HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BIF23
Appellant

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Respondent

SUBMISSIONS OF THE APPELLANT

I. CERTIFICATION

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

II. CONCISE STATEMENT OF ISSUES

2. This appeal raises the following issues.

   (a) Was it "practicable" within the meaning of s 501CA(3) of the *Migration **Act** 1958* for a delegate of the Minister, on 1 December 2021, to: (i) give the appellant a notice setting out the original decision and particulars of the relevant information; and (ii) invite him to make representations within the period and in the manner ascertained in accordance with reg 2.52 of the *Migration **Regulations** 1994* about revocation of the original decision in circumstances where, at that time, he lacked decision-making capacity and no guardian had been appointed?

   (b) Alternatively, now that it is known that the appellant lacked decision-making capacity and that no guardian had been appointed at that time, is the Minister able to issue a further notice and invitation to him under s 501CA(3), read with s 33(1) of the *Acts Interpretation Act* (**AI Act**)? (The appellant understands there to be no dispute that, if the answer is "yes", the Minister would be obliged to do so.)

III. SECTION 78B NOTICES

3. No issue arises under the *Constitution* requiring notice to be given under s 78B of the *Judiciary Act 1903* (Cth).

IV. DECISIONS OF THE COURTS BELOW

4. The decision of the Federal Circuit and Family Court of Australia is *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 469; 377 FLR 409 (***PJ***).

5. The decision of the Full Court of the Federal Court is *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 201; 301 FCR 229 (***J***).[1]

V. FACTS

6. The appellant is a citizen of Cambodia. He arrived in Australia with his mother when he was aged 12 on a Class AH Subclass 101 Child (Permanent) visa (*J* [2], CAB 48). On 22 October 2021, he was convicted of offences including theft from a shop, intentionally causing injury and affray (*J* [2], CAB 48). He was sentenced to an aggregate term of imprisonment for 18 months (*J* [3], CAB 48).

7. The Minister was obliged by s 501(3A) of the Act to cancel the appellant's visa. On 24 November 2021, a delegate of the Minister did so (*J* [5], CAB 49). The making of that decision — the "original decision" — engaged the operation of s 501CA: s 501CA(1).

8. Section 501CA(3) provided that, as soon as "practicable" after making the original decision, the Minister must: (a) give the person a written notice that sets out the original decision and particulars of the "relevant information" as defined;[2] and (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

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1 On 27 May 2024, the Full Court amended the sealed final order and reasons for judgment to correctly identify the appellant as "BIF23 by his litigation guardian the Public Advocate": CAB 148. By an interlocutory application dated 12 June 2024, the appellant seeks an order pursuant to rule 3.01.1 of the *High Court Rules 2004* (Cth) that the title of this appeal be amended in the same way: CAB 96.

2 "Relevant information" is defined in s 501CA(2) as meaning "information (other than non-disclosable information) that the Minister considers: (a) would be the reason, or a part of the reason, for making the original decision; and (b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member".

9. Regulation 2.52 prescribed (and has always prescribed) the period as 28 days after the person is given the notice and the particulars of relevant information under s 501CA(3)(b). The regulation also prescribed (and has always prescribed) various requirements as to the manner in which any representations are to be made, including (for example) that: if the representations are in a language other than English they must be accompanied by an accurate translation; the representations must be accompanied by a statement of the reasons on which the person relies to support the representations; a document accompanying the representations must be the original document or a copy certified in writing by a limited class of persons and, if the document is in a language other than English, it is accompanied by an accurate translation.

10. On 1 December 2021, a written notice and invitation for the purposes of s 501CA(3) was handed to the appellant (*J* [6], CAB 49). The appellant was, at that time, residing in the psychiatric unit of the Ravenhall Correctional Centre, known as the "Erskine Unit".[3] However, it was not possible for the appellant to decide whether to make representations about non-revocation and (if so) what representations to make because, as the primary judge found on the medical evidence, the appellant lacked legal decision-making capacity at and around the time that the notice and invitation was issued (*PJ* [86], CAB 35).[4]

11. On 23 December 2021, in light of the appellant's apparent incapacity, a social worker employed by the Victorian Institute of Forensic Mental Health ("Forensicare") at the Ravenhall Correctional Centre, applied to the Victorian Civil and Administrative **Tribunal** for an order appointing a guardian for him under the ***Guardianship*** *and Administration* ***Act*** *2019* (Vic), and specifically in order to enable a "best-interest based" decision to be made in relation to the notice/invitation issued to him on 1 December 2021 (*J* [7]-[9], CAB 49-50; *PJ* [11], CAB 21).[5]

12. On 11 January 2022, the Tribunal made an order under s 30 of the Guardianship Act appointing the Public Advocate as guardian of the appellant (*J* [10]; CAB 50).[6] However, by this time, the limited period of time within which the appellant could make representations in accordance with the invitation issued on 1 December 2021 had expired.

13. Between July and September 2022, the appellant's legal representatives and the

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3 See also affidavit of Nikki Wickremasinghe affirmed on 12 October 2021 (**Wickremasinghe affidavit**) at [7] **[BFM 7]** and Annexures NW-3 **[BFM 25–35]** and NW-7 **[BFM 52–91]**.

4 The Minister did not challenge this finding by any contention on appeal in the Federal Court.

5 See also Wickremasinghe affidavit at [9] **[BFM 7]** and Annexure NW-2 **[BFM 22–24].**

6 See also Wickremasinghe affidavit at [9] **[BFM 7]** and Annexure NW-4 [**BFM 36–39]**.

Department exchanged correspondence about the events that had transpired (*J* [11], CAB 50). In particular, on 6 September 2022, the Department advised of its view that the Minister could not issue a new notice and invitation to the appellant (*PJ* [15], CAB 21).

14. On 12 October 2022, the appellant commenced a proceeding in the Federal Circuit Court and Family Court of Australia, seeking an extension of time to commence proceedings under s 477(2) of the Act, and relief including a declaration that the notice and invitation purportedly issued on 1 December 2021 were not lawfully issued, and mandamus requiring the Minister to comply with the duty in s 501CA(3) (*J* [12], CAB 7, 50). The grounds on which the appellant sought relief included a ground to the same effect as reflected in ground 1 here – i.e., that it was not "practicable" within the meaning of s 501CA(3) for the Minister give a notice/invitation to him on 1 December 2021.

15. On 7 June 2023, the primary judge made an order under s 477(2) extending time for the making of an application to 12 October 2022, but dismissed the application (CAB 18).

16. On 5 July 2023, the appellant appealed to the Federal Court of Australia. The appellant sought to advance a new additional ground to the same effect as reflected in ground 2 here – i.e., that the Minister could (and acting reasonably would) issue a new notice and invitation to the appellant under s 501CA(3) of the Act. The appellant sought leave to advance the new ground, supported by an affidavit of a solicitor, Natalie Young.[7]

17. On 19 December 2023, a Full Court of the Federal Court dismissed the appeal, including the ground that is now reflected in ground 1. As for the ground that is now reflected in ground 2, the Court held that it did not have sufficient merit and, "coupled with the lack of explanation for not having raised it below", concluded that it was not in the interests of justice to permit it to be raised for the first time on appeal (*J* [102], CAB 74). The Court's reasons for judgment did not refer to the affidavit of Ms Young.

VI. ARGUMENT

A. The scheme in ss 501(3A) and 501CA of the Act

18. Sections 501(3A) and 501CA were inserted into the Act by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth),[8] which received royal assent on 10 December 2014.

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7 Affidavit of Natalie Young affirmed 18 October 2023 **[BFM 93–99]**.

8 See s 3 of the amendment Act, read with cll 8 and 18.

19. The regulations relating to s 501CA were inserted by the *Migration Amendment (2014 Measures No. 2) Regulation 2014* (Cth),[9] on 11 December 2014.[10] These regulations provide some assistance in understanding the nature of the scheme established by ss 501(3A) and 501CA.[11] Moreover, given the interdependency of s 501CA(3) of the Act with the contemporaneously prepared regulations relating thereto, the regulations may assist in interpreting s 501CA(3) insofar as there is any ambiguity.[12]

20. The scheme is one whereby, for a person who fails certain objective limbs of the "character test", their visa should be cancelled while they are in prison and without consideration of any discretionary factors as to whether they should keep their visa; but that the person is to be afforded a reasonable opportunity to be heard on whether the cancellation should be revoked. In this way, the community is protected while a process of consideration of any submissions is conducted.[13] The scheme is, in effect, "cancel first; fairness later".

21. While the window of time afforded to the person is a narrow one, Parliament no doubt intended that a person whose visa is cancelled have real and meaningful opportunity to persuade the Minister to revoke the cancellation, whether: (a) on the basis that the person passes the character test; or (b) on the basis of discretionary matters that were not able to be considered at the time of mandatory cancellation. As the majority of the Full Court correctly observed in ***BDS20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, "[a] particular purpose of s 501CA(3) is to ensure that the

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9 See reg 4 of the amendment Regulations, read with cll 9-11 of Schedule 3.

10 These regulations have never been amended.

11 *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101, [19] (the Court), citing with approval *Brayson Motors Pty Ltd (In liq) v Federal Commissioner of Taxation* (1985) 156 CLR 651, 652 (Mason J).

12 *O'Connell v Nixon* (2007) 16 VR 440, [28] (Nettle JA, Chernov and Redlich JJA agreeing). See also, e.g., *Elazac Pty Ltd v Commissioner of Patents* (1994) 53 FCR 86, 90 (Heerey J); *Pilcher v HB Brady & Co Pty Ltd* [2005] WASCA 159, [33] (the Court); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, [324] (Heydon J), [56] (French CJ); *CCM Holdings Trust Pty Ltd v Chief Commissioner of State Revenue* (2013) 97 ATR 509, [118]-[121] (Bergin CJ in Eq).

13 See Australia, House of Representatives, Migration Amendment (Character and General Visa Cancellation) Bill 2014, Explanatory Memorandum at 8 [34]: "The intention of this amendment is that a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from custody, in immigration detention while revocation is pursued." See also the Minister's second reading speech at Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 September 2014 at 1037: "Upon notification, the non-citizen will be provided with the opportunity to seek revocation of the cancellation decision." The report of the Senate Legal and Constitutional Affairs Legislation Committee into the amendment Bill (November 2014) at [41] records that the Department "justified" proposed s 501(3A) on this basis: "Under existing provisions non-citizens in prison who do not pass the character test can be released from prison prior to the character visa cancellation or refusal process being finalised. This has meant that criminals who may potentially present a risk to the community can reside lawfully in the community while this consideration takes place. The proposed mandatory cancellation process assists in ameliorating this risk."

opportunity of the person to persuade the Minister is a meaningful one".[14]

22. Furthermore, the scheme is to be "construed … against a background of common law notions of justice and fairness".[15] And it is an established common law principle of statutory interpretation that, subject to any clearly expressed contrary intention, when a decision-maker exercises a statutory power that would affect the rights or interests of another person, the person is entitled to a "reasonable opportunity of presenting [their] case".[16] Here, the statutory rights affected by cancellation are very significant: they include a right to liberty, and to remain in Australia.[17]

23. The questions arising on this appeal ought to start from the proposition that it is "highly improbable" that Parliament is to be taken to have intended that a lawful non-citizen's significant rights could be destroyed without that person being afforded a real opportunity to be heard on whether: (a) they pass the character test; or (b) there are discretionary matters that ought to persuade the Minister to revoke the cancellation.[18] The appeal ought also to start from the proposition that "attribution of a legislative intention to produce a consequence which appears to be 'absurd' or 'capricious' or 'irrational or unjust' is to be avoided where the statutory text is not intractable".[19]

24. But the Full Court's construction of s 501CA of the Act, which was the construction urged on it by the Minister, has both those consequences. The Full Court's construction entails what the primary judge called "objective unfairness" (*PJ* [86]) and, moreover, entails

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14 (2021) 285 FCR 43, [94] (Banks-Smith and Jackson JJ).

15 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* (2024) 98 ALJR 532, [26] (the Court), citing with approval *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J).

16 ***BVD17*** *v Minister for Immigration and Border Protection* (2019) 268 CLR 29, [45] (Edelman J), citing with approval *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118, quoted in *Kioa v West* (1985) 159 CLR 550, 613. See also, e.g., *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, [83] (the Court); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, [52] (Gageler and Gordon JJ).

17 The person would have been, but for the "mandatory" cancellation of their visa under s 501(3A), a lawful non-citizen with associated statutory rights. See, e.g., *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [56] (Kiefel CJ, Bell, Keane and Edelman JJ); ***XJLR*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 256, [45] (Rares J).

18 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)). See also, e.g., *BVD17* (2019) 268 CLR 29, [55]-[56] (Edelman J); *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [105]-[114] (the Court); *BDS20* (2021) 285 FCR 43, [107] (Banks-Smith and Jackson JJ).

19 *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 623, [37] (the Court). See also, e.g., *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, [48] (French CJ, Hayne, Crennan and Kiefel JJ); *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, [45] (French CJ, Kiefel, Bell and Keane JJ); *Stewart* (2020) 281 FCR 578, [38], quoting *Public Transport Commissioner of New South Wales v J Murray-More (NSW) Pty Ltd* (1985) 132 CLR 336, 350 (Gibbs J).

unfairness that is incapable of being remedied.[20]

25. Of course, "the question of fairness is not a matter that can displace the determination of the proper construction based on the text, context and purpose of the provision" (cf. *J* [76], CAB 67). But where there is a "constructional choice" as between two textually-available meanings, it is orthodox, and it is consistent with this Court's reasoning in *AEU v Fair Work Australia*,[21] to prefer the construction that would allow a person a meaningful opportunity to be heard and that would avoid absurdity and injustice.

26. The text of s 501CA is not intractable. There are two – and only two – alternative ways to construe the Act to avoid the unfairness and the absurdity that flows from the Full Court's construction. Both are textually available. One or the other should be accepted.

(a) **First**, it is not "practicable" for the Minister to give a person a notice and invitation under s 501CA(3) at a time when – because the person lacks capacity to respond and no guardian has yet been appointed – doing so would be incapable of achieving the singular object of giving the notice and invitation (i.e., to provide a reasonable opportunity to make representations on revocation). This is ground 1.

(b) **Secondly**, s 501CA(3) read with s 33(1) of the AI Act empowers the Minister to give a second notice and invitation if and when it becomes apparent that the first notice and invitation was incapable of providing that reasonable opportunity. This is ground 2.

B. Ground 1 – not "practicable" to give notice/invitation on 1 December 2021

B.1 EFX17

27. In *Minister for Immigration and Border Protection v **EFX17***, this Court found that the ordinary meaning of the words "give" and "invite" in s 501CA(3) is, respectively, to "deliver or hand over" and to "request politely or formally".[22] The Court held that these words "connote[] only the performance of an act rather than the consequences of that performance such as the recipient's capacity to comprehend the content of the English

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[20] If it is suggested that the availability of the Minister's power in s 195A is the remedy, that cannot be accepted. The mere availability of a non-compellable personal power of the Minister to grant a visa is no substitute for a procedural right enforceable by the person to seek to persuade the Minister to revoke the cancellation (see s 501CA(5)), noting that the cancellation itself prejudices a person's rights even if the Minister were to grant them a visa under s 195A (see, e.g., s 501E).

[21] (2012) 246 CLR 117, [32].

[22] (2021) 271 CLR 112, [23].

notice given or the English invitation made".[23] The Court held that the ordinary meaning of the words "give" and "invite", coupled with the statutory context, lead to the conclusion that the words "in the way the Minister considers appropriate in the circumstances" in s 501CA(3)(a) as it then was[24] were concerned only with the method of delivery or invitation of a notice and invitation rather than the "substantive content".[25]

28. Notably, however, in *EFX17*, this Court correctly accepted, by analogy with the reasoning of the plurality in *Minister for Immigration and Citizenship v* ***Li***,[26] that an "invitation" must be "meaningful".[27] Indeed, specifically, this Court approved the observation of Hayne, Kiefel and Bell JJ in *Li* that an invitation to a hearing that is given to an applicant who had "not recovered from an incapacity so as to permit attendance" would be an "empty gesture". "By contrast", the Court stated (emphasis added):

> … it would never be an "empty gesture" under s 501CA(3) for the Minister to give written notice, particulars and an invitation in English, **in any reasonable way that the Minister considers appropriate in the circumstances**, where the notice and particulars contain the information required and the representations are invited within the period and in the manner ascertained in accordance with the Migration Regulations.

29. But what *EFX17* did not address is the possibility that it is not the <u>way</u> that a notice/invitation is given for the purpose of s 501CA(3)(a) of the Act, or the <u>content</u> of a notice/invitation, that may bear on whether the invitation is meaningful or merely an "empty gesture", but the <u>time</u> that the notice/invitation is given (and in particular whether the person lacked capacity at that time, and was therefore <u>incapable</u> of responding).

30. This case is, therefore, different to *EFX17*.

    (a) This case is concerned with the proper construction of the expression "[a]s soon as practicable" in s 501CA(3) (ground 1), and the interaction of s 501CA(3) with s 33(1) of the AI Act (ground 2), neither of which was considered in *EFX17*.

    (b) And, unlike *EFX17*, this case involves a person who was found to lack capacity (and not to have a guardian) at the time that he was given the notice/invitation.

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23 (2021) 271 CLR 112, [23].

24 On 23 June 2023, after the Court's judgment in *EFX17*, the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Cth) was enacted. This Act amended s 501CA(3)(a) so as to omit the words "in the way the Minister considers appropriate in the circumstances" (see item 27), and insert new s 501CA(3A) requiring the notice to under s 501CA(3) to be given in the prescribed way (item 30).

25 (2021) 271 CLR 112, [25]-[26] (the Court).

26 (2013) 249 CLR 332.

27 (2021) 271 CLR 112, [29] (the Court).

31. *EFX17* is not authority for what it did not decide.[28]

B.2 When is it "practicable" to give a notice and invitation?

32. The appellant contends that it is not "practicable" within the meaning of s 501CA(3) to give a notice/invitation to a person who, at that time, is legally incapable of considering whether (and if so how) to exercise their right to make representations on revocation, or indeed to make representations on revocation even if he or she purported to do so.

33. The concept of "practicability" is concerned with feasibility.[29]

34. But feasibility of what? A constructional choice arises. On one textually-available view (as the Full Court held: *J* [39], CAB 58), it is simply the feasibility of performing the act of "giving" or "inviting" at that time. On another textually-available view, it is (or includes) the feasibility of performing the act at that time achieving the actor's singular object (i.e., providing a reasonable opportunity to make representations on revocation).

35. On the second view, if the issuing of a notice/invitation at a particular time would, by reason of the present incapacity of the person whose visa has been cancelled (and the present absence of a guardian), be incapable of achieving the object of giving the notice/invitation, then it is not "practicable" to issue the notice/invitation at that time. It would become "practicable" to issue the notice/invitation as soon as the incapacity is overcome (i.e., because the person acquires capacity, or because a guardian is appointed).

36. Of course, in most cases, the requisite reasonable opportunity to make representations would be availed by the Minister giving the notice/invitation at any time. But not always. That is because the person may be subject to an incapacity (e.g., for medical including psychiatric reasons, or due to being a minor), and a guardian has not yet been appointed.

37. For the reasons outlined below, the second view is to be preferred, because it better promotes the purpose of s 501CA, it avoids the objective unfairness and absurdity consequent on the Full Court's construction, and it does not give rise to inconvenience.

Only the subject person (or their agent or guardian) may make representations

38. First, it is to be noted that s 501CA only allows the person whose visa has been cancelled to be issued a notice/invitation (s 501CA(3)(a)), and only allows that person to make

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28 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, [42] (Kiefel CJ, Gageler and Gleeson JJ).

29 See, e.g., *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 305–306 (Stephen and Mason JJ). See also *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146, [65] (the Court); *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 43, [53] (Rares J).

representations in accordance with the invitation so as to satisfy the first condition on the Minister's power to revoke the cancellation (s 501CA(4)(a)).

39. Of course, the Act ought to be read as operating together with the law of agency (just as it ought to be read as operating together with the law of guardianship). Thus, in most cases, a lawyer properly instructed (for example) could make representations in accordance with the invitation on behalf of their client, being the person whose visa was cancelled. But a person who lacks capacity is not able to appoint an agent, let alone to make decisions as to what instructions to give to an agent as to whether to make representations and (if so) what representations to make. Only a parent (if relevant) or a guardian could make representations on behalf of the person and in their best interests.

40. Under long-established statutory guardianship legislation in all jurisdictions,[30] and pursuant to the inherent protective jurisdiction of courts with respect to persons under a disability,[31] which law Parliament can be taken to have been aware of when enacting the scheme in ss 501(3A) and 501CA, a guardian can be appointed to make decisions on behalf of and in the best interests of a person who lacks capacity to make such decisions. Upon the appointment of a guardian, which in this case occurred on 11 January 2022, it would then, on the second textually-available interpretation of "practicable", be "practicable" for the Minister to issue a notice/invitation to the person.

Distinction between practical challenge facing a person, and incapacity

41. Contrary to the Full Court's conclusion, there is a meaningful distinction to be drawn between a mere practical challenge that a person may face in responding to an invitation (e.g., a lack of English skills), and a legal incapacity to respond (cf. *J* [47], CAB 59).

    (a) Section 501CA is only intended to provide a reasonable (time-limited) opportunity to a person whose visa has been cancelled to make representations on revocation. A mere practical challenge, even if significant (e.g., a lack of English), is capable of being overcome by practical action by that person (e.g., appointing a translator).

    (b) Whereas, if a person lacks legal capacity to make a decision about making

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30 In addition to the Guardianship Act in Victoria, see also: *Guardianship Act 1987* (NSW); *Guardianship and Management of Property Act 1991* (ACT); *Guardianship and Administration Act 2000* (Qld); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1990* (WA); *Guardianship of Adults Act 2016* (NT). See also the *Immigration (Guardianship of Children) Act 1946* (Cth).

31 See, e.g., *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 241A (Kirby P); *IR v AR* [2015] NSWSC 1187, [100]–[105]; *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 258 (Mason CJ, Dawson, Toohey and Gaudron JJ).

representations, or to make valid representations, the position is quite different. That is because that person cannot, by their own action, protect their own interests. They cannot decide whether to make representations and (if so) what representations to make; they cannot make valid representations to the Minister; and they cannot appoint another person to make representations on their behalf.

42. Accordingly, if (as is the Full Court's construction) the notice/invitation under s 501CA(3) can be validly given to such a person who lacks a guardian, then the person's statutory right to make representations within a limited (28-day) period is entirely illusory; it is non-existent.

10 Principles underlying law of guardianship

43. The legal distinction between a practical challenge affecting a person (which is capable of being overcome by that person) and incapacity (which is not) has deep historical roots. The law requires that, in order for a person to perform a legally effective act, they must have the capacity to perform that act, where the requisite capacity is the ability to understand the general nature of the transaction or act and its consequences. The degree of understanding required is specific to the particular transaction or act.[32] Incapacity is a "grave matter"[33] that can only be cured by the appointment of a guardian.

44. The guardianship legislation referred to above arose out of a public policy concern as to how persons with impaired capacity "could make legally effective choices", particularly
20 in the context of consenting to medical treatments. That is because, "[w]ithout a proxy with the power to make legally valid decisions, those who lacked competence might be deprived of access to necessary and therapeutic treatment". But it was also recognised that recourse to the inherent protective jurisdiction of the courts presented practical difficulties.[34] As a result, "all Australian jurisdictions implemented schemes under which some form of guardianship tribunal, with an associated public advocate or public guardian, was given statutory power to appoint substitutes to make legally valid decisions on behalf of those who lacked the competence to do so."[35] For similar reasons, the law of

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32 See, e.g., *Gibbons v Wright* (1954) 91 CLR 423, 437 (Dixon CJ, Kitto and Taylor JJ); *Burnett v Browne (No 2)* [2021] FCA 373, [3] (O'Callaghan J). His Honour referred with approval to the summary of authorities in *Vishniakov v Lay* (2019) 58 VR 375, [30] (Derham AsJ) including, e.g., *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511, [17] (Kennedy LJ), [58] (Chadwick LJ).

33 *Easter v Griffith* (1995) 217 ALR 284, 290 (Gleeson CJ). See also, e.g., the discussion in *RH v CAH* [1984] 1 NSWLR 694, 703–706 (Powell J).

34 *Northern Territory of Australia v EH* (2021) 43 NTLR 67, [9]-[14] (the Court).

35 *Northern Territory of Australia v EH* (2021) 43 NTLR 67, [14] (the Court).

limitation has long recognised that time does not run against a person under a disability.[36]

45. Parliament can be taken to aware of these schemes, and the underlying common law principles on which they are built. Especially in that light, it is a startling conclusion that a person who suffers an incapacity may have significant statutory rights (to liberty, and to reside in Australia) destroyed, with no more than an "empty gesture" of inviting them (pointlessly) to make representations on revocation in a limited time window, which opportunity they simply cannot avail in the absence of a guardian .

Person who lacks capacity cannot make representations

46. Having regard to the principles outlined above, a person who suffers a relevant incapacity could not make a valid representation, even if they purported to do so.

47. The correctness of that proposition may be illustrated by analogy with other decisions of the Full Court and this Court.

48. In ***Soondur*** *v Minister for Immigration and Multicultural Affairs*, Gray J (with whom Goldberg J agreed) observed: "It is trite to say that an act generally only has legal effect if the mind of the person performing it accompanies its performance. The making of a purported application by a person who lacks capacity to make such an application will not be regarded as an application".[37]

49. The Full Court dismissed the appellant's submissions on *Soondur* as "inapt" (*J* [56]; CAB 62). But, with respect, it is the Full Court's analysis that is wanting.

50. The Full Court held that, in *Soondur*, the Court was concerned with s 48A (in the form that it then was) and "whether a non-citizen had made an application" (*J* [61], CAB 64). The Full Court held that "[i]n those circumstances it is understandable that the non-citizen's capacity to make the application at that time was relevant". "In contrast", the Full Court held, "s 501CA(3) of the Act does not impose any obligation on a non-citizen to do anything." That is true, but it misses the point sought to be drawn from *Soondur*.

51. What *Soondur* shows is that a person who lacks capacity cannot exercise a right under the Act – even if the exercise of that right might objectively be seen to be to their

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[36] The law of limitation has long drawn a distinction between a claimant who is (merely) vulnerable or disadvantaged in their ability to understand their legal rights and a claimant who is under a disability giving rise to legal incapacity. The *Limitation Act 1623* (Imp), s 7 provided that limitation periods would be suspended where a claimant is *non compos mentis*, meaning of unsound mind; that is reflected in modern limitation statutes. "Time does not run against persons [under a disability] because it is regarded as wrong in principle to have time running against people who are unable to pursue their rights": see *T v H* [1995] 3 NZLR 37, 61 (Tipping J). See also *Murphy v Welsh* [1993] 2 SCR 1069, 1080 (Major J for the Court).

[37] (2002) 122 FCR 578, [35].

advantage – such as by making an application for a visa under s 46 (*Soondur*)[38] or by making a representation on revocation under s 501CA(4) (this case). It is because the appellant could not have made a valid representation on representation at the time that the notice/invitation was given to him on 1 December 2021, and because he lacked a guardian, that an invitation under s 501CA(3)(b) for him "to make" representations within the period and in the manner ascertained in accordance with the regulations was hollow.

52. This Court has also recognised a person may be incapable of making "immigration decisions" under the Act, but that a parent or guardian may do so.[39]

Nothing in appellant's construction undermines convenience

53. There is nothing in the appellant's construction that undermines the scheme under ss 501(3A) and 501CA or inhibits its effectiveness (cf *J* [55], CAB 61–62).

54. Given that it is an inherent feature of the scheme that the person whose visa is cancelled under s 501(3A) is in criminal custody at that time, it is unlikely in practice that there would ever be an extended period in which the person's capacity (and thereby the validity of the notice/invitation) is in doubt. What can be expected to occur is precisely what occurred here: upon the giving of a notice to the person, the person's potential lack of capacity is promptly identified by those persons who are engaged in the provision of services to such persons in custody, and appropriate action is then taken to resolve that by application to the appropriate statutory decision-maker on guardianship (or potentially to a court). If the decision-maker on that application determines that the person does lack capacity, and makes a guardianship order the Minister can then immediately issue a notification/invitation under s 501CA(3) to the guardian.

Conclusions

55. Having regard to the considerations outlined above, the construction of "practicable" advanced by the appellant coheres with the broader legislative object underpinning the scheme under ss 501(3A) and 501CA outlined above.[40] Whereas, on the other hand, the Full Court's construction is apt to produce objectively unfair and, indeed, absurd results.

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38 Section 501E of the Act also reflects Parliament's acceptance that some persons cannot make visa applications due to minority or incapacity, but that applications may be made on their "behalf".

39 See, e.g., *Re Woolley; Ex Parte Applicants M276/2003* (2004) 225 CLR 1, [102]-[104] (McHugh J). See also [153]-[155] (Gummow J), [226] (Hayne J), [270] (Heydon J); See also, by analogy, *ASF17 v Commonwealth of Australia* [2024] HCA 19, [41], [44] and [48] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), [107] (Edelman J).

40 *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 281 FCR 578, [41] (the Court).

56. The absurdity consequent to the Full Court's construction can be easily revealed by a analogy. Assume that a person whose visa has been cancelled is in a coma, and no guardian has yet been appointed. Assume, also, that the Minister knows all this. The Minister could perform the physical act involved in giving a notice and inviting the person to make representations, within the period and in the manner ascertained in accordance with the regulations, about revocation. But to do so would, obviously, be farcical. Yet, on the Full Court's construction of s 501CA(3), not only would that action be permitted but it would be required.

57. The only way of avoiding the absurdity is to accept that the Minister could, in the circumstance described, withhold giving the notice/invitation until the person wakes up or a guardian is appointed. How can that be justified in light of the imperative terms of s 501CA(3)? It could only be justified by accepting that whether it is "practicable" to give a notice/invitation depends on whether giving the notice/invitation is capable of achieving the object of giving the notice/invitation. That is the appellant's case.

58. Of course, the very same absurdity arises if the Minister knows that the person lacked legal capacity due to a psychiatric condition. In both circumstances, it is the incapacity of the person to respond, and the absence of a guardian, that renders it not "practicable" to give the notice and invitation at that time. It would become "practicable" to give the notice and invitation when either: (a) the physical or psychiatric condition resulting in the incapacity subsides; or (b) a guardian is appointed.

59. When considering the two competing constructions, the objective unfairness and absurdities consequent to the Full Court's construction are "presumptively to be avoided". The text of s 501CA(3), and the meaning of the word "practicable" is not intractable. The objective unfairness and absurdity entailed by the Minister's construction powerfully support the appellant's construction. No inconvenience is wrought by it. The appellant's construction ought to be accepted; the Full Court was wrong to reject it.

B.3 Practicability is an objective jurisdictional fact

60. It is accepted that the Minister did not know that the appellant lacked capacity when the notice and invitation was physically given to him on 1 December 2021: that only emerged clearly later (in light of the medical evidence given to the VCAT in support of the guardianship application). The next issue, therefore, is whether the question of when it is or was "practicable" to give a notice/invitation is susceptible of determination by a court

on evidence as occasion arises, or is to be assessed only by reference to the information known by the Minister at the time the duty in s 501CA(3) is purportedly discharged.

61. The Full Court held that whether it is or was "practicable" to give a notice to a person is not a question of objective jurisdictional fact that may be determined by a court on judicial review, including on the basis of material not known to the Minister at the time the notice was given. The Full Court held practicability is an "evaluative" question to be made based on material known to the Minister, confined only by the requirement that the Minister acted rationally (*J* [62]-[75], CAB 64–67).

62. Respectfully, the Court was wrong to so conclude.

63. A number of textual and contextual features of the Act suggest Parliament intended that the question of when it is, or whether it was, "practicable" for the Minister to give a notice/invitation to a person under s 501CA(3) is an objective fact the existence of which is amenable to determination by a court on judicial review.[41]

64. ***First***, it is salient that it is an inherent feature of the scheme that, when a cancellation decision is made under s 501(3A), the person will be in criminal custody rather than immigration detention (see s 501(3A)(b)). Accordingly, when the duty of the Minister to give the person a notice/invitation "as soon as practicable" under s 501CA(3) is engaged, the person will <u>not</u> be in the Minister's (or, in most cases, the Commonwealth's) control. It is therefore not to be readily supposed that the Minister will be in a position to be aware of any disability the person may suffer. That, indeed, is precisely what transpired here.

65. Accordingly, if the Court were to accept the appellant's submission outlined above that the question of when it is "practicable" to give the notice/invitation accommodates assessment of whether doing so would achieve the Minister's object, that would strongly support a conclusion that the question of "practicability" is susceptible of determination by a court. Given that, in the typical case, the Minister will not have custody of the person when the duty in s 501CA(3) is discharged, and therefore ought not to be supposed to have knowledge of the person's physical or medical condition, it would make little sense for the question of whether the person lacks capacity (and therefore whether it is

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[41] See the criteria set out in, e.g., *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, [36]–[44] (Spigelman CJ, Mason P and Meagher JA agreeing); *AOU21 v Minister for Home Affairs* [2021] FCAFC 60, [118]; *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97, [28] (Mortimer and Wigney JJ).

practicable to give a notice/invitation to the person) to be determined by the Minister on the limited (if any) information that may be available to the Minister at the time.

66. ***Second***, even if "practicability" accommodates considerations from the Minister's "perspective", that says nothing as to whether the question is one of jurisdictional fact (cf. *J* [50], [62]–[75], CAB 60, 64–67). By analogy, where cases have arisen as to whether removal under s 198 of the Act is "reasonably practicable" — including in recent cases that have led to decisions by this Court in *AJL20*,[42] *NZYQ*[43] and *ASF17*[44] — that has been the subject of evidence (or agreed facts) by the parties, which has led to findings by a court. Those cases have not proceeded on the basis that whether removal was "reasonably practicable" was determined by the Minister, subject only to judicial review on limits grounds by the court. There is no reason why a different approach would be adopted to the question of "practicability" in s 501CA(3).

67. Thus, even if the question of when it is "practicable" for the Minister or an officer to perform an act accommodates considerations from the government's perspective, this does not mean a court cannot determine, in light of evidence from the Minister, whether and when the performance of an action is "practicable".[45] The evidence adduced in the trial here, including evidence that was not known to the Minister on 1 December 2021, led to the primary judge's undisturbed finding that the appellant then lacked capacity.

68. ***Third,*** textually, the practicability of giving a notice/invitation to a person is framed as an objective pre-condition to the issuing of a notice/invitation. Certainly, s 501CA(3) is not framed as depending on an opinion formed by the Minister. That is, s 501CA(3) does not provide that the Minister must give a notice/invitation as soon as the Minister considers it "practicable" to do so (compare, e.g., s 501CA(4)(b)). That tends to indicate that Parliament intended the question of when it is or was "practicable" to issue a notice/invitation to be determined objectively, on evidence before a court, on the (likely very rare) occasions where there would be a real dispute about this.

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42 *Commonwealth v AJL20* (2021) 273 CLR 43, [28]-[32], [45].

43 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, [60]-[61], [70].

44 *ASF17 v Commonwealth* [2024] HCA 19. See also *ASF17 v Commonwealth* (2024) 300 FCR 530, [12], [31], [37], [57], [135]-[136] (Colvin J).

45 See, e.g., *AJL20* (2021) 273 CLR 43, [2], [3], [8], [28]-[32], [45]; *NZYQ* (2023) 97 ALJR 1005, [60]-[61]; *Sami v Minister for Home Affairs* [2022] FCA 1513, [43]. Cf. *Beyazkilinc v Manager, Baxter Immigration Reception and Processing Centre* (2006) 155 FCR 465, [41], [44], [45] (Besanko J); *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146, [65]-[69] (the Court).

69. ***Fourth***, treating "practicability" as a jurisdictional fact is apt to avoid the potential for unfair and absurd outcomes such as the present, where the Minister (as may often occur) was unaware of the appellant's incapacity, and should therefore be preferred in light of the principles outlined above.

C. GROUND 2

70. Before the Full Court, the appellant sought to contend, in the alternative to ground 1, that the Court should prefer the dissenting analysis of Rares J in *BDS20* and to conclude that the Minister had power to give a second notice and invitation under s 501CA(3) read with s 33(1) of the AI Act and (acting reasonably) ought to do so. The Full Court declined to grant leave to the appellant to raise the new argument on appeal, principally on the basis that the Full Court considered the argument lacked sufficient merit.[46] The appellant respectfully contends that the argument does have merit; indeed, it should be accepted.

71. Section 33(1) of the AI Act provides that where an Act confers a power or function or imposes a duty then, subject to any contrary intention (AI Act, s 2) the power may be exercised and the function or duty must be performed from time to time as occasion requires. The section is enacted against the background of "an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise".[47] "The section counters that doctrine not by itself conferring any power but by requiring that a provision conferring a power be interpreted as authorising the power it confers to be exercised and re-exercised from time to time … The words 'as occasion requires' acknowledge the need for the repository of the power to comply with the incidents of the power spelt out in the terms of the provision".[48]

72. As explained above, the purpose of the scheme in s 501CA is to enable a person to satisfy the Minister that the person in fact passes the character test, or that there is "another reason" why the cancellation should be revoked.

73. But there may be circumstances where the person is precluded from making a representation bearing on whether the cancellation decision should be revoked in the

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46 The Full Court stated it declined leave for this reason, "coupled with the lack of explanation for not having raised it below": *J* [102], CAB 74. The Full Court seemingly overlooked that the applicant had, in support of his interlocutory application to rely on the proposed amended notice of appeal, filed an affidavit of Ms Young addressing why the ground had not been raised at first instance. The Minister's submissions also did not take issue with the explanation or suggest that he was prejudiced in dealing with it; the Minister only responded to the proposed ground on its merit.

47 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [45] (the Court).

48 Ibid.

period of time after they are given a notice under s 501CA(3).

74. The most obvious such circumstances is where, after the expiry of the initial notice, a person's conviction is quashed or otherwise nullified, or the person is pardoned, or a sentence is reduced on appeal, such that the person does pass the character test.

75. As the Full Court explained in *XJLR*, even if a conviction that founded the "mandatory" cancellation of a person under s 501(3A) is quashed etc., the person has no right under the Act to have their visa restored. Nor, indeed, could the Minister revoke the cancellation of his or her own motion. Rather, the cancellation could only be revoked under s 501CA(4), and that requires "compli[ance] with the strict requirements of s 501CA(3)(b) and (4)(a)".[49] Therefore, if the quashing etc. of the conviction that founded the mandatory cancellation occurs after the expiry of the period allowed by a notice under s 501CA(3), the person has no remedy at all, unless the Minister is able to issue a further notice/invitation under s 501CA(3). Is it really to be supposed that Parliament intended that the Minister is precluded from doing so?

76. This is not an "extreme situation" or a distorting possibility. As Rares J correctly held in *BDS20*, the scheme of the Act in s 501(10) recognises that such events may occur. And it is not answered by the suggestion of the majority in *BDS20* that a person with a "realistic hope" of such an outcome "can be expected to raise this" in their representations in response to the original invitation.[50] It may be entirely speculative to do so. And, in the short window of time allowed to make representations (28 days from notification), the person may not have a right to appeal, or may not know of a process that might lead to the conviction being voided (by a pardon, for example).

77. The circumstance in this case, where the appellant who received a notice/invitation under s 501CA(3) was incapable of exercising the right to make any representations on revocation due to incapacity (and the absence of a guardian), is an even more stark illustration of how (if ground 1 is not upheld) a person would be precluded from making a representation bearing on whether the cancellation decision should be revoked unless the Minister is empowered to issue a further notice/invitation. Properly construing s 501CA(3) read with s 33(1), the Minister could (and indeed would be obliged to) issue the appellant a new notice/invitation that affords him reasonable opportunity the Act intended that he be given.

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49 *XLJR* (2022) 289 FCR 256, [45] (Rares J, Yates J agreeing).

50 *BDS20* (2021) 285 FCR 43, [116] (Banks-Smith and Jackson JJ).

78. The fact that the duty to issue a notice/invitation under s 501CA is "tethered to a single and clearly identifiable event from which it is calculated: the making of the original decision"[51] (*J* [113], CAB 76) does not support the Full Court's approach.[52] If the Minister becomes aware, after giving a notice and invitation, that the notice or invitation could not have been acted on and/or that the foundation for the exercise of power under s 501(3A) no longer exists, the Minister can (conformably with s 33(1) of the AI Act) issue a further invitation as soon as practicable after the original decision.

79. Indeed, if the Minister is dilatory in doing so in circumstances where the changed circumstances indicate a clear basis for revocation under s 501CA(4), the duty to issue the notice/invitation would be compellable by mandamus (as the appellant contends here). The majority's analysis in *BDS20* at [83], adopted by the Full Court here, tends to assume the answer to the question being raised.

80. Contrary to the Full Court's conclusion (*J* [118], CAB 77–78), the analysis of the majority in *BDS20* is substantially weakened if the Court were to reject ground 1, and find that the scheme in s 501CA(3) could operate so as to result in "objective unfairness". That is because the majority considered that "injustice" would be avoided on their construction because where a person could not make representations in response to a notice and invitation due to incapacity, it would not be "practicable" for the notice and invitation to have been given to them.[53] But if that possibility (advanced in ground 1) is rejected, then the only way to construe the scheme so as to avoid objective unfairness or injustice, which the Court is impelled to adopt if textually available, is to accept that the Minister could give a further notice and invitation (ground 2).

VII. ORDERS SOUGHT

81. The appellant seeks the orders set out in the notice of appeal.

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51 *BDS20* (2021) 285 FCR 43, [79] (Rares J).

52 Compare, e.g., s 418(3) of the Act, which duty and power is a continuing one notwithstanding that the duty must (initially) be performed "as soon as is practicable" after a certain event: *SZOIN v Minister* (2011) 191 FCR 123.

53 *BDS20* (2021) 285 FCR 43, [118] (Banks-Smith and Jackson JJ).

VIII. ESTIMATE OF TIME

82. The appellant estimates that 2 hours will be required for presentation of his oral argument.

Dated: 27 June 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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BETWEEN: **BIF23**
Appellant

and

Minister for Immigration, Citizenship and Multicultural Affairs
Respondent

ANNEXURE

Pursuant to Practice Direction No 1 of 2019, the Appellant sets out below a list of the constitutional provisions and statutes referred to in these submissions.

No.	Description	Version	Provisions
	Statutory provisions		
1.	*Migration Act 1958* (Cth)	As at 1 December 2021	ss 195A, 501(3A), 501CA, 501E
2.	*Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth)	As enacted (10 December 2014)	s 3, cll 8 and 18
3.	*Migration Regulations 1994* (Cth)	As at 1 December 2021	reg 2.52
4.	*Migration Amendment (2014 Measures No. 2) Regulation 2014* (Cth)	As enacted (11 December 2014)	reg 4, cll 9-11 of Sch 3
5.	*Acts Interpretation Act 1901* (Cth)	As currently in force	s 33
6.	*Guardianship and Administration Act 2019* (Vic)	As at 11 January 2022	s 30
7.	*Guardianship Act 1987* (NSW)	As currently in force	-
8.	*Guardianship and Management of Property Act 1991* (ACT)	As currently in force	-
9.	*Guardianship and Administration Act 2000* (Qld)	As currently in force	-
10.	*Guardianship and Administration Act 1995* (Tas)	As currently in force	-

11.	*Guardianship and Administration Act 1993* (SA)	As currently in force	-
12	*Guardianship and Administration Act 1990* (WA)	As currently in force	-
13.	*Guardianship of Adults Act 2016* (NT)	As currently in force	-
14.	*Immigration (Guardianship of Children) Act 1946* (Cth)	As currently in force	-