[redacted]

29 January 2019

Australian Border Force

Dear Officer

OUR CLIENT: DEANNA LYNLEY MOORCROFT

We act on behalf of the above in relation to immigration-related legal matters. We **enclose** a copy of our client's signed Form 956.[1]

On about 17 November 2013 our client travelled to Australia with the intention of permanently relocating. She was granted a subclass 444 visa upon her arrival in Australia. Our client resided in Australia from about 17 November 2013 to 3 January 2018.

Our client returned to New Zealand from 24 December 2017 and returned on 2 January 2018. Upon her return to Australia our client was granted a further subclass 444 visa, but on 3 January 2018, while our client was still in immigration clearance, that visa was purportedly cancelled under s 116(1)(e)(i) of the *Migration Act 1958*.[2] Subsequently, our client was purportedly removed from Australia under s 198 of the *Migration Act 1958* on 4 January 2018.[3]

After being removed from Australia our client applied to the Federal Circuit Court of Australia for judicial review of the decision to cancel her visa. With the consent of the Minister for Home Affairs, the Federal Circuit Court of Australia issued a writ of certiorari quashing the decision dated 3 January 2018 cancelling our client's visa.[4]

In circumstances where our client has not been convicted of any further criminal offence since last being granted a subclass 444 visa on 2 January 2018 it is submitted that our client's past criminal convictions, and associated sentences, do not cause her to fall within the definition of 'behavioural concern non-citizen' as prescribed by s 5 of the *Migration Act 1958*.

However, we note that if our client was removed from Australia on 4 January 2018 then she would fall within the definition of behaviour concern non-citizen and be ineligible to be granted a subclass 444 visa if she were to return to Australia.

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[1] Doc 1 (pp. 4-6).
[2] Doc 3 (p. 8).
[3] Doc 4 (p. 9).
[4] Doc 5 (pp. 10-11).

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In our submission, our client was not removed from Australia and, therefore, does not fall within the definition of a 'behavioural concern non-citizen.'

While section 5 of the *Migration Act 1958* defines 'remove' as 'remove from Australia,' it is submitted that a reference to removal in the Migration Act can only be interpreted as removal by an officer of the Commonwealth in accordance with a power conferred by the Act. If 'remove' were to be construed more broadly, then a child removed from Australia by a parent would be ineligible to be granted a subclass 444 visa in the future.

It is uncontroversial that a decision involving jurisdictional error is regarded, in law, as no decision at all.[5] In circumstances where the Federal Circuit Court of Australia issued a writ of certiorari on the grounds that the decision dated 3 January 2018 cancelling our client's visa involved a jurisdictional error, it is submitted that the cancellation decision had no effect at law. It then follows that our client's subclass 444 visa was not cancelled on 3 January 2018 and she continued to hold a subclass 444 visa until she departed Australia on 4 January 2018.

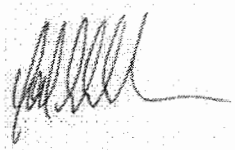
The *Migration Act 1958*, and in particular s 198, only authorises the removal of unlawful non-citizens; there is no power conferred by the *Migration Act 1958* that allows Commonwealth, or one of its officers, to remove a lawful non-citizen from Australia. Given that our client possessed a valid subclass 444 visa until she departed Australia on 4 January 2018,[6] we submit that she cannot be taken to have been removed from Australia and, therefore, does not fall within the definition of behavioural concern non-citizen.

In the premises, it would appear that our client does not fall within the definition of behavioural concern-non citizen and, therefore, would be granted a subclass 444 visa on the presentation of her New Zealand passport to an officer or authorised system.[7]

We confirm that we hold our client's instructions to file an urgent application in the Federal Circuit Court of Australia if the grant of her special category visa is denied.

If you would like to discuss this matter further, please do not hesitate to contact our Mr Joel McComber.

Yours faithfully



Joel McComber

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[5] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 ; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 606.
[6] *Migration Regulations 1994* (Cth) Schedule 2, s 444.511.
[7] *Migration Act 1958* (Cth) s 32(2)(a).