A was also inserted, which provided a definition of "permanent resident" for the purpose of calculating the period of ten years, excluding terms of imprisonment.

(142) Section 35 of the *Migration Legislation Amendment Act 1989* (Cth) came into effect on 20 December 1989 and it renumbered all the provisions of the Act, resulting in s 12 becoming s 55. Section 14 of the 1992 Reform Act enacted s 55A, which provided that "[t]he Minister may order the deportation of a non-citizen to whom this Division applies". This section was the predecessor to s 200 of the Act. The 1994 Amendment Act, which came into effect at the same time as the 1992 Reform Act on 1 September 1994, renumbered ss 55A and 55, so that they became ss 200 and 201 in the Act.

(143) Australia, Senate, *Parliamentary Debates* (Hansard), 7 September 1983, pp 373-374.

citizens of non-Commonwealth countries remain always liable to deportation unless they become Australian citizens. This is unacceptable. In administering a large-scale immigration program the Government and the community must be prepared to accept some 'bad with the good'."

139 While it cannot be doubted that the new s 12, in its application to a non-citizen, was a law with respect to naturalisation and aliens (144), equally it cannot be doubted that the forerunner to s 201(b)(i), s 12(b)(ii), derived its language from the previous s 13(a) which was confined to immigrants and turned on the notion that an immigrant (unlike an alien) could cease to be an immigrant as a result of the effluxion of time and then not be liable to deportation.

140 Since the introduction of ss 200 and 201 into the Act in their present form it has been noted that absorption, a concept relevant to the process of immigration, is irrelevant to the operation of laws made pursuant to the naturalisation and aliens power (145).

141 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*, Gleeson CJ said (146):

> "Treating absorption into the community as relevant to the status of alienage is inconsistent with earlier judicial views as to the width of para (xix) compared with para (xxvii) … In my opinion, it is wrong in principle. For reasons already discussed, while absorption reflects the fact that an activity of immigration has come to an end, it may co-exist, and commonly co-exists, with a legal status of alienage. Resident aliens may be absorbed into the community, but they are still aliens."

142 Mr Nystrom's alien status is conceded and is covered by the authority of *Ex parte Te*. The reasoning of the majority of the Full Court is inconsistent with the well-settled view that absorption is irrelevant to the status of alienage.

The cancellation power

143 To summarise for present purposes, the 1958 Act was based not only on a distinction between aliens and immigrants but also on the dual concepts of "entry permits" and "visas". An entry permit was a permit to enter Australia, which was defined to include re-entry, or to remain in Australia, or both (147). A visa was a permission to travel to

(144) See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, the authority of which is confirmed in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

(145) *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 171-172 [25]-[26] per Gleeson CJ; at 191-192 [107]-[109] per Gummow J; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 472-473 [247] per Gummow and Hayne JJ; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295 per Mason CJ.

(146) (2002) 212 CLR 162 at 176 [42]. See also Gummow J at 200 [134] and Hayne J at 220 [211].

(147) Section 6(3) of the 1958 Act.

Australia, but not a permission to enter (148). Once a person arrived in Australia an entry permit was required (149). Only temporary entry permit holders (150) could have their permits cancelled pursuant to s 7(1) (151). Mr Nystrom entered Australia on a permanent entry permit, therefore his permit could not be cancelled.

144 The *Migration Legislation Amendment Act 1989* (Cth) came into effect on 19 December 1989 and the *Migration (Criteria and General) Regulations* (Cth) were made to accompany that amending Act. Regulation 4 contained a test related to when a person was "to be taken not to be of good character", which test was the forerunner to the test in s 501(6) and (7) as now enacted.

145 Following this, the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) inserted ss 180A, 180B and 180C into the Act giving the Minister a special power to refuse or cancel a visa or entry permit. These sections were renumbered by the 1994 Amendment Act as ss 501, 502 and 503.

146 To complete the legislative history, it can be noted that on 1 June 1999 the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) came into effect and contained amendments designed to effect a change in onus in relation to the character test by prescribing the content of the character test in the Act and erecting a presumption that a person does not pass the test unless he or she satisfies the Minister in accordance with s 501(2) (152).

147 This brief consideration of the legislative history of the powers as they emerged, and developed, against the background of the changed constitutional basis of the Act, shows their independent purposes. In particular, it shows that s 201(b)(i) derived from the earlier s 13(a) which was confined to immigrants and which reflected in its terms, the conclusion of the process of immigration by absorption, a notion which has long since been held to be irrelevant to laws enacted pursuant to the naturalisation and aliens power, one of which is s 501 (153).

148 Mr Nystrom submitted that, with due consideration to the historical context, there is no distinction in substance between removal from

(148) There was no express statutory provision for the grant or cancellation of a visa.

(149) There was an express power in the 1958 Act to grant an entry permit under s 6(5), and a prohibition on entry without it in s 6(1).

(150) A "temporary entry permit" was defined in s 5(1) as "an entry permit referred to in sub-section (6) of section six of this Act". Section 6(6) provided that: "An entry permit that is intended to operate as a temporary entry permit shall be expressed to authorise the person to whom it relates to remain in Australia for a specified period only, and such a permit may be granted subject to conditions."

(151) This section provided that: "The Minister may, in his absolute discretion, cancel a temporary entry permit at any time by writing under his hand."

(152) Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 December 1998, pp 1230-1231.

(153) *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 193-194 [113] per Gummow J.

Australia following the cancellation of a visa or a deportation order. It was argued that the subject matter of ss 200 and 201 is the exclusion from Australia by reason of conviction for criminal offences resulting in a substantial prison term, which evidences a choice to protect certain persons from exclusion after they have been in Australia for a lengthy period of time (154). It was contended that s 501(2) is similar to s 201 because s 501(2) deals with exclusion from Australia by reason of bad character which can turn on a "substantial criminal record", and s 201(c) refers to criminal offences.

149 It was also submitted that the "specific statutory protection" from exclusion from Australia which s 201 confers cannot, on ordinary principles, be impliedly repealed by the subsequent conferral of an additional and general method of exclusion in s 501 (155). This argument depended on showing that s 200, as restricted by s 201, conferred a special power, such that it would be repugnant to resort to s 501(2) as a source of general power "to do the same thing" (156). It was contended that the power in s 200 of the Act, coupled with a restriction in s 201, constitutes a substantive protection, which should not be infringed without evidence that the Parliament had a clear intention to do so (157) and it was said there is no evidence of such an intention. The amending pieces of legislation, which could have resulted in an implied repeal of the restriction in s 201 (158), only use general words, and do not refer to repealing the protection (159).

150 The Minister submitted that statutory concepts of "deportation" and "removal" are not the same. Although in practice the ultimate effect of a refusal or cancellation under s 501 and the making of a deportation order under s 200 will usually be the compulsory departure of the person concerned from Australia, this will not always be the case. Even after cancellation a non-citizen can avoid removal, at least temporarily

(154) cf s 203 of the Act.

(155) *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29-30; *R v Wallis* (1949) 78 CLR 529 at 550-551; *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation [No 2]* (1980) 44 FLR 455; *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511; *Saraswati v The Queen* (1991) 172 CLR 1 at 23-24; *Smith v The Queen* (1994) 181 CLR 338; *Hoffman v Chief of Army* (2004) 137 FCR 520 at 528-532 [12]-[27]; *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 530 [33].

(156) *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J. See also *Downey v Trans Waste Pty Ltd* (1991) 172 CLR 167 at 170-171 per Mason CJ, Deane, Gaudron and McHugh JJ; at 180 per Dawson J.

(157) *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J.

(158) See *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) and the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).

(159) In addition, the intention of s 8(c) of the *Acts Interpretation Act 1901* (Cth) is the protection of accrued statutory rights against implied repeals. See also *Maxwell v Murphy* (1957) 96 CLR 261 at 266-267 per Dixon CJ.

and perhaps permanently, by applying for a protection visa. By way of contrast, s 206(1) provides that where the Minister has made an order for the deportation of a person, that person shall, unless the Minister revokes the order, be deported accordingly.

151 It was also argued that s 200 is no more specific than s 501(2). In particular, the character test in s 501(6) and (7) is defined in a way that expressly extends to people who have a criminal record of the same type as that described in s 201(c), which is inconsistent with Mr Nystrom's characterisation of s 501(2) as a "general" power which must yield to the "specific" power in s 200. Furthermore, s 501 is expressly referred to in ss 65(1)(a)(iii) and 118(f) as a "special power".

152 The Minister contended that the arguments for Mr Nystrom were unsound because they depend on the proposition that Mr Nystrom acquired protection from removal, or an "accrued statutory right" not to be removed, once he had lived in Australia for ten years without conviction. This cannot be sustained once it is recognised that Mr Nystrom had no such right or substantive protection. Since Mr Nystrom's counsel disclaimed any suggestion that the right has a constitutional foundation, the claimed right must be based on the Act, yet there are no provisions in the Act which confer any such right. It appeared to be suggested that s 201 is the source of the right, but this section does no more than limit the scope of the power in s 200.

153 In essence, the submission on behalf of Mr Nystrom was that s 501(2) (and any related provisions) should be read as if subject to the unexpressed proviso, limitation or restriction, that the power to cancel a visa only applies to a non-citizen who could be deported under s 200, by reference to ss 201, 202 or 203. The Minister submitted that this construction is untenable. If Parliament had intended to impose any such limitation on s 501(2) and the following sections it would have made that intention clear, yet there is nothing in the Act which indicates that any such limitation was intended (160).

154 To the contrary, the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) introduced provisions which make it evident that Parliament was aware that s 200 would have a separate parallel operation in relation to s 501 (see ss 499(1A), 500(1)(a), 500(4)(a), 502(1)(a), 503). For example, s 499(1A) provides that a Ministerial direction "could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply" (161). Section 499(1A) is evidence that Parliament assumed two different systems and expressly contemplated that ss 200 and 501 might apply to the same facts. It

(160) See also Commonwealth, Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, June 1998, paras [2.16], [7.15].

(161) Section 499(1A) was inserted at the same time as s 501 was enacted in its current form: see s 16 of the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).

would be perverse for Parliament to have intended that there would be a choice of powers when both ss 501 and 200 applied, but that neither power would be available if certain limitations applied to s 200.

155 The Minister submitted that the majority's view was contrary to a substantial body of Federal Court authority (162). In *Minister for Immigration and Multicultural Affairs v Gunner* (163) the Administrative Appeals Tribunal had set aside the Minister's decision under s 200 to deport a person and the Minister responded by making a fresh decision under s 501 to cancel the visa. The Full Federal Court specifically rejected the argument that ss 200 and 201 limited s 501, stating that (164):

> "The fortuitous circumstance that two separately-sourced powers might be exercised in respect of the same collocation of facts cannot affect the construction of the relevant statutory provisions …"

156 The Full Court went on to uphold the Minister's decision under s 501, stating that the Minister had (165):

> "… exercised a separate statutory power which was available to him and the exercise of which was directed towards the purpose for which the power was conferred, namely the removal from Australia of non-citizens who have committed serious crimes or are otherwise not of good character."

157 In *Minister for Immigration and Multicultural Affairs v Jia Legeng* (166), an appeal to the High Court in relation to a decision by the Minister to cancel a visa on character grounds under s 501, Gleeson CJ and Gummow J (with whom Hayne J agreed) referred to the Full Federal Court's finding in *Gunner* that when making a decision under s 501 the Minister exercised a "separate statutory power" and held that "[w]ith immaterial differences in relation to the matter of appeal, those observations apply equally to this case" (167).

158 The Minister submitted that there was no reason for this Court to reconsider the view expressed in *Jia Legeng*.

159 It was contended on behalf of Mr Nystrom that *Gunner* and *Jia Legeng* deal with much narrower points than those in this case and neither resolves the power issue. First, in *Gunner* and *Jia Legeng* either of the two powers could have been exercised, whereas in the present case the deportation power has never been available to be exercised against Mr Nystrom. Secondly, it was argued that in *Jia Legeng* ss 501

(162) In addition to the cases referred to immediately below, see also *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 135 in which a Full Federal Court held at 141 [19] that: "s 501 can be seen as a power available to the Minister additional to all other powers of refusal and not intended to carve out a particular field of criminal conviction or character generally as relevant matters in the grant or refusal of a visa."

(163) (1998) 84 FCR 400.

(164) (1998) 84 FCR 400 at 408.

(165) (1998) 84 FCR 400 at 409.

(166) (2001) 205 CLR 507.

(167) (2001) 205 CLR 507 at 535 [85]-[86].

and 502 should not be construed as conferring upon the Minister a power to set at nought a decision of the Tribunal and this Court held that the powers should not be limited in this manner (168).

160 In reply, the Minister argued that attempting to distinguish *Jia Legeng* and *Gunner* from the present case by pointing to the fact that both powers were available does not assist Mr Nystrom, as was recognised by Ryan J in the recent case of *Moran v Minister for Immigration and Multicultural and Indigenous Affairs* (169). In *Moran* the appellant had spent many years in Australia and was not susceptible to deportation under s 200. Counsel for the appellant put to Ryan J the same proposition advanced by Mr Nystrom here relying on the reasoning of the majority below in the present case. Ryan J declined to follow that reasoning, saying that an extensive line of authority, including *Jia Legeng* and *Gunner*, bound him to hold that "s 501 is an independent parallel source of power to cancel a visa which is not impliedly cut down by the presence in the Act of ss 200 and 201" (170). The Minister submitted that the reasoning and conclusion of Ryan J in this regard is correct.

161 The arguments advanced by Mr Nystrom should be rejected, and the arguments of the Minister should be accepted, for the following reasons.

Is s 501(2) restricted by ss 200 and 201?

162 Mr Nystrom's argument that the power to deport and the power to cancel a visa, which will result in removal, deal with the same subject matter is wrong. The power under s 200, as restricted by s 201, to deport non-citizens is a power in respect of the continuing presence in Australia of non-citizens convicted of certain crimes. The power under s 501(2) to cancel a visa of a non-citizen on character grounds (based on a "substantial criminal record") and thereby remove that non-citizen is a much wider power, although it is also for the protection of the Australian community. The powers are distinct and cumulative.

163 Not only do the powers have different purposes, different criteria apply for their exercise. The criteria in respect of a person's criminal record in ss 201(c) and 501(7) are not co-extensive, although there is some overlap between ss 201(c) and 501(7)(a), (b) and (c). Criteria in s 501(7)(d) and (e) give s 501(2) a wider field of operation than that which is covered by s 201(c).

164 Moreover, it was not disputed that different consequences follow when the powers are exercised. A person who is subject to a deportation order is subject to discretionary rather than mandatory detention during any challenge (s 253(8) and (9)), but will then be

(168) *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 535 [85] per Gleeson CJ and Gummow J; at 547 [130] per Kirby J; at 561 [176] per Hayne J; at 591-592 [282] per Callinan J.
(169) (2006) 151 FCR 1 at 31-33 [141]-[144].
(170) (2006) 151 FCR 1 at 33 [144].

deported unless the Minister revokes the order. A person who has a visa cancelled is subject to mandatory detention and removal (s 189) but may apply for a protection visa (s 501E).

165 While the powers are different, with different criteria for their exercise and different consequences when exercised, they are both special powers. The power in s 501(2), construed as it must be, together with s 501(6) and (7), is not a vague or general power. The line of authority (171) beginning with *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (172), upon which Mr Nystrom relied, has no application here as there is no repugnancy between the two powers. In fact, they are consonant with each other.

166 The provisions have a different legislative history and a different relationship to the constitutional sources of power in s 51(xix) and (xxvii) as already explained. The Act contains two separate but consonant statutory systems for deportation and removal which operate differently, although the final outcome of removal may be the same. Section 201 does not in terms, confer on an alien any "statutory protection" from removal, consequent upon the cancellation of a visa under s 501(2).

167 Here, s 200 has no application. To that extent, the facts here raise the issue of the interaction between s 200, as restricted by s 201, and s 501(2), more squarely than the facts in *Jia Legeng* (173). This distinction provides no reason to reconsider the statement in *Jia Legeng* that s 501 contains a separate statutory power. In fact, the distinction is an illustration of the discrete nature of the powers in question.

168 Further, there is nothing in the relevant legislative history, or the terms of the two provisions, which would warrant "reading down" the power in s 501(2), which rests on s 51(xix), by reference to s 201(b)(i) which, while it applies to "non-citizens", derived its language and purpose from the Act's former resting on s 51(xxvii).

169 Accordingly, the power conferred in s 501(2) is not restricted by the operation of ss 200 and 201.

Orders

170 This appeal proceeded on the condition that the orders for costs made below were not disturbed and that the Minister agreed to pay the reasonable costs of Mr Nystrom of and incidental to the appeal. Accordingly, we would make the following orders:

1. The appeal be allowed.
2. The orders of the Full Court of the Federal Court made on 1 July 2005 be set aside, except as to costs, and in their place there be an order that the appeal to that Court be dismissed.

(171) As referred to in fn 155 above.
(172) (1932) 47 CLR 1.
(173) (2001) 205 CLR 507.

3. The appellant pay the respondent's reasonable costs of the appeal.

1. Appeal allowed.

2. Set aside paras 2, 3, 4(a) and (b), (i), (ii) and (iii) of the order of the Full Court of the Federal Court made on 1 July 2005 and, in their place, order that the appeal be dismissed.

3. The appellant pay the respondent's costs of the appeal to this Court.

Solicitor for the appellant, *Australian Government Solicitor*.

Solicitor for the respondent, V*ictoria Legal Aid*.

CJH