HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

Matter No M32/2022

MARTIN JOHN DAVIS — APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ORS — RESPONDENTS

Matter No S81/2022

DCM20 — APPELLANT

AND

SECRETARY OF DEPARTMENT OF HOME AFFAIRS & ANOR — RESPONDENTS

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
DCM20 v Secretary of Department of Home Affairs
[2023] HCA 10
Date of Hearing: 19 & 20 October 2022
Date of Judgment: 12 April 2023
M32/2022 & S81/2022

ORDER

Matter No M32/2022

1. Grant leave to the appellant to file an Amended Notice of Appeal.

2. Appeal allowed.

3. *Set aside the orders made by the Full Court of the Federal Court of Australia on 23 November 2021 (as varied by the orders of 15 December 2021) and in their place make the following orders:*

    (a) *Appeal allowed.*

    (b) *Set aside the orders made by O'Callaghan J on 9 June 2020 and in their place make the following orders:*

        (i) *Declare that the decision made by the third respondent on 8 May 2019 in purported compliance with section 10.1 of the Minister's guidelines on ministerial powers (s351, s417 and s501J) (11 March 2016) exceeded the executive power of the Commonwealth.*

        (ii) *The first respondent pay the costs of the applicant.*

    (c) *The first respondent pay the costs of the appellant.*

4. *The first respondent pay the costs of the appellant.*

Matter No S81/2022

1. *Grant leave to the appellant to file an Amended Notice of Appeal and vary the grant of special leave to appeal accordingly.*

2. *Appeal allowed.*

3. *Set aside the orders made by the Full Court of the Federal Court of Australia on 23 November 2021 (as varied by the orders of 15 December 2021) and in their place make the following orders:*

    (a) *Appeal allowed.*

    (b) *Set aside the orders made by Perry J on 20 July 2020 and in their place make the following orders:*

(i) Declare that the decision made by the second respondent on 10 January 2020 in purported compliance with section 10.2 of the Minister's guidelines on ministerial powers (s351, s417 and s501J) (11 March 2016) exceeded the executive power of the Commonwealth.

(ii) The first respondent pay the costs of the applicant.

(c) The first respondent pay the costs of the appellant.

4. The first respondent pay the costs of the appellant.

On appeal from the Federal Court of Australia

Representation

C J Horan KC with A F L Krohn and A R Sapienza for the appellant in each matter (instructed by Rasan T. Selliah & Associates)

S P Donaghue KC, Solicitor-General of the Commonwealth, and N M Wood SC with M F Caristo for the first respondent in each matter and for the Attorney-General of the Commonwealth, intervening in both matters (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M W R Adams for the Attorney-General for the State of New South Wales, intervening in both matters (instructed by Crown Solicitor (NSW))

M J Wait SC, Solicitor-General for the State of South Australia, with J F Metzer for the Attorney-General for the State of South Australia, intervening in both matters (instructed by Crown Solicitor's Office (SA))

R J Orr KC, Solicitor-General for the State of Victoria, with M A Hosking for the Attorney-General for the State of Victoria, intervening in both matters (instructed by Victorian Government Solicitor's Office)

Submitting appearances for the second and third respondents in M32/2022 and for the second respondent in S81/2022

CATCHWORDS

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
DCM20 v Secretary of Department of Home Affairs

Constitutional law (Cth) – Executive power of the Commonwealth – Where s 351 of *Migration Act 1958* (Cth) permitted Minister to personally exercise power to substitute more favourable decision for decision of tribunal – Where requests made for Minister to exercise power under s 351 – Where Minister issued instructions to departmental officers in purported exercise of executive power for general conduct of requests to substitute more favourable decision under s 351 ("Ministerial Instructions") – Where Ministerial Instructions required departmental officers to refer requests to Minister only where satisfied that "unique or exceptional circumstances" exist in respect of request – Whether Ministerial Instructions purported to instruct departmental officers to make decisions required to be exercised personally by Minister – Whether Ministerial Instructions exceeded limits of executive power as constrained by s 351 of Act.

Administrative law – Judicial review – Whether decisions in purported compliance with Ministerial Instructions exceeded limits of Commonwealth executive power.

High Court – Appellate jurisdiction – Whether Federal Court lacked jurisdiction to hear appeals by reason of s 476A(1) of Act – Consideration of character of purported decisions of departmental officers – Whether High Court accordingly deprived of jurisdiction to hear appeal.

Judgments and orders – Where appellants sought declarations as to departmental officers' legal error – Whether appellants had sufficient material interest to seek declaratory relief – Whether declaratory relief appropriate.

Words and phrases – "decision made personally", "declaratory relief", "evaluation of the public interest", "executive power of the Commonwealth", "guidelines", "Ministerial Instructions", "more favourable decision", "non-compellable power", "non-delegable power", "non-statutory action", "personal power", "procedural decision", "public interest", "repeat request", "statutory decision", "statutory limitation", "substantive decision", "unique or exceptional circumstances", "2009 Ministerial Instructions", "2016 Ministerial Instructions".

Constitution, ss 61, 64, 67, 73.
Federal Court of Australia Act 1976 (Cth), s 21.
Judiciary Act 1903 (Cth), ss 37, 39B.
Migration Act 1958 (Cth), ss 351, 474, 476A.

1 KIEFEL CJ, GAGELER AND GLEESON JJ. Two appeals are brought from a decision of the Full Court of the Federal Court of Australia[1]. Each arises out of an application in the original jurisdiction of the Federal Court for judicial review of a decision of a departmental officer not to refer to a Minister a request to exercise the power conferred on that Minister by s 351(1) of the *Migration Act 1958* (Cth) ("the Act") to substitute in the "public interest" a more favourable decision for a decision made or taken to be made by the Administrative Appeals Tribunal ("the Tribunal") under s 349(2)(a) of the Act affirming a refusal by a delegate of the Minister to grant the applicant a visa. The Full Court dismissed an appeal from the dismissal of each application.

2 Each departmental decision not to refer a request to the Minister was made in purported compliance with instructions issued in 2016 by the then Minister for Immigration and Border Protection ("the 2016 Ministerial Instructions")[2]. The 2016 Ministerial Instructions relevantly instructed departmental officers not to refer a request to exercise the power conferred by s 351 of the Act to a Minister in any case which departmental officers assessed not to "have unique or exceptional circumstances". Each departmental decision not to refer turned on the departmental officer assessing the case in relation to which the request was made not to meet that criterion for referral.

3 The 2016 Ministerial Instructions superseded earlier instructions issued by the then Minister for Immigration and Citizenship in 2009 ("the 2009 Ministerial Instructions")[3]. The 2009 Ministerial Instructions were considered by this Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[4].

4 Consistently with what was found in *Plaintiff S10/2011* in relation to the 2009 Ministerial Instructions and in relation to departmental decisions made in purported compliance with the 2009 Ministerial Instructions, the Full Court found that neither the issuing of the 2016 Ministerial Instructions nor the making of the departmental decisions in purported compliance with the 2016 Ministerial Instructions involved exercise of any power conferred by statute. Each was rather a purported exercise of the executive power of the Commonwealth conferred by

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1 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23.

2 Minister's guidelines on ministerial powers (s351, s417 and s501J) (11 March 2016).

3 Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J) (14 September 2009).

4 (2012) 246 CLR 636.

s 61 of the *Constitution*. More specifically, each was a purported exercise of "an executive function incidental to the administration of the Act and thus within that aspect of the executive power which 'extends to the execution and maintenance ... of the laws of the Commonwealth'"[5]. Those findings are not contested in these appeals.

5 The Full Court held that the aspect of the executive power of the Commonwealth purportedly exercised in making the departmental decisions is conditioned by a common law requirement for reasonableness in its exercise. The Full Court nevertheless found that neither impugned departmental decision was in fact unreasonable.

6 The first ground of each appeal challenges the finding that the departmental decision impugned was not unreasonable. By notice of contention in each appeal, the first respondent denies that any aspect of the executive power of the Commonwealth is conditioned by a common law requirement of reasonableness.

7 Whether any aspect of the executive power of the Commonwealth is conditioned by any requirement of reasonableness is a very large question. The question need not, and therefore should not, be addressed in the determination of these appeals.

8 Each appeal is rather to be determined on a second, logically anterior, ground not fully developed before the Full Court. The ground is founded on the proposition that, by conferring statutory power to substitute or not to substitute a decision in the public interest on a Minister personally, s 351 of the Act limits the executive power of the Commonwealth by excluding the capacity for another executive officer to decide that it is or is not in the public interest for the statutory power to be exercised. The ground is to the effect that the issuing and maintenance of the 2016 Ministerial Instructions, and the departmental decisions made in purported compliance with them, exceeded the executive power of the Commonwealth as so limited to the extent that the 2016 Ministerial Instructions instructed departmental officers not to refer requests in cases which departmental officers themselves assessed not to have unique or exceptional circumstances.

9 To explain the upholding of that ground further, and to explain the orders which are appropriate to be made in the appeals, it is best to begin by examining

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5 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 29 [14], citing *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 655 [51].

the nature and content of the statutory power conferred by s 351 of the Act before turning to examine its impact on the executive power of the Commonwealth.

The nature and content of the statutory power

10 Section 351 provides:

> "(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 349 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.
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> …
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> (3) The power under subsection (1) may only be exercised by the Minister personally.
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> (4) If the Minister substitutes a decision under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:
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> (a) sets out the decision of the Tribunal; and
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> (b) sets out the decision substituted by the Minister; and
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> (c) sets out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.
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> …
>
> (7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances."

11 The references throughout s 351 to "the Minister" encompass any of the Ministers who from time to time administer that section in accordance with

Administrative Arrangements Orders issued by the Governor-General[6] as well as any other Minister who might be authorised to act on behalf of such a Minister[7].

12 Section 351(1) is a conferral of power on the Minister. Section 351(3) and s 351(7) explain the nature of the power so conferred. The prescription in s 351(3) that the power may only be exercised by the Minister personally means that the power is neither delegable by the Minister under s 496 of the Act nor exercisable on the Minister's behalf by any officer of the Department administered by the Minister under s 64 of the *Constitution*[8]. The prescription in s 351(7) that the Minister does not have a duty to consider whether to exercise the power in any circumstances means exactly what it says. Under no circumstances can the Minister be compelled to exercise the power.

13 The structure of the section is relevantly indistinguishable from the structure of a number of other sections of the Act which confer personal and non-compellable powers on the Minister. Those other sections include ss 46A, 48B, 195A and 417, each of which has been considered by this Court in one or more of *Plaintiff M61/2010E v The Commonwealth*[9], *Plaintiff S10/2011*, *Plaintiff M79/2012 v Minister for Immigration and Citizenship*[10], *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[11] and *Minister for Immigration and Border Protection v SZSSJ*[12]. Drawing on the reasoning in those cases, the content of the power conferred by s 351(1) can be explicated as follows.

14 The Minister exercises the power conferred by s 351(1) by personally making the first or both of two distinct sequential statutory decisions neither of which the Minister is obliged to make. The first is procedural. The second is substantive. The procedural decision is either to consider, or to not consider, whether it is in the public interest to substitute a more favourable decision for a decision of the Tribunal. The substantive decision – which the Minister may but need not make where the Minister has made a procedural decision to consider

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6 See ss 19(1) Item 1 and 19(2)(a) of the *Acts Interpretation Act 1901* (Cth).

7 Section 34AAB of the *Acts Interpretation Act 1901* (Cth).

8 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 449-450 [176]-[179].

9 (2010) 243 CLR 319.

10 (2013) 252 CLR 336.

11 (2013) 251 CLR 322.

12 (2016) 259 CLR 180.

whether it is in the public interest to substitute a more favourable decision – is either to think that it is in the public interest to substitute a more favourable decision and to do so, or not to so think and not to do so. The procedural decision, no less than the substantive decision, involves "a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory enactments may enable given reasons to be pronounced definitely extraneous to any object the legislature could have had in view"[13]. The power is not further divisible.

15 A procedural decision made personally by the Minister to consider making a substantive public interest decision is an exercise of the power conferred by s 351(1). Likewise, a procedural decision made personally by the Minister not to consider making a substantive public interest decision is an exercise of the same statutory power. Within the meaning of the Act, each is a "privative clause decision" made under s 351(1)[14]. For the avoidance of doubt, s 474(7) spells that out. Within the meaning of the Act, each is therefore also a "migration decision"[15].

16 The Minister is not limited to exercising the power conferred by s 351(1) to make a procedural decision – to consider or not to consider making a substantive public interest decision – only in an individual case. The Minister can exercise the statutory power to make a procedural decision in a specified class of case and can do so in advance of a case arising within that class. Thus, the Minister can exercise the power conferred by s 351(1) to make a procedural decision to the effect that "I will consider making a substantive public interest decision in any case that has the following characteristics ... but I will not consider making a substantive public interest decision in any case that has the following characteristics ...".

17 For example, the Minister could exercise the power conferred by s 351(1) to make a procedural decision not to consider making a substantive public interest decision in any case which does not meet objective criteria specified by the Minister. The Minister could exercise the statutory power to make a procedural decision not to consider making a substantive public interest decision in any case where the Department has received a request for the exercise of the power which is not supported by information which a departmental officer assesses to bring the

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13 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648 [30] (cleaned up); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at 353 [39], 377 [127].

14 See s 474(2) and (3)(g) of the Act.

15 See s 5(1) of the Act.

case within a class which the Minister has indicated to be a class in which the Minister wishes to consider making a substantive public interest decision[16].

18 But the power conferred by s 351(1) to make the procedural decision not to consider making a substantive decision in a class of case is not unbounded. The power is bounded by the exclusivity which s 351(3) attaches to the totality of the power which s 351(1) confers on the Minister and which s 351(3) attaches in particular to the assessment of the public interest. Plainly, it would not be open to the Minister to decide not to consider making a substantive decision in a class of case defined by reference to whether a departmental officer or any other person might think it to be not in the public interest to substitute a more favourable decision for a decision of the Tribunal. For the Minister to do so would be for the Minister to abdicate to that other person the core aspect of the substantive decision-making power under s 351(1) which s 351(3) makes clear can be exercised by no one but the Minister.

19 Being under no obligation to exercise the statutory power to make a procedural decision at all, however, the Minister can choose to make no procedural decision one way or the other under s 351(1). The Minister can instead choose to exercise executive power, involving the Minister acting in "a capacity which is neither a statutory nor a prerogative capacity"[17], to give a non-statutory instruction to officers of the Department administered by the Minister under s 64 of the *Constitution* as to the occasions, if any, on which the Minister wishes to be put in a position to consider making a procedural decision. Thus, the Minister can exercise executive power to give a non-statutory instruction to departmental officers to the effect that "I wish to be put in a position to consider making a procedural decision in any case that has the following characteristics ... but I do not wish to be put in a position to consider making a procedural decision in any case that has the following characteristics ...". That was found to be the effect of the 2009 Ministerial Instructions in *Plaintiff S10/2011*[18] as explained in *SZSSJ*[19]

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16 cf *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 512 [9], 522 [62]-[63].

17 *Davis v The Commonwealth* (1988) 166 CLR 79 at 108. See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 97 [132]-[133].

18 (2012) 246 CLR 636 at 653 [46], 665 [91]. See also *Bedlington v Chong* (1998) 87 FCR 75 at 80.

19 (2016) 259 CLR 180 at 198-200 [46]-[54].

and has been found to be the effect of the 2016 Ministerial Instructions by the Full Court in an unchallenged aspect of the decision under appeal[20].

20 In *Plaintiff S10/2011*, the only question raised in relation to departmental decisions made in purported compliance with the 2009 Ministerial Instructions was whether the making of those decisions was conditioned by a requirement of procedural fairness. The answer was that those decisions were not so conditioned.

21 Not raised in *Plaintiff S10/2011*, but squarely raised in each of the present appeals, is whether the permissible scope of such a non-statutory instruction is itself bounded by the exclusivity which s 351(3) attaches to the power which s 351(1) confers on the Minister. For reasons now to be explained, it is so bounded.

The statutory power limits the exercise of executive power

22 The unanimous reasons for judgment of this Court in *Brown v West*[21] contain the following statement of constitutional principle:

> "Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope."

23 The principle is central to the relationship between the Commonwealth Parliament and the Executive Government of the Commonwealth within the system of representative and responsible government established by Chs I and II of the *Constitution*[22]. The principle was applied in *Brown v West* to hold that a "necessary implication" of the statutory fixing of the expenditure able to be incurred by a parliamentarian using a postal credit card was to deny the existence of executive power to increase the level of expenditure[23]. The principle is applicable here.

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20 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 31 [23]-[24], 38 [54]-[55], 48 [87], 81 [264], 85 [283]-[284].

21 (1990) 169 CLR 195 at 202.

22 See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 93 [121]-[122].

23 (1990) 169 CLR 195 at 205.

24 Section 64 of the *Constitution* requires that Ministers be appointed to administer departments, although it permits several Ministers to be appointed to administer the one department[24]. Section 67 of the *Constitution* makes clear that departmental officers, like Ministers, are "officers of the Executive Government of the Commonwealth"[25].

25 The relationship between a Minister and the department administered by the Minister which can ordinarily be taken to be contemplated by the Parliament when conferring a discretionary statutory power on a Minister is that described by Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[26]:

> "The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and précis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and précis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and précis of the material relevant to that decision."

26 When conferring on a Minister a discretionary statutory power unaccompanied by any duty to consider its exercise, the Parliament can ordinarily be taken to contemplate that the Minister will be able to task the department administered by that Minister with sorting the wheat from the chaff so as to bring to the personal attention of the Minister only those requests for exercises of discretionary statutory powers which departmental officers assess to warrant the

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24 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 403 [17], 415 [65], 459-460 [210]-[211], 464-465 [221].

25 See *Comcare v Banerji* (2019) 267 CLR 373 at 409-412 [56]-[65].

26 (1986) 162 CLR 24 at 65-66.

Minister's personal consideration. The Parliament can be taken to contemplate that, in undertaking such assessments, departmental officers will comply with instructions issued by or under the authority of the Minister or the Secretary of the department[27].

27 All of this accords with the general observation that "when a Minister is entrusted with administrative functions he may, in general, act through a duly authorized officer of his department"[28]. The "underlying principle" throughout is that "where a power or function is conferred on a Minister, in circumstances where, given administrative necessity, Parliament cannot have intended the Minister to exercise the power or function personally, an implied power of delegation (or agency) may be inferred"[29]. But the availability of such an inference must ultimately depend on the precise statutory scheme.

28 The sections of the Act which are expressed to confer powers capable of being exercised in the public interest, if at all, only personally by a Minister are obviously designed to cut across the ordinary relationship between a Minister and the department administered by that Minister. The sections cut both ways. They confine to a Minister (as distinct from the department administered by that Minister) any decision to exercise such a power in the public interest. They also confine to a Minister (as distinct from the department administered by that Minister) any decision not to exercise such a power in the public interest.

29 In enacting s 351 of the Act, the Parliament has seen fit to entrust to the Minister alone the evaluation of the public interest in substituting a more favourable decision for a decision of the Tribunal. A necessary implication of the exclusivity imposed by s 351(3) on the power which s 351(1) confers on the Minister is to deny the existence of executive power to entrust the dispositive evaluation of the public interest in substituting a more favourable decision to an executive officer other than the Minister.

30 Put another way, the extension by s 61 of the *Constitution* of the executive power of the Commonwealth to "the execution and maintenance ... of the laws of

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27 See s 57 of the *Public Service Act 1999* (Cth).

28 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 128 [33], quoting *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 11 discussing *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.

29 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2014) 88 NSWLR 125 at 129 [12].

the Commonwealth" does not authorise a Minister or any other officer of the Executive Government of the Commonwealth to undertake any non-statutory action that is expressly or impliedly excluded by a law of the Commonwealth. By confining evaluation of the public interest for the purpose of s 351(1) to the Minister personally, s 351(3) of the Act effects such an exclusion.

31 Put yet another way, being limited by s 351(3) to exercising personally the power conferred by s 351(1) – to make a statutory decision as to whether or not to consider whether it is in the public interest to substitute a more favourable decision for a decision of the Tribunal and likewise to make a statutory decision as to whether it is or is not in the public interest to substitute a more favourable decision – the Minister cannot circumvent that statutory limitation through a purported exercise of executive power which gives conclusive effect to an anterior consideration of the public interest undertaken by a departmental officer outside, but for the purpose of, the statutory power. What s 351 prevents the Minister or a departmental officer from doing directly in the exercise of statutory power, it prevents the Minister or a departmental officer from doing indirectly in the exercise of executive power[30].

32 That is the statutory limitation on executive power which will be seen to be transgressed by the 2016 Ministerial Instructions and by the two impugned departmental decisions made in purported compliance with the 2016 Ministerial Instructions.

The 2016 Ministerial Instructions

33 The 2016 Ministerial Instructions were not expressed with statutory precision. But their import was tolerably clear.

34 In relation to "first requests" for exercises of the power conferred by s 351(1), the Minister instructed in section 10.1 of the 2016 Ministerial Instructions that he wished to be put into a position to consider making a procedural decision only in cases assessed by the Department to have unique or exceptional circumstances. Cases assessed by the Department not to have unique or exceptional circumstances were to be "finalised" by the Department without referral to the Minister.

35 In relation to "repeat requests" for exercises of the power conferred by s 351(1), the Minister instructed in section 10.2 of the 2016 Ministerial

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30 *Wragg v New South Wales* (1953) 88 CLR 353 at 387-388; *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305.

Instructions that he wished to be put into a position to consider making a procedural decision only if the Department was satisfied of a significant change in circumstances raising new substantive issues and then only if the Department assessed those new substantive issues to have unique or exceptional circumstances.

36 Unique or exceptional circumstances were described non-exhaustively in section 4 of the 2016 Ministerial Instructions. Examples there given of circumstances meeting that description included: "strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit, where at least one member of the family is an Australian citizen or Australian permanent resident"; "compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person"; "exceptional economic, scientific, cultural or other benefit would result from the person being permitted to remain in Australia"; and "circumstances [in which] the application of relevant legislation leads to unfair or unreasonable results in a particular case".

37 Other sections of the 2016 Ministerial Instructions stressed that it was for the Minister under the Act to determine what was and was not in the public interest and made clear that the Minister might "consider intervening in cases where the circumstances do not fall within the unique or exceptional circumstances as described in section 4".

38 No doubt, it is possible to imagine cases in which the Minister might think it to be in the public interest to substitute a more favourable decision than that of the Tribunal which would not fall within an example in section 4 of the 2016 Ministerial Instructions and which would not meet its more general description of unique or exceptional circumstances. However, it is impossible to avoid the conclusion that the concept of unique or exceptional circumstances was used in the 2016 Ministerial Instructions as an approximation of the public interest. By instructing that those cases assessed by the Department not to have unique or exceptional circumstances were to be finalised by the Department without referral, the Minister purported to entrust the dispositive evaluation of the public interest to departmental officers. The Minister thereby exceeded the statutory limit on executive power imposed by s 351(3).

39 The same problem did not arise in relation to the treatment of first requests in accordance with the 2009 Ministerial Instructions. As Griffiths J pointed out in

the Full Court[31], the 2009 Ministerial Instructions instructed that first requests were in all cases to be brought to the attention of the Minister. In the case of a first request assessed by them to have unique or exceptional circumstances, departmental officers were instructed to "bring the case to my attention in a submission so that I may consider exercising my power". In the case of a first request assessed by them not to have unique or exceptional circumstances, departmental officers were instructed to "bring the case to my attention through a short summary of the issues in schedule format, so that I may indicate whether I wish to consider the exercise of my power".

40 Whether the same problem arose in relation to the treatment of repeat requests in accordance with the 2009 Ministerial Instructions was touched on in the present appeals in the context of an argument put by the first respondents that the 2016 Ministerial Instructions were sufficiently similar to the 2009 Ministerial Instructions for the second ground of appeal to be taken to be foreclosed by *Plaintiff S10/2011*.

41 The 2009 Ministerial Instructions instructed that a repeat request was ordinarily to be dealt with by the Department replying that the Minister did not wish to consider exercising power but that a repeat request might be referred to the Minister where the Department was satisfied that there had been a significant change in circumstances which raised new substantive issues not previously provided to and considered by the Minister and which, in the "opinion" of the Department, fell "within the ambit" of unique or exceptional circumstances. If it were necessary to consider the manner in which repeat requests were dealt with under the 2009 Ministerial Instructions in more detail, much would turn on the understanding in practice of the nature of the opinion to be formed. If the understanding was that the departmental officers were to form and act on their own opinions as to whether there were unique or exceptional circumstances, the same problem may well have arisen. If the understanding was that departmental officers were to form and act on opinions as to whether there was a basis upon which the Minister might think that there were unique or exceptional circumstances, the problem would not have arisen.

42 Whether the same problem arose in relation to the treatment of repeat requests in accordance with the 2009 Ministerial Instructions, however, is simply not an issue which arises in these appeals. Even if the instructions in the 2009 Ministerial Instructions in relation to repeat requests had been interpreted and applied in the same way as instructions in the 2016 Ministerial Instructions, *Plaintiff S10/2011* would not assist the first respondents. No issue was raised in

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31 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 49-50 [94].

that case as to whether the 2009 Ministerial Instructions or their implementation infringed a statutory limitation on executive power. Nothing said in any of the reasons for judgment in this Court was directed to such an issue. *Plaintiff S10/2011* is not authority for what it did not decide[32].

Davis

43 Mr Davis is a citizen of the United Kingdom. He arrived in Australia in 1997 on a working holiday visa. He applied for a partner visa. Afterwards, he remained in Australia under the mistaken belief that he had been granted permanent residency. He became aware that he did not hold a current visa only in 2014, following which he was granted first a tourist visa (which expired) and then a working visa (which was cancelled after he ceased employment with the sponsoring employer). In the meantime, he applied again for a partner visa. His application was refused by a delegate of the Minister. The decision of the delegate was affirmed on review by the Tribunal in 2019.

44 On 11 February 2019, Mr Davis requested an exercise of power under s 351 of the Act to substitute a more favourable decision for that of the Tribunal. In purported compliance with section 10.1 of the 2016 Ministerial Instructions, an Assistant Director of the Department of Home Affairs on 8 May 2019 assessed Mr Davis' case not to have unique or exceptional circumstances and two days later notified him that his request was finalised without referral to the Minister.

45 On 15 May 2019, Mr Davis complained to the Department about how his request had been dealt with. Treating the complaint as a repeat request, the Assistant Director assessed it in purported compliance with section 10.2 of the 2016 Ministerial Instructions and on 20 May 2019 notified him that it too was finalised without referral to the Minister.

46 Mr Davis then applied to the Federal Court for judicial review of the Assistant Director's decision of 8 May 2019 on grounds which included legal unreasonableness. The application was dismissed at first instance by O'Callaghan J[33].

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32 See *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13].

33 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 791.

47 On his appeal to the Full Court, Mr Davis sought leave to raise a ground of appeal substantially to the effect of the second ground now raised in the appeal to this Court. The Full Court, by majority, refused that leave[34].

48 On 12 May 2022, Gageler and Steward JJ granted special leave to appeal on both grounds.

DCM20

49 DCM20 is a citizen of Fiji. She arrived in Australia in the early 1990s. She has lived here continuously since.

50 DCM20 initially applied for a protection visa. That application was refused by a delegate of the Minister. The decision of the delegate was affirmed on review by the then Refugee Review Tribunal in 1996. She requested an exercise of power to substitute a more favourable decision under s 417 of the Act. The Minister then administering the Act personally decided not to exercise that power in 1997.

51 DCM20 then applied for a resolution of status visa. Much later, that application was refused by a delegate of the Minister, whose decision was affirmed on review by the then Migration Review Tribunal in 2013. She requested an exercise of power to substitute a more favourable decision under s 351 of the Act. On 17 March 2016, an Assistant Minister then administering that section personally decided not to consider the exercise of that power**.**

52 On 22 June 2016, DCM20 again requested an exercise of power under s 351 of the Act with respect to the same decision of the Migration Review Tribunal. That further request was assessed by an Assistant Director of the Department of Immigration and Border Protection in purported compliance with section 10.2 of the 2016 Ministerial Instructions on 28 June 2016. The assessment resulted in DCM20 being notified that her repeat request had been finalised without referral to the Minister.

53 On 20 December 2019, DCM20 yet again requested an exercise of power under s 351 of the Act with respect to the same decision of the Migration Review Tribunal. This time, the request was assessed by an Assistant Director of the Department of Home Affairs in purported compliance with section 10.2 of the 2016 Ministerial Instructions on 10 January 2020. The result was DCM20 again

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34 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 37 [47], 38 [54], 54 [114(b)], 95 [330]-[332], see contra at 56 [124].

being notified that her repeat request had been finalised without referral to the Minister.

54 DCM20 then applied to the Federal Court for judicial review of the Assistant Director's decision of 10 January 2020 on grounds including legal unreasonableness. The application was dismissed at first instance by Perry J[35].

55 DCM20's appeal to the Full Court was heard and determined concurrently with that of Mr Davis. Unlike Mr Davis, DCM20 did not seek leave to raise any new ground of appeal.

56 DCM20 subsequently sought and, on 12 May 2022, was granted by Gageler and Steward JJ special leave to appeal solely on the ground of unreasonableness. In the course of the hearing of her appeal, she applied to amend her notice of appeal to add a second ground mirroring that on which Mr Davis had already been granted special leave to appeal. The Court reserved its decision on that application. There being no forensic prejudice to the respondents, leave to amend the notice of appeal should be granted and the earlier grant of special leave to appeal should be varied to include the additional ground.

Jurisdiction, standing and declaratory relief

57 By their originating applications to the Federal Court, Mr Davis and DCM20 each claimed, amongst other relief, a writ of prohibition or an injunction against one or more officers of the Commonwealth. There being no suggestion that those claims for relief were incapable of legal argument[36], the matter to which each application related was within the original jurisdiction conferred on the Federal Court by s 39B(1) of the *Judiciary Act 1903* (Cth).

58 At first instance and on appeal in the Federal Court, Mr Davis and DCM20 challenged only decisions made in the purported exercise of executive power. The same is true of their appeals to this Court. Neither ground of appeal in either matter challenges or relies on any decision or purported decision made, or proposed or required to be made, under the Act. Neither ground of appeal can therefore be characterised as "in relation to a migration decision" so as to be excluded from the jurisdiction of the Federal Court by s 476A(1) of the Act. It follows that neither

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35 *DCM20 v Secretary, Department of Home Affairs* [2020] FCA 1022.

36 *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 486-487 [35]-[36]; 400 ALR 1 at 10.

ground of appeal is derivatively excluded from the appellate jurisdiction of this Court under s 73 of the *Constitution*.

59 Section 37 of the *Judiciary Act* confirms the power of this Court, in the exercise of its appellate jurisdiction under s 73 of the *Constitution*, to "give such judgment as ought to have been given in the first instance". The relief now sought from this Court in relation to the second ground of appeal does not go beyond the making of a declaration of right. Whether relief by way of a writ of prohibition or an injunction might also have been available and appropriate need not be considered[37].

60 Section 21(1) of the *Federal Court of Australia Act 1976* (Cth) empowers the Federal Court to, "in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed". "It is neither possible nor desirable to fetter" the power to grant such declaratory relief "by laying down rules as to the manner of its exercise"[38].

61 Declarations appropriate to reflect the disposition of the second ground of each appeal are to the effect that the impugned departmental decisions made in purported compliance with sections 10.1 and 10.2 of the 2016 Ministerial Instructions exceeded the executive power of the Commonwealth. Being declarations that conduct found to have been engaged in by executive officers exceeded a legal limit on executive power, they are by definition declarations of right[39] and are unquestionably appropriate to be made in the exercise of judicial power[40].

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37 cf *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25 [42]; *In re K L Tractors Ltd* (1961) 106 CLR 318 at 338.

38 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437; see also *Sankey v Whitlam* (1978) 142 CLR 1 at 20, 23; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

39 See *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182 at 193; *Croome v Tasmania* (1997) 191 CLR 119 at 126, 132-133; *Egan v Willis* (1998) 195 CLR 424 at 439 [5].

40 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 379-380; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157

62 Each of Mr Davis and DCM20 has a "sufficient material interest"[41] to seek such a declaration in relation to the particular decision which he or she impugns. That is so notwithstanding that neither has a legal right or legally protected interest which would be vindicated by the declaration[42] and that neither had an interest which attracted any obligation of procedural fairness in the process which resulted in the making of the impugned decision[43]. The sufficiency of their respective interests arises from the fact that it would follow from the declaration of right that their request for an exercise of the power conferred by s 351(1) of the Act is yet lawfully to be finalised. It could not be said that the declaration would produce no foreseeable consequences for the ministerial and departmental respondents or for them.

Orders

63 The orders appropriate to be made in the appeal by Mr Davis are:

1. Grant leave to the appellant to file an Amended Notice of Appeal.

2. Appeal allowed.

3. Set aside the orders made by the Full Court of the Federal Court of Australia on 23 November 2021 (as varied by the orders of 15 December 2021) and in their place make the following orders:

    (a) Appeal allowed.

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[56]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

41 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257.

42 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 253 [64]-[65]; 399 ALR 214 at 233. See also *Edwards v Santos Ltd* (2011) 242 CLR 421 at 436 [37]; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 373 [102].

43 See *Griffith University v Tang* (2005) 221 CLR 99 at 117-118 [45], quoting *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 at 568. Compare *Kioa v West* (1985) 159 CLR 550 at 621-622; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 659 [68].

(b) Set aside the orders made by O'Callaghan J on 9 June 2020 and in their place make the following orders:

(i) Declare that the decision made by the third respondent on 8 May 2019 in purported compliance with section 10.1 of the 2016 Ministerial Instructions exceeded the executive power of the Commonwealth.

(ii) The first respondent pay the costs of the applicant.

(c) The first respondent pay the costs of the appellant.

4. The first respondent pay the costs of the appellant.

64 The orders appropriate to be made in the appeal by DCM20 are:

1. Grant leave to the appellant to file an Amended Notice of Appeal and vary the grant of special leave to appeal accordingly.

2. Appeal allowed.

3. Set aside the orders made by the Full Court of the Federal Court of Australia on 23 November 2021 (as varied by the orders of 15 December 2021) and in their place make the following orders:

(a) Appeal allowed.

(b) Set aside the orders made by Perry J on 20 July 2020 and in their place make the following orders:

(i) Declare that the decision made by the second respondent on 10 January 2020 in purported compliance with section 10.2 of the 2016 Ministerial Instructions exceeded the executive power of the Commonwealth.

(ii) The first respondent pay the costs of the applicant.

(c) The first respondent pay the costs of the appellant.

4. The first respondent pay the costs of the appellant.

65 GORDON J. These appeals touch upon some basic principles concerning the executive power of the Commonwealth. The appeals are to be decided by reference to only one of those principles: that the executive power of the Commonwealth is susceptible of control by statute[44].

66 For the reasons given by Kiefel CJ, Gageler and Gleeson JJ[45], s 351 of the *Migration Act 1958* (Cth) requires that the decisions to exercise or not to exercise the power given by that section may be made *only* by the Minister. Neither a decision to exercise the power, nor a decision *not* to exercise the power, may be made by an official in the department administered by a Minister (or any other person). I agree with the orders proposed by Kiefel CJ, Gageler and Gleeson JJ.

67 I write separately to make the point that it is always necessary first to identify the source of a power which is said to be executive power. It is not sufficient to state that the power is "non-statutory executive power" or "common law executive power". Each phrase assumes but does not demonstrate the existence of the asserted power.

Constitutional structure

68 The *Constitution* constitutes the Commonwealth of Australia; it creates "one indissoluble Federal Commonwealth under the Crown ... and under the Constitution" (preamble). The Commonwealth is a legal or juristic person[46], although that label may have a different meaning in respect of the Commonwealth compared to when it is applied to a private corporation or a natural person[47]. The branches of the Commonwealth do not have a separate legal personality[48]. Rather, those branches are empowered under the *Constitution* to exercise certain powers of the Commonwealth. And in setting up the institutional arrangements for the exercise of the powers of the Commonwealth, the *Constitution* separates and limits those powers.

69 What is significant is that each of the three chapters of the *Constitution* creating the three branches of the Commonwealth – Ch I (the Parliament),

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44 *Brown v West* (1990) 169 CLR 195 at 202. See also *Williams v The Commonwealth* ("*Williams [No 1]*") (2012) 248 CLR 156 at 250 [195], 369 [579]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 93 [121]-[122], 96 [128], 158 [369], 158-159 [372]-[373].

45 See reasons of Kiefel CJ, Gageler and Gleeson JJ at [14]-[15].

46 *Williams [No 1]* (2012) 248 CLR 156 at 184 [21], 185 [23], 237 [154].

47 See *Williams [No 1]* (2012) 248 CLR 156 at 193 [38].

48 *Williams [No 1]* (2012) 248 CLR 156 at 184 [21], 237 [154].

Ch II (the Executive Government) and Ch III (the Judicature) – begins with a section which provides that the relevant power of the Commonwealth is vested in a particular organ of government. "The legislative power of the Commonwealth shall be vested in a Federal Parliament ..." (s 1); "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative ..." (s 61); and "The judicial power of the Commonwealth shall be vested in [the High Court and such other courts as Parliament creates and/or invests with federal jurisdiction]" (s 71). None of the three chapters *defines* the power it is concerned with – legislative, executive or judicial.

70 It is true that Ch I, addressing legislative power, gives very elaborate specification of subject matters but it does not tell you what legislative power is. It simply provides that there is power to make laws with respect to those subject matters. In Ch III, there are elaborate provisions about *who* can exercise the judicial power of the Commonwealth and in what circumstances, but there is no definition of the judicial power of the Commonwealth. Similarly, in Ch II, the sections do not define executive power. As will be explained, the chapter identifies the *institutions* that are entrusted with the exercise of executive power, and marks out the boundary of that executive power to be the execution and maintenance of the *Constitution* and the laws of the Commonwealth[49]. Critically, like Chs I and III, Ch II also limits the power it confers: "the extent it marks out cannot be exceeded"[50].

71 It is this structure that not only is consistent with, but points directly to, the need to identify the source of executive power.

Executive power of the Commonwealth

72 The Executive Government is a "creature[] of the Constitution" and "has no powers except such as are conferred by or under [the *Constitution*], expressly or by necessary implication" from the text and structure of the *Constitution*[51].

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49 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("*Wool Tops Case*") (1922) 31 CLR 421 at 437; see also 431. See also *Davis v The Commonwealth* (1988) 166 CLR 79 at 92, 107; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [113], 87 [227], 89 [234]; *Williams [No 1]* (2012) 248 CLR 156 at 342 [483], 362 [560].

50 *Wool Tops Case* (1922) 31 CLR 421 at 438. See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264; *Davis* (1988) 166 CLR 79 at 111.

51 *Wool Tops Case* (1922) 31 CLR 421 at 453; see also 431, 437-438, 441. See also *Barton v The Commonwealth* (1974) 131 CLR 477 at 498; *Victoria v The*

Hence, the first question is to ask, "does the Executive have the asserted power and, if so, how?"; not to ask what prevents the Executive from doing what it seeks to do. In some cases the source is constitutional – including some prerogatives[52], nationhood[53], emergency[54], and ss 61 and 64, giving power to administer departments of State[55]. But otherwise, the source is statutory (and therefore, ultimately, also derived from the *Constitution*).

73 As was held in *R v Kirby; Ex parte Boilermakers' Society of Australia*[56]:

> "[I]n very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, *but whether it has been specifically vested by the Constitution in that department*, or *whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given*."

74 In *Boilermakers*, the concern about the separation of powers had its focus in Ch III but it was situated in a larger and fuller understanding of the separation of powers in the *Australian* context which is directly contrary to the implied premise in the Solicitor-General of the Commonwealth's submissions, which appeared to be that[57] the Executive can do anything it wants (anything, or "substantially" anything, a natural person can do) *unless* some limit can be

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Commonwealth and Hayden ("*AAP Case*") (1975) 134 CLR 338 at 362; *Pape* (2009) 238 CLR 1 at 23 [8(5)]; *Williams [No 1]* (2012) 248 CLR 156 at 362 [559]; *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 454-455 [24]-[25]; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 538 [42].

52 See *Wool Tops Case* (1922) 31 CLR 421 at 437-439; *Barton* (1974) 131 CLR 477 at 498; *Davis* (1988) 166 CLR 79 at 93; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [86]; *CPCF* (2015) 255 CLR 514 at 538 [42].

53 See *Davis* (1988) 166 CLR 79.

54 See *Pape* (2009) 238 CLR 1.

55 The source to contract to buy paperclips is to be found in s 61 because officers (Ministers) are appointed – and so conferred power – to administer departments of State under s 64 of the *Constitution*.

56 (1956) 94 CLR 254 at 279 (emphasis added). That analysis in *Boilermakers* goes back to *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; see in particular at 89-93, 96-98.

57 See also *Williams [No 2]* (2014) 252 CLR 416 at 467 [76].

identified[58]. That is the wrong analysis. It starts at the wrong point. And it is contrary to what was held in *Boilermakers* and said in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ("the *Wool Tops Case*")[59].

75 The proper starting point for an inquiry about executive power is to identify the source of the asserted power, function or capacity in the grants of executive power in s 61 and the other provisions in Ch II of the *Constitution*[60]. Section 61 of the *Constitution* provides:

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and *extends* to the *execution and maintenance of this Constitution, and of the laws of the Commonwealth*." (emphasis added)

76 There are two points to be made about s 61 of the *Constitution*. It does not say "includes" but "extends to". The phrase had to be "extends to" because executive power in a written constitution creating a federal government of limited powers was historically and necessarily different from executive power in a unitary state with no single written constitution and with executive power centred in the monarchy[61].

77 And the "extends to" clause in s 61 should *not* be read as indicating the existence of a broad and undefined executive power. Rather, "extends to" is used in the sense of "adds to" and gives a certain range or scope to the executive power. Thus, s 61 contains both an addition and a limit[62]. The extension is "delimiting"[63] in the sense that it adds to executive power the execution and maintenance of the *Constitution* and the laws of the Commonwealth but, at the same time, it gives a specific range, scope or magnitude to both the extension of executive power and

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58 cf Gageler, "The Legitimate Scope of Judicial Review: The Prequel" (2006) 57 *Admin Review* 5; Perry, "The Crown's Administrative Powers" (2015) 131 *Law Quarterly Review* 652.

59 (1922) 31 CLR 421 at 431-433, 437-439, 441, 453. See also *CPCF* (2015) 255 CLR 514 at 598-601 [270]-[279].

60 *Wool Tops Case* (1922) 31 CLR 421 at 438; *CPCF* (2015) 255 CLR 514 at 538 [42].

61 See *Wool Tops Case* (1922) 31 CLR 421 at 439-440; *Boilermakers* (1956) 94 CLR 254 at 267-268; *AAP Case* (1975) 134 CLR 338 at 378-379; *Williams [No 1]* (2012) 248 CLR 156 at 363 [562].

62 See *Re Judiciary* (1921) 29 CLR 257 at 264; *Wool Tops Case* (1922) 31 CLR 421 at 431, 438; *Williams [No 1]* (2012) 248 CLR 156 at 362 [560].

63 *Wool Tops Case* (1922) 31 CLR 421 at 431, 444; see also 437-438.

executive power more generally. As was said in *Boilermakers*, "[a] federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but *it must be incompetent to go beyond them*"[64]. Put in different terms, executive power is subject to boundaries and, in the case of the extension under s 61, the boundary is the execution and maintenance of the *Constitution* and the laws of the Commonwealth[65]. As observed, the content of executive power in s 61 may be said to extend to some prerogative powers, appropriate to the Commonwealth, that were accorded to the Crown at common law[66]. Critically, however, as *Williams v The Commonwealth*[67] and *Williams v The Commonwealth [No 2]*[68] demonstrate, the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that it is the same as the ambit of British executive power at common law. For present purposes, it is appropriate to put prerogatives, nationhood and emergency to one side.

78 Next, Ch II of the *Constitution*, headed "The Executive Government", was established to take from its inception the form of a responsible government[69]. Two ideas are central to the concept of responsible government – the Executive acts on the advice of its Ministers and the Ministers are responsible to the Parliament for the actions of the Executive[70]. So how is that addressed in the *Constitution*?

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64 (1956) 94 CLR 254 at 267 (emphasis added). See also *Wool Tops Case* (1922) 31 CLR 421 at 437-438, 458; *Dignan* (1931) 46 CLR 73 at 96-97.

65 See *Wool Tops Case* (1922) 31 CLR 421 at 438. See also *AAP Case* (1975) 134 CLR 338 at 378-379; *Williams [No 1]* (2012) 248 CLR 156 at 230 [130], 364 [564].

66 *CPCF* (2015) 255 CLR 514 at 538 [42], citing *Cadia Holdings* (2010) 242 CLR 195 at 226 [86] and *Williams [No 1]* (2012) 248 CLR 156 at 227-228 [123].

67 (2012) 248 CLR 156.

68 (2014) 252 CLR 416 at 469 [81], see generally 467-469 [76]-[83].

69 *Plaintiff M68* (2016) 257 CLR 42 at 92 [119].

70 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147; *Boilermakers* (1956) 94 CLR 254 at 275; *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 364-365; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135, 184-185; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 415 [63]-[64], 463 [217]; *Comcare v Banerji* (2019) 267 CLR 373 at 409-410 [59], 436-437 [146]-[149].

79 In addition to s 61, there are five provisions in Ch II about the institutions exercising executive power that are important. First, s 62 provides that there shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth.

80 Second, s 64 provides that there will be Ministers of State, who are members both of the Federal Executive Council and of Parliament:

> "The Governor-General may appoint *officers* to administer such *departments of State* of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They *shall be members of the Federal Executive Council*, and shall be the Queen's Ministers of State for the Commonwealth.
>
> **Ministers to sit in Parliament**
>
> After the first general election no Minister of State shall hold office for a longer period than three months unless *he is or becomes a senator or a member of the House of Representatives*." (emphasis added)

The requirement that Ministers are senators or members of the House of Representatives (or become so within three months of appointment) "provides the machinery by which a Minister is accountable to Parliament"[71].

81 Third, under s 65, Ministers shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs. Fourth, s 67 provides for the appointment of civil servants: "[u]ntil the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council". Fifth, under s 69, there will be the transfer of certain departments from the former colonies to the Commonwealth.

82 As is clear, departments of State expressly form part of the institutions of Executive Government under the *Constitution*, as do the officers (Ministers) appointed to administer those departments[72]. Consequently, under s 61, the executive power for the "execution and maintenance of this Constitution"

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71 *Re Patterson* (2001) 207 CLR 391 at 415 [64].

72 See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 70 [199].

includes a field of action for the administration of departments of State under s 64 of the *Constitution*[73].

83 There are also provisions in Chs I and III of the *Constitution* that directly concern executive power and mark out its relationship to legislative and judicial power. In Ch I of the *Constitution*, s 51(xxxix) provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> (xxxix) matters incidental to the execution of any power *vested by this Constitution* in the Parliament or in either House thereof, *or in the Government of the Commonwealth*, or in the Federal Judicature, or *in any department or officer of the Commonwealth*." (emphasis added)

84 As was explained in *Boilermakers*[74]:

> "[The legislative power in s 51(xxxix)] *takes the powers vested by the Constitution respectively in the three branches of government*, that is to say by s 1, *by s 61* and by s 71, and gives a power to make laws with respect to matters *incidental to the execution of these various powers, and adds, apparently for the purposes of such provisions as ss 64 and 69, a reference to the powers vested in any department or officer of the Commonwealth*."

85 What s 51(xxxix) does – as *Boilermakers* recognised – is to provide legislative power in relation to matters incidental to the "execution of any power" vested by the *Constitution* "in any department or officer of the Commonwealth". It provides incidental legislative power to Parliament to make laws with respect to the two institutions of the Executive Government – or structures of the Executive Government – namely officers (Ministers) and departments that are established under s 64 of the *Constitution*. It allows not only for facilitation of executive power, but also for limitation of the manner and circumstances of its exercise, and so reflects the subordination of the Executive to Parliament[75]. And the Executive and the officers of the Commonwealth are always subject to the

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73 *Williams [No 1]* (2012) 248 CLR 156 at 191 [34].

74 (1956) 94 CLR 254 at 269 (emphasis added). See also *Plaintiff M68* (2016) 257 CLR 42 at 93 [122].

75 *Plaintiff M68* (2016) 257 CLR 42 at 93 [122]-[123].

entrenched jurisdiction of this Court under ss 75(iii)[76] and 75(v)[77] of the *Constitution*.

86 Underlying all of these provisions – across Chs I, II and III of the *Constitution* – is the principle of government accountability: "the basic idea that the executive branch and its delegates must be answerable, and as a general principle justify their actions, to the public, the Parliament, the courts or any administrative agency"[78]. This is the idea underpinning the relationship between members of the public and the Executive Government, between the Executive Government and the Parliament, and between the Executive Government and the Judicature[79].

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76 The "Commonwealth" in s 75(iii) has been described as referring to the Executive Government of the Commonwealth, the purpose of s 75(iii) being "to ensure that the political organization called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction [which could be invoked]": *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 362-363; *Plaintiff M68* (2016) 257 CLR 42 at 94 [124].

77 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [38]-[39]. See also *Bank of NSW* (1948) 76 CLR 1 at 363; *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482-483 [5], 513-514 [103]-[104]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 668-669 [45]-[46]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580 [98]; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 347 [57]-[59]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 204 [71], 206 [81]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 463-464 [92]; 390 ALR 590 at 612.

78 *MZAPC* (2021) 95 ALJR 441 at 465 [98]; 390 ALR 590 at 614, quoting Boughey and Weeks, "Government Accountability as a 'Constitutional Value'", in Dixon (ed), *Australian Constitutional Values* (2018) 99 at 103. See also *MZAPC* (2021) 95 ALJR 441 at 463-464 [92]; 390 ALR 590 at 612, quoting French, "Administrative Law in Australia: Themes and Values Revisited", in Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (2014) 24 at 29.

79 *MZAPC* (2021) 95 ALJR 441 at 465 [98]-[99]; 390 ALR 590 at 614.

87 It also reflects that the *Constitution* "is framed upon the assumption of the rule of law"[80]. While the precise meaning of the rule of law is often contested[81], the irreducible meaning of the rule of law, about which there cannot be any debate, is "that Government should be under law, that the law should apply to and be observed by Government and its agencies, those given power in the community, just as it applies to the ordinary citizen"[82]. The "agreed beginning" for debates about the rule of law is "that State power must be exercised in accordance with promulgated, non-retrospective law made according to established procedures"[83]. Public power is not to be exercised in a way that is contrary to law, and, of no less significance, the Executive cannot itself authorise a breach of the law[84].

Executive power for the administration of departments and execution of laws

88 One of the two limbs of executive power mentioned in s 61 is the execution and maintenance of the laws of the Commonwealth. The term "laws of the Commonwealth" is a reference to statute law[85]. The execution of laws means doing something authorised or required by those laws[86].

89 The function is characteristically performed by execution of statutory powers[87]; however, it also extends to doing things which are necessary or incidental to the execution and maintenance of a valid law of the Commonwealth

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80 *Plaintiff S157* (2003) 211 CLR 476 at 492 [31]. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Graham* (2017) 263 CLR 1 at 24-25 [40].

81 *MZAPC* (2021) 95 ALJR 441 at 463 [91]; 390 ALR 590 at 612.

82 *MZAPC* (2021) 95 ALJR 441 at 463 [91]; 390 ALR 590 at 612, quoting Stephen, "The Rule of Law" (2003) 22(2) *Dialogue* 8 at 8. See also Laws, *The Constitutional Balance* (2021) at 13, 15.

83 *MZAPC* (2021) 95 ALJR 441 at 463 [91]; 390 ALR 590 at 612, quoting Laws, *The Constitutional Balance* (2021) at 15.

84 *MZAPC* (2021) 95 ALJR 441 at 464 [96]; 390 ALR 590 at 613, citing *A v Hayden* (1984) 156 CLR 532 at 540.

85 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487.

86 *Australian Communist Party* (1951) 83 CLR 1 at 230.

87 *Davis* (1988) 166 CLR 79 at 109. See also *Williams [No 1]* (2012) 248 CLR 156 at 190 [31].

once that law has taken effect[88]. The latter field does not require express statutory authority, nor is it necessary to find an implied power in the statute[89]. In that sense, administrative action that is incidental to the execution of a law does not involve statutory power, but finds its source in – and is controlled by – the statute and s 61 of the *Constitution*. Incidental action is strictly ancillary[90]; the Executive "cannot change or add to the law; it can only execute it"[91]. In that respect, executive action is qualitatively different from legislative action[92]. There is no executive power or capacity to dispense with the operation of the general law – whether statute or common law[93]. This principle, as was said in *A v Hayden*[94], "is fundamental to our law, though it seems sometimes to be forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies".

90 The other of the two limbs of executive power mentioned in s 61 is the execution and maintenance of the *Constitution.* As explained, this limb includes an area of executive action necessary for the administration of departments of State under s 64 of the *Constitution.* But to describe it as non-statutory or common law is likely to distract and mislead. Its source is the *Constitution* – ss 61 and 64.

91 Because only the Minister can exercise the powers given by s 351, it is not necessary to examine, in this case, what has come to be known as the *Carltona* principle[95]. Three points, however, should be made. First, I accept that,

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88 *Williams [No 1]* (2012) 248 CLR 156 at 184 [22], citing *R v Kidman* (1915) 20 CLR 425 at 440-441 and *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464. See also *Williams [No 1]* (2012) 248 CLR 156 at 191 [34]; *CPCF* (2015) 255 CLR 514 at 648 [484].

89 *Williams [No 1]* (2012) 248 CLR 156 at 191 [34].

90 See *Kidman* (1915) 20 CLR 425 at 440; *Australian Communist Party* (1951) 83 CLR 1 at 193; *Shanahan v Scott* (1957) 96 CLR 245 at 250.

91 *Kidman* (1915) 20 CLR 425 at 441. See also *Plaintiff M68* (2016) 257 CLR 42 at 158-159 [372]-[373].

92 *Williams [No 1]* (2012) 248 CLR 156 at 187 [27].

93 *Plaintiff M68* (2016) 257 CLR 42 at 98 [136], 158-159 [372]-[373]. See also *Kidman* (1915) 20 CLR 425 at 441.

94 (1984) 156 CLR 532 at 580.

95 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.

as Brennan J explained in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[96], part of a department's function is to undertake an analysis, evaluation and précis of material to which a Minister is bound to have regard, or to which the Minister may wish to have regard, in making decisions. As Brennan J explained, the Minister may personally make a statutory decision while relying on the department's summary, provided the Minister does in fact have regard to all relevant considerations that condition the exercise of the power[97]. In such a case, the department is assisting the Minister; it is not exercising a power on the Minister's behalf.

92 Second, however, it is an altogether different proposition (which I do not accept) that a Minister may ordinarily give the department administered by the Minister the task of deciding which requests for the exercise of discretionary statutory powers should be brought to the personal attention of the Minister by assessing which requests warrant the Minister's personal consideration. I do not accept that Parliament can ordinarily be taken to contemplate that this can or will be done. Prima facie, when Parliament confers a statutory power on a person, it intends that person to exercise the power[98]. Further, subject to a contrary intention, the conferral of a statutory discretion implies a duty to consider any application that is made for the exercise of power[99].

93 That said, I accept that there is a general principle that, "where a power or function is conferred on a Minister, in circumstances where, given administrative necessity, Parliament cannot have intended the Minister to exercise the power or function personally, an implied power of [agency] may be inferred"[100]. In these appeals, it was clear that s 351(1) did not permit such authorisation because Parliament expressly required under s 351(3) that the power – both its procedural and substantive limbs – be exercised personally. The plurality suggest that, were it not for s 351(3), that principle would have applied to the procedural limb of

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96 (1986) 162 CLR 24 at 65-66.

97 *Peko-Wallsend* (1986) 162 CLR 24 at 66.

98 *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Q)* (1979) 142 CLR 460 at 481; *Dainford Ltd v Smith* (1985) 155 CLR 342 at 349.

99 *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 17-18, referring to *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189.

100 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2014) 88 NSWLR 125 at 129 [12]. See also *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 11; *Peko-Wallsend* (1986) 162 CLR 24 at 38; *Plaintiff M61* (2010) 243 CLR 319 at 350 [68]; *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 128 [33].

s 351(1), because Parliament can "ordinarily" be taken to permit a Minister entrusted with a non-compellable discretionary power to instruct departmental officials to sort through requests so as to bring to the Minister's attention only those that the officials assess to warrant the Minister's consideration. But these are not matters to be answered according to some broad and untethered assertion of what "ordinarily" Parliament can be taken to contemplate. Whether such an authorisation is possible will depend on the construction of the statute, in particular the nature, scope and purpose of the power, the consequences of its exercise, and its function under the statutory scheme[101].

94 Third, and finally, there is both a critical difference, and an important commonality, between officials assisting the Minister to exercise a power in the manner described by Brennan J in *Peko-Wallsend*, and officials permissibly acting under an authorisation to exercise the Minister's power under the statute. The critical difference is that in the first category the Minister exercises the statutory power whereas, in the second category, the official exercises the statutory power in the Minister's name (not some "non-statutory" power or capacity). The important commonality is that in both categories – whether the power is exercised by the Minister or by the official as the agent of the Minister – the power is subject to the enforceable limits that inhere in the statute.

95 Ultimately, the Executive Government was and remains relevantly subordinated to the Parliament[102]. Put in different terms, "[w]hatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute"[103]. Its scope must be identified with proper understanding of the "basal assumption of legislative predominance inherited from the United Kingdom" and the relationship between Chs I and II of the *Constitution*[104].

96 Where a statute conditions powers or functions by reference to the persons who can exercise them, the circumstances in which they can be exercised, and the purposes for which they can be exercised, there will not be any unconstrained executive power or function covering the same subject matter that is preserved[105].

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101 *Peko-Wallsend* (1986) 162 CLR 24 at 38.

102 *Plaintiff M68* (2016) 257 CLR 42 at 93 [123].

103 *Plaintiff M68* (2016) 257 CLR 42 at 93 [122], quoting *Brown* (1990) 169 CLR 195 at 202.

104 *Williams [No 1]* (2012) 248 CLR 156 at 232 [136].

105 *CPCF* (2015) 255 CLR 514 at 538 [41].

If a statute regulates or controls how executive power is to be exercised, then the statute governs *to the exclusion of any residual power*[106].

Exercise of executive power under s 351

97 As has been stated, s 351 of the *Migration Act* requires that the decisions to exercise or not to exercise the power given by that section may be made *only* by the Minister. Neither a decision to exercise the power, nor a decision *not* to exercise the power, may be made by an official in the department administered by a Minister (or any other person). That is, s 351 excludes the capacity of another to decide that it is or is not in the public interest for the Minister to consider exercising the power or for the statutory power to be exercised. Aspects of the exercise of power under s 351 are worth restating.

98 Section 351 is a conferral of statutory executive power on the Minister. The Minister does not have a duty to consider whether to exercise the power under s 351(1) in any circumstances[107]. This means the Minister cannot be compelled to consider whether to exercise the power. It must be recognised, however, that a Minister might put themselves in a position where they are committed to following a certain process and may become obliged to consider exercising the power[108].

99 A Minister can exercise the statutory power under s 351(1) to make a decision to consider or not to consider making the substantive decision under s 351 by reference to a specified class of case and can do so before a case within that class exists[109]. As the plurality state, the Minister could exercise the power conferred by s 351(1) to make a procedural decision to the effect that "I will consider making a substantive public interest decision in any case that has the following characteristics ... but I will not consider making a substantive public interest decision in any case that has the following characteristics ...". But the characteristics identified by the Minister must be objective and cannot be whether a departmental official or any other person might think it to be or not to be in the public interest to substitute a more favourable decision for that of the Tribunal. The exercise of the statutory power under s 351 is not unbounded.

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106 *CPCF* (2015) 255 CLR 514 at 600-601 [279].

107 *Migration Act*, s 351(7).

108 cf *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 340-341 [24]-[26], 357-358 [88]-[91].

109 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 665 [91].

100 Thus, I do not accept that, because the Minister is under no obligation to exercise the statutory power to make a procedural decision at all[110], the Minister can choose to make no procedural decision one way or the other under s 351(1) but give some "non-statutory" instruction to officials in the department administered by the Minister under s 64 of the *Constitution* as to the occasions, if any, on which the Minister wishes to be put in a position to consider making such a procedural decision.

101 That statement, and the example that follows it, is too broad. First, the power to give an instruction in this context is derived from s 351 of the *Migration Act* and ss 61 and 64 of the *Constitution*[111], not some "non-statutory" source. Second, s 351(1) encompasses two decisions (procedural and substantive), and, as the plurality state, the power is not further divisible. Third, the statement blurs the important distinction between a Minister exercising a statutory power personally (which the officials in the department implement) and officials giving advice or assistance to the Minister for the exercise of the power by the Minister. Fourth, and no less important, the instruction cannot purport to require or permit the officials to make a decision reposed in the Minister by s 351(1).

102 The Minister may instruct officials to implement the Minister's procedural decision (by instructing the screening out of requests based on objective criteria) *or* the Minister may seek advice and assistance to enable the Minister to make a decision. In both cases, the processes undertaken by departmental officials are not and cannot be divorced from the statute[112].

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110 *Migration Act*, s 351(7).

111 See [88]-[90] above.

112 *Plaintiff S10* (2012) 246 CLR 636 at 665 [92]-[93].

EDELMAN J.

The real issues in these appeals

103 The appeals before this Court are two of the hundreds of cases where, under the *Migration Act 1958* (Cth), a delegate of the Minister administering that Act ("the Minister") had refused an application for a visa, that decision was affirmed by an administrative tribunal ("the Tribunal"), and the appellant requested that the Minister exercise a personal override power. These appeals concern the proper processes for the consideration and exercise of that personal override power.

104 The personal override power relevant to these appeals allows the Minister to substitute a more favourable decision even if the Tribunal would not have had power to make that more favourable decision. The Minister is not required to consider whether to exercise that personal override power. In neither case currently before the Court did the Minister do so. The Minister did not do so because officials of the department of State responsible for administering the Act, exercising a discretion under guidelines provided by the Minister, chose not to refer the requests to the Minister for consideration.

105 Since the Minister did not make any decision concerning the personal override power there was no ministerial decision about the exercise or non-exercise of the power that could be challenged. And since the Minister was not required to consider the exercise of the personal override power the Minister's lack of consideration could not be challenged. So the appellants each sought judicial review by challenging the actions of the departmental officials assisting the Minister. The appellants each asserted that the departmental officials had exercised executive power in an unreasonable way. Those challenges failed before each of the primary judges in the Federal Court of Australia[113], who held that the actions of the officials were not legally unreasonable. Appeals to the Full Court of the Federal Court of Australia on the same ground were determined together and dismissed[114].

106 At first instance, in each case, the appellant's challenge based on unreasonableness proceeded on the assumption that when the departmental officials chose not to refer the requests to the Minister they were otherwise authorised to do so. But in the Full Court, Mr Davis sought leave to raise an anterior ground of appeal to the effect that the actions of the officials went beyond

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113 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 791; *DCM20 v Secretary, Department of Home Affairs* [2020] FCA 1022.

114 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23.

their authority. A majority of the Full Court refused leave for this point to be raised, although Mortimer J, rightly recognising the importance of the point, would have granted leave. Her Honour ultimately dismissed the appeals with fidelity to existing law. But she correctly, and presciently, recognised that the state of the law was "troubling" and was difficult to reconcile with principle[115].

107 In this Court, Mr Davis was granted special leave to raise this anterior ground and, during the oral hearing, DCM20 sought leave to raise the same ground of appeal by a variation of the basis for her grant of special leave to appeal. There is no prejudice to the respondents in a grant of leave. Leave should be granted to DCM20.

108 In order to address the anterior ground, it is necessary to identify whether any "power" was exercised by the departmental officials. Some of the suggested formulations of that "power" resemble the bureaucratese of Sir Humphrey Appleby: a "procedural decision" by the officials to consider whether the Minister considered that he wished to consider the exercise of the "substantive power". Part of the difficulty with such formulations is the abuse of legal concepts by misdescribing a liberty to act as a power to act. The anterior ground should be expressed in terms that avoid this conflation. The issue should be expressed in simple language to be assessed as a matter of substance: did the departmental officials themselves exercise a liberty that is granted to the Minister personally?

109 When expressed in this way the essence of the issue concerns the point at which departmental officials cross the line between two categories of conduct: (i) permissible advice and assistance to the Minister so that the Minister can personally exercise the Minister's own liberty as to whether or not to consider the request; and (ii) an impermissible exercise by the officials themselves of the Minister's personal liberty.

110 In the application by departmental officials of the 2016 Ministerial Instructions relevant to these appeals, there is a fine line between category (i) conduct and category (ii) conduct. The reasons of Steward J treat the circumstances of these appeals as involving category (i). There is force in that view and, as Mortimer J correctly observed in her Honour's reasons in the Full Court in these appeals, it is a view that is consistent with the general tenor of past authority, including in this Court[116]. Ultimately, however, and contrary to the tenor of past

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115 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 62 [155].

116 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 62 [155].

authority, I consider that the circumstances of these two appeals involve category (ii).

111 The following three examples illustrate the dividing line. First, suppose that the Minister, confronted by hundreds of requests seeking the exercise of a personal override power, issues an instruction to departmental officials that over a period of time the Minister does not wish to consider exercising the power in relation to any request at all. The implementation of that decision during that time by officials – following the Minister's instruction – involves only assistance. In every case, the exercise of the liberty, refusing to consider the request, has been made by the Minister and not by the officials.

112 Secondly, suppose that the Minister instructs departmental officials that the Minister will consider all first applications but no repeat applications. Again, the implementation of that decision by officials involves no more than assisting the Minister to exercise the Minister's liberty to consider. The officials might sometimes have to exercise judgment as to whether a request is a repeat request. But in every case the exercise of the liberty to refuse to consider the requests has still been made by the Minister, not by the officials.

113 Thirdly, suppose that the Minister instructs departmental officials that they should decide, in the public interest, which requests the Minister should consider, and that they should not refer those requests to the Minister if they decide that the Minister should not consider them. In this third example, the decision as to which requests the Minister should consider is now being made, in substance, by the departmental officials. Although it remains possible that in a rare case the Minister might be alerted to the request by a third party (such as the media) and might then exercise the liberty to consider the request, the earlier decision by the departmental officials remains, in substance, an exercise of the Minister's liberty. In my view, the circumstances of these appeals are akin to this third example.

114 The past authority on this point, including decisions of this Court, has been premised upon an erroneous assumption, albeit with limited argument on the point. That assumption is that the actions of officials who implement guidelines of the Minister will always be characterised as the official merely assisting the Minister, rather than the official unlawfully exercising the Minister's personal liberty. Once that assumption is properly rejected, the circumstances of these appeals should be seen to involve, in substance, an unlawful exercise of the Minister's personal liberty by departmental officials. The appeals must therefore be allowed subject to one further issue.

115 The further issue is that the Solicitor-General of the Commonwealth submitted that the appeals should nevertheless be dismissed because s 476A(1) of the *Migration Act* excluded the jurisdiction of the Federal Court (and therefore the jurisdiction of any courts considering appeals from decisions of the Federal Court) to adjudicate upon the authority of the departmental officials to make decisions.

116 Section 476A(1) excludes the jurisdiction of the Federal Court in proceedings that concern decisions which are made, or which purport to be made, under the *Migration Act*. Since s 476A(1) is part of a scheme to exclude the jurisdiction of the courts, it is a provision that should be interpreted narrowly, consistently with reasonable expectations informed by deep common law values. So interpreted, s 476A(1) did not exclude the jurisdiction of the Federal Court in relation to the present matters because the unlawful actions of the departmental officials were not taken under the *Migration Act* and did not purport to be decisions made under the Act. Rather, they purported to be mere assistance to the Minister.

Executive powers and liberties and judicial review

117 "A loose vocabulary is a fruitful mother of evils."[117] The issues in these appeals and past authority have been beset by loose vocabulary which has generated much confusion. That loose vocabulary concerns the notions of "executive power" and the "rights" which are the subject of judicial review.

Executive power and the Constitution

118 Section 61 of the *Constitution* vests the executive power of the Commonwealth in the Queen, exercisable by the Governor-General, and "extends" that executive power to the execution and maintenance of the *Constitution* and of the laws of the Commonwealth. The *Constitution* provides that the Governor-General is advised by the Federal Executive Council and acts with that advice (ss 62, 63). It provides for the Governor-General to appoint Ministers to administer departments of State (s 64) and, subject to delegation or Commonwealth law, for the Governor-General in Council to appoint and remove all other officers of the Executive Government (s 67). But the *Constitution* does not define the "power" that the Governor-General, and hence Ministers, can exercise or delegate to others.

119 At a high level of generality, s 61 of the *Constitution* is the ultimate source of all Commonwealth executive "power". But to recognise the vesting of Commonwealth executive power by s 61 as the ultimate source of that "power" says nothing about the content of that vested "power" or how that content is to be identified. So too, s 61 contains no detail concerning the content of the power to which s 61 "extends" or the content of the matters the existence of which s 64 assumes for the administration of departments of State. In short, s 61 neither

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117 Gray, "Some Definitions and Questions in Jurisprudence" (1892) 6 *Harvard Law Review* 21 at 21, quoted in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 618 [150].

defines the concept of executive power nor explains the sources from which the content of that power can be identified[118].

The concept of executive power

120 Perhaps the best known, and most widely accepted, legal and analytical meaning given to the term "power", which separates it from other forms of legal relation, is that it is the ability to effect a change in legal relations[119]. This is, "in general terms", the starting point for the meaning of executive power in s 61 of the *Constitution*[120]. But the executive power to which s 61 refers is both narrower and wider than the concept of "power" in this analytic sense.

121 Executive power in s 61 is narrower than this analytic definition of power because it is confined to those actions which the law permits. Hence, as the Solicitor-General submitted, although an assault by an officer of the Executive would alter the legal rights of the person assaulted, and the consequent actions that they could bring, it is not an exercise of power that is contemplated by s 61.

122 Executive power in s 61 is also wider than this analytic definition of power because it includes all other jural relations of the Executive, including claim rights, liberties or privileges, and immunities[121]. In *Davis v The Commonwealth*[122], Brennan J referred to these other legal relations as "capacities" to distinguish them from "the Crown's powers" in the analytic sense described above. But, as Hohfeld observed, the term "capacity" is "unfortunate" and might not denote any legal relation at all[123]. "Capacity" has also sometimes been used interchangeably with

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118 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437, 461.

119 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 44; American Law Institute, *Restatement (First) of Property* (1936), §3. See also Wade, *Constitutional Fundamentals* (1980) at 46.

120 See *Griffith University v Tang* (2005) 221 CLR 99 at 128 [80].

121 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424, 438. See also *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 321.

122 (1988) 166 CLR 79 at 108. See also *In re K L Tractors Ltd* (1961) 106 CLR 318 at 335; Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 24.

123 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 45.

other terms, including "permission"[124], another word for which is a "liberty". On other occasions, "capacity", or "capacities and functions", has also been used in the context of s 61 of the *Constitution* to mean all legal relations: "rights, powers, privileges and immunities"[125].

123 Where "capacity" is used to refer to the general freedom of the Commonwealth Executive to act in a manner that does not affect the rights of others, the best description – to contrast it with the concept of a "power" in the sense of altering the legal relations of others – is a "liberty". For example, in *Clough v Leahy*[126], Griffith CJ properly described as a "liberty" the ability of officials to obtain information on any topic. Importantly, and in contrast with a power in the sense of altering the legal relations of others, the exercise of such a liberty does not affect the legal relations of any other person.

The sources of executive power

124 Although the entirety of Commonwealth executive power (including executive liberty and other jural relations) is recognised in s 61 of the *Constitution*, s 61 does not distinguish between the different sources of executive power that it vests in the Governor-General. The sources might be: (i) Commonwealth legislation; (ii) express or implied powers or liberties in the *Constitution* itself; or (iii) what is loosely described as the "common law". These sources might overlap and are not a neat, mutually exclusive taxonomy.

Constitutional executive power

125 As s 61 provides, Commonwealth executive power extends to the execution and maintenance of the *Constitution*. This includes powers to execute and maintain the *Constitution* which are express in, and implied by, the terms and structure of the *Constitution*. For instance, Commonwealth executive power includes the express power, contained in s 68 of the *Constitution*, for the command in chief of the naval and military forces of the Commonwealth. Commonwealth executive power also includes the implied power that is part of nationhood[127] and the power

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124 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 98 [135].

125 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424.

126 (1904) 2 CLR 139 at 157.

127 *Davis v The Commonwealth* (1988) 166 CLR 79 at 110-111; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 48-49 [92].

to respond to a national emergency[128] (which may both be aspects of the same concept, expressed at different levels of generality).

Statutory executive power

126 Statutory executive power (in the sense that includes statutory liberties and other jural relations) might be expressly or impliedly conferred by a law of the Commonwealth under a primary head of power in the *Constitution*. It might also be conferred by laws made under s 51(xxxix) of the *Constitution*, which provides for legislative power in respect of matters incidental to the execution of Commonwealth executive power, including Commonwealth executive power to protect and safeguard matters that are authorised by a law of the Commonwealth[129]. By providing in s 61 that Commonwealth executive power "extends to" the execution and maintenance of the laws of the Commonwealth, the *Constitution* "marks the external boundaries of the Commonwealth executive power"[130].

"Common law" executive power: non-statutory prerogative and general powers and liberties

127 "Common law" executive power, as it is commonly described, is subject to displacement by statute[131]. A determination of the scope of the "common law" executive power that is vested by s 61 of the *Constitution* is assisted by consideration of the common law powers that existed in British and colonial constitutional practice at the time of Federation[132].

128 The power of the British Crown included "the exercise of the discretionary authority ... by virtue of the common law without any express parliamentary

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128 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 89 [233]. See also *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 454 [23].

129 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 230; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464.

130 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437.

131 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 69-70 [85]; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 58 [27]. See also *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

132 *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 469 [81].

sanction or supervision"[133]. Some of those powers were described as prerogative powers of the Crown[134]. One view of prerogative powers, taken by Blackstone, is that a power is prerogative if it is one "which the king enjoys alone, in contradistinction to others"; if it were a power that were possessed by both king and subject, "it would cease to be prerogative any longer"[135]. An example of a prerogative power that is said to be "inherent in the Crown and in no one else" is the power to pardon a convicted criminal[136]. The prerogative powers are commonly considered to be common law powers because of a centuries-old understanding that prerogative powers are customs and practices recognised by the common law[137].

129 The presently fashionable view purports to draw a clear conceptual distinction between (i) "common law" prerogative powers and (ii) "common law", non-prerogative, "general administrative powers to carry on the ordinary business of government"[138]. On that view, the treatment of all powers of the Crown as prerogative was a matter upon which even writers as formidable as Coke[139] or Dicey[140] had nodded. The supposedly better view is that a common law non-prerogative power held by the Crown is one in respect of which there is a parity of

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133 *Halsbury's Laws of England*, 1st ed, vol 6, para 579.

134 *Farey v Burvett* (1916) 21 CLR 433 at 452. See also *Barton v The Commonwealth* (1974) 131 CLR 477 at 498, 505.

135 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 7 at 232.

136 Wade, "Procedure and Prerogative in Public Law" (1985) 101 *Law Quarterly Review* 180 at 191.

137 Coke, *The Third Part of the Institutes of the Laws of England* (1644), ch 24 at 84, note 8. But cf Kershaw, "Revolutionary amnesia and the nature of prerogative power" (2022) 20 *International Journal of Constitutional Law* 1071.

138 *R (New London College Ltd) v Secretary of State for the Home Department* [2013] 1 WLR 2358 at 2371 [28]; [2013] 4 All ER 195 at 210. See also *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 at 1695-1696 [46]-[47]; [2006] 1 All ER 487 at 506-507.

139 Coke, *The First Part of the Institutes of the Laws of England*, 3rd ed (1633), bk 2, ch 5, §125 at 90.

140 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 350.

power with "an ordinary person", such as the power to convey land or chattels[141]. This picture of common law prerogative powers and common law non-prerogative powers may not be as neat as the presently fashionable view draws it, particularly where the Commonwealth Executive is concerned. There are three complications.

130 First, the presently fashionable view does not usually distinguish between a power and a liberty. Serious errors can arise by conflating a liberty to act with a power to act. The conflation leads to erroneous reasoning that if a member of the Executive has the same liberties as a natural person this must mean that the member has the same powers to act, and thus the same abilities to affect the legal relations of others, as a natural person[142]. This reasoning is erroneous because, although a member of the Executive is not prohibited from (and thus has a liberty in respect of) "solving the Middle East crisis in a day" or "flying to Jupiter", that does not mean that the member has the power to do these things[143].

131 The absence of a prohibition upon action provides no justification for the existence of a power of the Commonwealth Executive. Indeed, to treat the absence of prohibition on action as giving rise to a power for the Commonwealth Executive to act could undercut the "distribution of powers and functions between the Commonwealth and the States"[144] in a federation formed by the *Constitution*. Hence, in *Williams v The Commonwealth*[145], the erroneous conflation of liberties and powers in the submissions of the Commonwealth parties[146] was not accepted by this Court, and consequent analogies between the powers of a natural person and the powers of the Commonwealth Executive were repeatedly rejected[147].

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141 Wade, "Procedure and Prerogative in Public Law" (1985) 101 *Law Quarterly Review* 180 at 191.

142 *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 357. Compare Gageler, "The legitimate scope of judicial review: the prequel" (2006) 57 *Admin Review* 5 at 6.

143 Perry, "The Crown's Administrative Powers" (2015) 131 *Law Quarterly Review* 652 at 656.

144 *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 469 [83].

145 (2012) 248 CLR 156.

146 (2012) 248 CLR 156 at 165.

147 (2012) 248 CLR 156 at 193 [38], 237-239 [154]-[159], 253-255 [204]-[207], 259 [217], 352-353 [518]-[524]. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

132 Secondly, even if the focus is only upon liberties, there are difficulties in identifying those non-prerogative liberties in which there is parity between the Commonwealth Executive and a natural person. The difficulty lies in assuming that the Crown "as a corporation possessing legal personality" has "the same liberties as the individual"[148] such that "that which is lawful to an individual can surely not be denied to the Crown"[149]. That reasoning ignores that "an act when performed by a government may assume a different significance from that performed by individuals"[150].

133 For instance, in *Clough v Leahy*[151], Griffith CJ (with whom Barton and O'Connor JJ agreed) treated the liberty of the Commonwealth Executive to hold a Royal Commission of inquiry without coercive powers as a liberty in common with the liberty of a natural person to make any inquiry. But an inquiry takes on a different complexion when it is undertaken by the Executive rather than a natural person[152]. Hence, Dixon J later treated the "source" of the liberty for the Commonwealth Executive to issue a Royal Commission of inquiry as "the prerogative of the Crown"[153].

134 Whether a liberty of the Commonwealth Executive is properly characterised as one that is shared with a natural person generally or as a prerogative of the Commonwealth Executive might ultimately depend on the level of generality at which the liberty is described. Similarly to the contrived assumption in *Clough v Leahy*, it is only possible on these appeals to treat a liberty

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148 *R v Secretary of State for Health; Ex parte C* [2000] 1 FLR 627 at 632, quoting *Halsbury's Laws of England*, 4th ed (1996 reissue), vol 8(2) at 94, para 101, note 6. See also *R (on the application of Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548 at 555-556 [21]. See further *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60 [126].

149 *Clough v Leahy* (1904) 2 CLR 139 at 157. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564, quoting *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 283.

150 Zines, "The inherent executive power of the Commonwealth" (2005) 16 *Public Law Review* 279 at 283-284, citing Winterton, *Parliament, the Executive and the Governor-General* (1983). See also Allen, *Non-Statutory Executive Powers and Judicial Review* (2022) at 43.

151 (1904) 2 CLR 139 at 157.

152 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 88-89.

153 *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 93-94.

of officers of the Commonwealth Executive to advise and assist a Minister as being common to a liberty held by a natural person generally if it is characterised at an artificially high level of generality: a liberty to advise and assist another person. Yet, just as the liberty to make an inquiry takes on a different complexion when it is undertaken by the Executive, the liberty to advise and assist a person takes on a different complexion when that person is a Minister and the advice and assistance concerns the exercise of executive power.

135 Thirdly, whether or not the label "non-prerogative" is attached to the exercise of everyday general powers or liberties by the Commonwealth Executive by analogy with a natural person generally, it is at least misleading to describe those powers or liberties as having their source in the "common law". A better description of those powers and liberties might be as "non-statutory general powers and liberties". This reflects their source in the reasonable necessity for actions by officers of the executive arm of the Commonwealth polity to ensure the basic existence and functional operation of the polity – the essential functions "of the central government of a country in the world of to-day"[154].

136 The creation of the Commonwealth of Australia − as a political body corporate or "body politic"[155] – necessarily entails the existence of powers that are "an essential attribute of this country as a sovereign nation"[156] and thus the conferral of powers and liberties for basic functions. These powers and liberties for basic functions can be described as relating to "the ordinary course of administering a recognised part of the government"[157]. They might include the power to hire and fire staff who perform the basic functions of administration. They might include the power to enter contracts, or dispose of property, in relation to matters that are a core part of the functioning of executive government[158]. And they might include powers and liberties that are necessarily incidental to the execution of a statutory provision.

137 This constitutional foundation for the existence of such non-statutory general powers and liberties for basic functions is consistent with the view of

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154 *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237 at 269.

155 *Hocking v Director-General, National Archives of Australia* (2020) 271 CLR 1 at 87-88 [213]. See also *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 120 [194].

156 *Barton v The Commonwealth* (1974) 131 CLR 477 at 505.

157 Sapienza, *Judicial Review of Non-Statutory Executive Action* (2020) at 37.

158 Hayne, "Executive Power" (2017) 28 *Public Law Review* 236 at 246.

Isaacs J in *R v Kidman*[159], where his Honour said − borrowing from Lord Selborne's discussion of the powers of the New South Wales Legislative Assembly[160] − that the "mere creation" of the body politic involves the implied grant of "whatever, in a reasonable sense, was necessary for the purposes of its existence and the proper exercise of its functions". That implication is reinforced by the presupposition in ss 67, 70, 81, 84, 86 and 119 of the *Constitution* of the existence of an executive arm of the polity with the ability to function[161], and particularly the assumption in s 64 of the *Constitution* that a Minister (officer of State) will have the power to administer that office of State.

The exercise of ministerial executive power by delegates and agents

138 Section 64 of the *Constitution* authorises the Governor-General to appoint officers, commonly known as Ministers, to administer the departments of State that are established. Those departments are sometimes vast, making it impossible for a Minister personally to exercise every executive power concerning the functions of that department. Subject to any express or implied statutory limitation, there are two ways that such power can sometimes be exercised other than by the Minister.

139 The first, and common, way by which executive power can be exercised by officials of a department is pursuant to the principle, "based in part on administrative necessity", that the Minister can "act through a duly authorized officer of [the] department"[162]. This is sometimes referred to as the *Carltona* principle[163]. But it is no more than an application of the rules of agency. Where these rules of agency are applicable, the official acts on behalf of the Minister as the Minister's agent, not on the official's own behalf.

140 The second way in which executive power can sometimes be exercised by officials of a department is through delegation, as that principle is properly called. A delegate is not an agent[164]. Rather, at common law a delegate exercises "power

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159 (1915) 20 CLR 425 at 440. See also *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 467-468 [78].

160 *Barton v Taylor* (1886) 11 App Cas 197 at 203.

161 See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 83 [214].

162 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 128 [33], quoting *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 11.

163 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.

164 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 350 [68].

as their own", not subject to the delegator's control, with "their own independent discretion in the exercise of their delegated power"[165].

141 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[166], Mason J (with whom Gibbs CJ and Dawson J agreed) said that the conferral by statute of a personal power on the Minister excluded the possibility of an implied power to act through an officer of the department as agent or an implied power to delegate to an officer of the department. But that does not preclude a departmental official from exercising their liberty to obtain information, or to advise or assist the Minister in the exercise of the Minister's power, including in the implementation of the exercise of a power or liberty by the Minister. There can, however, be a fine line between cases where the departmental officials' actions involve advice and assistance to the Minister to exercise the Minister's liberty or power and cases where the departmental officials' actions amount, in substance, to an exercise of the Minister's personal liberty or power itself. Where that fine line is drawn is at the heart of these appeals.

Judicial review

142 In *Attorney-General (NSW) v Quin*[167], Brennan J said that judicial review "provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power". Different considerations arise where the plaintiff challenges the legality of an exercise of public power, or even the legality of an exercise of a public liberty, such as by an allegation that the public body has acted unlawfully and contrary to public duties or public freedoms[168].

143 A person's legal relations (rights, powers, privileges, and immunities) need not be affected for the person to have standing to challenge the authority or legality of such public action. But the person must have a sufficiently special interest[169],

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165 *Northern Land Council v Quall* (2020) 271 CLR 394 at 431 [83], quoting *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] 2 NZLR 679 at 702 [61].

166 (1986) 162 CLR 24 at 37-39. See also at 30, 71.

167 (1990) 170 CLR 1 at 35.

168 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 246-247 [33]-[34], 257-261 [84]-[99]; 399 ALR 214 at 224, 239-243.

169 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552;

with "foreseeable consequences", over and above that of the general population arising from the legal relation that is the subject of the order sought[170].

144 It has been said that no rights are affected by, and there can be no judicial review of, an action by a departmental official, following ministerial instructions, not to refer to the Minister a request for consideration of the exercise of a personal statutory power of the Minister[171]. As an absolute proposition that is wrong. It is true that if such action involves a departmental official's lawful exercise of a liberty merely to advise and assist the Minister, not affecting the legal relations of any person, then no judicial remedy could be ordered. But if the departmental official's action is said to exceed the lawful liberty of officials to advise and assist the Minister, and to trespass (in substance) into an unlawful exercise of the Minister's personal liberty, then a person with a sufficiently special interest in the remedy sought can obtain a declaration as to the legality of that action.

The ministerial powers and the Ministerial Instructions

The Minister's personal override power

145 Section 351(1) of the *Migration Act* confers a personal override power on the Minister. That sub-section, which follows a similar format to other personal override powers conferred on the Minister by the *Migration Act*[172], permits the Minister − if the Minister "thinks that it is in the public interest to do so" − to override an administrative decision made under s 349 of the *Migration Act* and to substitute a decision that is more favourable to the applicant, even if the Tribunal had no power to make that more favourable decision.

146 The personal override power in s 351(1) necessarily implies an ability for the Minister to consider the exercise of that power. But s 351(7) provides that the

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Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234; 399 ALR 214.

170 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 359 [103]. See also *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 527-528, 530-531, 537, 547-548; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36, 41-42, 43, 44, 63, 78; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 423 [115].

171 *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 522 [64].

172 See also ss 46A(2), 48B(1), 195A(2), 417(1), 501J(1).

Minister does not have any "duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances". In other words, the ability in s 351(1) for the Minister to consider whether to exercise the personal override power is a liberty to consider. It is not a duty.

147 Section 351(3) provides that the power under s 351(1) must be exercised by the Minister personally. Two important concessions were properly made by the Solicitor-General on these appeals. First, the effect of s 351(3), in the context of the whole of s 351, is that both the personal override power and the liberty to consider whether to exercise that power are personal to the Minister. Secondly, the personal nature of both the power and the liberty means that neither can be exercised by either a delegate or an agent.

148 It is, in theory, possible that issues might arise concerning the scope of the Minister's liberty to consider whether to exercise their personal override power. For instance, it might be said that the Minister's liberty is not exercised where the Minister makes no decision about whether or not to consider because the Minister carelessly forgets the existence of a request for intervention that has been provided. But these issues do not arise on these appeals. The fundamental question on these appeals is whether the departmental officials, in substance, exercised the Minister's personal liberty to consider exercising the override power.

149 A longstanding practice of the Minister has been to create rules and principles that purport to inform departmental officials of the way in which they can advise or assist the Minister to exercise the Minister's personal liberty and personal override power[173]. Like other judgments in this Court, I refer to those rules and principles as Ministerial Instructions. But it is telling that this is not how they are described by the Minister: the heading that describes the instructions is "Guidelines". In some instances, the rules do purport to be instructions as to how to assist the Minister. But in the instances relevant to these appeals involving the 2016 document, the Minister did no more than provide "guidance" for the decision to be made. The Minister did not instruct the decision to be made.

150 The "instructions" relevant to these appeals are the 2016 Ministerial Instructions. But it is necessary also to consider the 2009 Ministerial Instructions, which were relevant to the decisions of this Court relied upon by the Solicitor-General in these appeals.

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173 See, eg, *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 515-516 [25]-[26].

The 2009 Ministerial Instructions

151 In 2009, the Minister issued instructions to the department in relation to the Minister's exercise of personal override powers under the *Migration Act*. The 2009 Ministerial Instructions were expressed to be a "policy instruction". The Minister expressed the purpose of the 2009 Ministerial Instructions to include the explanation of "the circumstances in which I may wish to consider exercising my public interest powers" and to "inform departmental officers when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest".

152 The 2009 Ministerial Instructions had the effect that all initial requests for the exercise of the Minister's personal override powers were to be brought to the Minister's attention. Section 16 of the 2009 Ministerial Instructions created different categories of initial request which were to be brought to the Minister's attention in different ways (either by way of a submission or a short summary of the issues in schedule format). But in every case of an initial request the Minister would decide whether to consider the request and, if the Minister chose to consider the request, the Minister would decide whether to exercise the personal override power. The department would reply, on behalf of the Minister, communicating whichever decision is made.

153 Repeat requests were treated differently. Section 17 of the 2009 Ministerial Instructions provided that the Minister "generally do[es] not wish to consider a repeat request". A repeat request was defined as a request which had been previously *considered* by the Minister. But, in limited circumstances, the department could refer a repeat request to the Minister where it was satisfied that there had been a significant change in circumstances raising new, substantive issues which, in the opinion of the department, fell "within the ambit" of categories of case which the Minister might wish to consider, including the category of "Unique or exceptional circumstances". The department was to make that "ambit" assessment of unique or exceptional circumstances by reference to s 11 of the 2009 Ministerial Instructions by considering a list of factors that "may be relevant", including:

1. an unfairness or unreasonableness criterion "where the application of relevant legislation leads to unfair or unreasonable results in a particular case";

2. a compassionate circumstances criterion of "strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident)"; and

3. an exceptional benefit criterion of "circumstances where exceptional economic, scientific, cultural or other benefit to Australia would result from the visa applicant being permitted to remain in Australia".

154 In summary, the only circumstance in which a request for the exercise of the Minister's personal override power would not be brought to the attention of the Minister was where the request was a repeat request which the department assessed to be outside the ambit of cases that the Minister might wish to consider.

The 2016 Ministerial Instructions

155 The 2016 Ministerial Instructions made significant changes to the model of the 2009 Ministerial Instructions. Initial requests were no longer always to be brought to the attention of the Minister. Instead, the effect of s 10.1 was that initial requests would only be brought to the attention of the Minister if the department assessed "that the case has unique or exceptional circumstances". That assessment was no longer an "ambit" assessment of whether the case fell within the ambit of categories of case which the Minister might wish to consider (including the category of unique or exceptional circumstances). Instead, the assessment of whether circumstances were unique or exceptional was to be made by the department itself. There would be unique or exceptional circumstances if the department considered that one or more categories of unique or exceptional circumstances were satisfied, including the compassionate circumstances criterion and the exceptional benefit criterion.

156 In relation to repeat requests − now defined as requests that had been previously *received* by the Minister − the effect of s 10.2 of the 2016 Ministerial Instructions was that it was again left to the departmental officials to decide whether to refer the request to the Minister. The department was required to be satisfied of two conditions: (i) there had been a significant change in circumstances since the previous request which raised new, substantive issues not previously provided or considered; and (ii) the new, substantive issues were considered by the department to fall within a category of unique or exceptional circumstances.

157 In summary, the 2016 Ministerial Instructions moved away from a model in which almost all cases were brought to the Minister's attention with the only exception being those repeat applications that fell outside the ambit of circumstances that the Minister wanted to consider. Rather, the 2016 model became one in which no applications would be brought to the attention of the Minister unless the application met broad evaluative criteria to the satisfaction of the departmental officials.

The facts of Mr Davis' and DCM20's appeals

Mr Davis

158 The circumstances of Mr Davis' appeal are as follows. Mr Davis is a United Kingdom citizen who arrived in Australia on a working holiday visa in 1997. He claims that he applied for a partner visa prior to the expiry of his working holiday visa. The evidence does not disclose whether Mr Davis' application for a partner visa was ever lodged or considered. For around 16 years, Mr Davis mistakenly believed that he was a permanent resident as a result of having lodged a partner visa application. He filed tax returns, held a Medicare card, purchased Australian property, and was part of the Australian community. But the legal status of Mr Davis' residence in Australia was always temporary and it was not suggested that his legal status or the associated conditions was unreasonable[174].

159 In November 2014, upon returning to Australia from a trip to the United Kingdom, Mr Davis became aware that he did not hold a current visa. He was granted a tourist visa, and shortly afterwards a Temporary Work visa. He also applied for a partner visa. The Temporary Work visa was cancelled. The partner visa application was refused by a delegate of the Minister and the Administrative Appeals Tribunal affirmed the decision of the delegate.

160 On 11 February 2019, Mr Davis requested that the Minister exercise their personal override power under s 351(1) of the *Migration Act* to substitute a more favourable decision claiming that the circumstances of his case were unique and exceptional, including on the basis of the compassionate circumstances criterion in the 2016 Ministerial Instructions. Those compassionate circumstances included his long period of residence in Australia and the dependence upon him of an elderly Australian citizen.

161 On 11 April 2019, a case officer provided an assessment of Mr Davis' case to the Assistant Director, Ministerial Intervention. The case officer's assessment contained significant errors, including the assertion that Mr Davis' investment and business ties to Australia were "obtained in the full knowledge that he did not have the right to remain in Australia permanently" and that there was "no evidence that any Australian citizen ... will suffer hardship as a result of his departure". The case was assessed as "not meeting the [2016 Ministerial Instructions] for referral to the Minister" because the circumstances were said not to be unique or exceptional. On 8 May 2019, the Assistant Director agreed. As Charlesworth J observed in the Full Court, one effect of the errors in the case officer's assessment was that the Assistant

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174 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 606 [211], 622 [291]; 401 ALR 438 at 491, 512.

Director never had regard to the effect on the elderly Australian citizen of removing Mr Davis[175]. Mr Davis' request was never provided to the Minister.

162 On 15 May 2019, Mr Davis' representatives wrote to the department noting that Mr Davis' request had not been provided to the Minister but submitting that the department had not considered various matters in Mr Davis' request, including the compassionate circumstances relating to the dependence of an elderly Australian citizen on Mr Davis. The Assistant Director treated the letter from Mr Davis' representatives as a "repeat request" and concluded that the information in the letter did not satisfy the criterion of new circumstances that are unique or exceptional. The reply from the Assistant Director concluded as follows:

> "This repeat request will not be referred to the Minister because the department is satisfied there has not been a significant change in circumstances since the previous request(s) which raises new, substantive issues that were not provided before or considered in a previous request and which would now present unique or exceptional circumstances."

As with the 11 February 2019 request, none of the information in the letter from Mr Davis' representatives was ever provided to the Minister.

DCM20

163 DCM20 is a citizen of Fiji who arrived in Australia with her family in 1993 on a Close Family Visitor (Short Stay) visa and was later granted a Close Family Visitor (Long Stay) visa. In 1994, DCM20 applied for refugee and humanitarian status. That application was refused. The Refugee Review Tribunal affirmed the decision. In 1995, DCM20 applied for a protection visa. That application was also refused by a delegate of the Minister. Again, the Refugee Review Tribunal affirmed the decision of the delegate.

164 In 1996, DCM20 made a request for the Minister to exercise their personal override power under s 417(1) of the *Migration Act*. In 1997, DCM20 was informed that the Minister had decided not to exercise that power. In 1998, DCM20 applied for a resolution of status visa. Department records show that the application was undecided until June 2013, when the resolution of status visa was refused. By this time, DCM20 had been lawfully in Australia for two decades, although the legal status of her residence in Australia was always temporary and,

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175 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 94 [324].

as with Mr Davis' appeal, it was not suggested that her temporary legal status or the associated conditions was unreasonable[176].

165 In August 2013, DCM20 made a request for the Minister to exercise their personal override power under s 351 of the *Migration Act*. Almost three years later, in April 2016, DCM20 was informed by the department that the Assistant Minister for Immigration had considered her request but had declined to intervene in the public interest. Approximately three months later, in June 2016, DCM20 again requested that the Minister exercise their personal override power under s 351 of the *Migration Act*. Six days later, DCM20 was notified by a departmental official that since the request was a repeat request, it would not be referred to the Minister because the department considered that it did not satisfy the criterion of new circumstances that are unique or exceptional.

166 On 20 December 2019, DCM20 again requested ministerial intervention by exercise of the Minister's personal override powers under ss 351 and 417 of the *Migration Act*. DCM20 said in her request that since her previous requests she had become a full-time carer for her Australian citizen parents. DCM20 also said that she had the care of her niece and nephew whose father had died and whose mother suffered from depression. She added that to return her to Fiji − as a single woman of an ethnic minority with no family or friends in Fiji, no place of residence, and no employment − would make her more vulnerable than ever to abuse. On 10 January 2020, a departmental official signed a minute which concluded:

> "This repeat request will not be referred to the Minister because the department is satisfied there has not been a significant change in circumstances since the previous request(s) which raises new, substantive issues that were not provided before or considered in a previous request and which would now present unique or exceptional circumstances."

The legal character of the departmental officials' actions

167 As explained above, whether or not the label "non-prerogative" should be attached to such an exercise of a liberty might depend upon the level of generality at which the liberty is characterised. Both the 2009 Ministerial Instructions and the 2016 Ministerial Instructions were in the general form of, and purported to be, instructions to officials to advise and assist the Minister in the exercise (and implementation of the exercise) of the Minister's statutory powers and liberties. At a high level of generality the exercise of a liberty pursuant to those instructions involves parity with an ordinary person: an ordinary person has a liberty to advise and assist another. But characterised with greater particularity there is no parity:

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176 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 606 [211], 622 [291]; 401 ALR 438 at 491, 512.

an ordinary person does not have a liberty to advise and assist a Minister in the performance of ministerial duties.

168 Consistently with an approach based on a high level of generality, the position of the parties throughout this litigation was that the exercise by departmental officials of a liberty to advise and assist the Minister was not a prerogative of the Commonwealth Executive. Nothing turns upon this characterisation in these appeals. In this context, to borrow from Professor Winterton, "the debate concerning the proper definition of the 'prerogative' is a particularly sterile one"[177]. However described, there is no doubt that the liberty to advise and assist a Minister exists within the basic functions relating to the ordinary course of administering a recognised function of government.

169 It is unnecessary to attempt to classify, as prerogative or not, the general non-statutory liberty that enables the Commonwealth Executive to perform basic functions. The relevant point is that that liberty permits the Minister to issue instructions that provide for the manner in which officials can advise and assist the Minister. With one arguable exception, the 2009 Ministerial Instructions were instructions of this nature concerning how to advise and assist the Minister. The arguable exception in the 2009 Ministerial Instructions relates to repeat requests. It is arguable that the liberty to decide whether to consider a repeat request is exercised (in substance) by the departmental official, not the Minister, when the official applies the broad criterion of whether the application is outside the ambit of cases that the Minister might wish to consider. But these appeals are not concerned with that arguable exception, and it is unnecessary to consider it.

170 The 2016 Ministerial Instructions were quite different from the 2009 Ministerial Instructions in their operation. Although the 2016 Ministerial Instructions also purported to be instructions to officials to advise and assist the Minister[178], and although they provided criteria for circumstances that are unique or exceptional, including the compassionate circumstances criterion and the exceptional benefit criterion, they conferred upon the officials a broad discretion in all cases to decide whether a request should be brought to the attention of the Minister. The breadth of the criteria and the extent of evaluation by the official meant that the decision was not one in which "the Minister ... determined, in

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177 Winterton, *Parliament, the Executive and the Governor-General* (1983) at 112.

178 2016 Ministerial Instructions, ss 2, 12.

advance, the circumstances in which he or she wishe[d] to be put in a position to consider exercising the power"[179].

171 The exercise by a departmental official of the broad discretion in the 2016 Ministerial Instructions to refuse to refer a request to the Minister amounted, in substance, to the exercise by the official of the Minister's personal liberty. The officials' decisions not to refer Mr Davis' and DCM20's requests to the Minister were therefore decisions which amounted, in substance, to the exercise of the Minister's personal liberty to consider (or not to consider) the requests. There can be no doubt that each of Mr Davis and DCM20 has a sufficiently special interest to seek a declaration as to the legality of the exercise of a public liberty by departmental officials in relation to each request.

172 The decision by departmental officials, in substance, that the requests by Mr Davis and DCM20 would not be considered did not itself affect any legal relation of Mr Davis or DCM20. Neither appellant had a right to have their request considered by the Minister, so neither appellant was deprived of any right by the decision of the officials. Nor, as a matter of law, did the officials exercise any power that deprived the Minister of the liberty to consider, since the Minister remained entitled to consider the requests. Nevertheless, as a matter of substantive effect, the actions of the officials involved the exercise of a liberty which they did not have to deprive Mr Davis and DCM20 of a consideration of their requests by the Minister. The liberty to consider (or decline to consider) a request was not conferred by statute on the departmental officials; rather, s 351(3) of the *Migration Act* created the liberty and made it personal to the Minister. Hence, this statutory liberty could not be said to involve the exercise of basic functions by an official relating to the ordinary course of administering a recognised function of government. The exercise of the liberty by the departmental officials was therefore unlawful.

Unreasonableness in the exercise of non-statutory executive powers and liberties

173 In each of the appeals before this Court, an assumption made in the decisions of the primary judge and the Full Court was that the actions of the departmental officials involved only advice and assistance to the Minister. On that assumption, those courts considered whether the actions of the departmental officials were unreasonable. Since that assumption was incorrect, because the actions of the officials involved in substance an invalid exercise of the Minister's personal liberty, it is unnecessary on these appeals to revisit that issue of unreasonableness as a condition of the legality of the officials' advice and assistance. However, in light of the thorough submissions concerning the issue of

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179 Compare the submission in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 640, accepted at 665 [91].

an unreasonableness constraint upon the exercise of non-statutory executive liberties and powers it is appropriate to make two observations.

174 First, the submissions of the parties assumed that non-statutory executive liberties and powers were either always subject to a condition of reasonableness or never subject to such a condition. As a starting point, there is obvious force in the view of Robertson J, adopted by several members of the Full Court on these appeals[180], that it would be "incongruous" for reasonableness usually to be an implied condition upon the exercise of statutory executive power, but never to be an implied condition upon the exercise of non-statutory executive power (whether or not characterised as prerogative)[181]. The fundamental principles of the common law that inform statutory implications[182] must also inform the scope of executive liberty and power which is prerogative or otherwise implied from the creation of a functional Commonwealth polity.

175 In this manner, like statutory executive power, the existence of a condition of legal reasonableness in the exercise of non-statutory executive powers or liberties – and the content of such a condition[183] – will depend upon the nature of the power or liberty being exercised. The existence and content of legal reasonableness in the exercise of a non-statutory executive liberty or power will be part of the definition of the liberty or power itself. The liberty or power to act will commonly, but not necessarily, be identified as a liberty or power to act reasonably.

176 Secondly, and related to the first point, any reasonableness requirement for the exercise of an extremely broad non-statutory executive power will usually involve a high threshold[184]. As Steward J rightly points out in his Honour's reasons in this case, the various reasons given by the officials in relation to Mr Davis'

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180 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 27 [3], 35 [39], 42 [66], 54 [118], 89 [305].

181 *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438 at 460 [101].

182 *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at 747 [30], 758 [89]; 403 ALR 398 at 409, 424; *Stephens v The Queen* (2022) 96 ALJR 871 at 879-880 [33]-[34]; 404 ALR 367 at 376.

183 See also *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 584-586 [133]-[135].

184 Horan, "Judicial Review of Non-Statutory Executive Powers" (2003) 31 *Federal Law Review* 551 at 568, referring to *R v Ministry of Defence; Ex parte Smith* [1996] QB 517 at 556.

requests can be characterised as ungenerous and unsatisfactory[185]. The decisions of the officials in relation to both Mr Davis and DCM20 do not reflect the virtue of exceptional charity and equity – for others, tzedakah or zakah – which is part of the foundations of the grant to the Minister of the liberty and power in s 351(1). But that lack of virtue may not be sufficient to establish any high threshold of legal unreasonableness in the result if that issue were to arise.

The privative clause

177 The appellants commenced these proceedings in the original jurisdiction of the Federal Court of Australia under s 39B of the *Judiciary Act 1903* (Cth). But s 476A(1) of the *Migration Act* denies jurisdiction to the Federal Court, with certain exceptions that do not relevantly apply, in "relation to a migration decision". A "migration decision" is defined in s 5(1) as relevantly including "a privative clause decision" or "a purported privative clause decision". Hence, it was submitted, if the decision by the departmental officials was "a privative clause decision" or "a purported privative clause decision", then the Federal Court would not have had jurisdiction to consider the issue the subject of the appeals to this Court, and this Court would have no jurisdiction to consider it on appeal.

178 A "privative clause decision" has the meaning given by s 474(2)[186], which is, relevantly, a decision of an administrative character made, proposed to be made, or required to be made under the *Migration Act*. A "purported privative clause decision" has the meaning given by s 5E[187], which is, relevantly, a decision purportedly made, proposed to be made, or required to be made, under the *Migration Act* that would be a privative clause decision if there were not a failure to exercise jurisdiction or an excess of jurisdiction in the making of the decision.

179 The privative clause in s 476A(1) is part of a scheme, together with the privative clause in s 476(2), which attempts to exclude the jurisdiction of all courts to adjudicate upon the validity of privative clause decisions and purported privative clause decisions. Putting constitutional limitations concerning the scope of such clauses to one side, such legislative schemes have historically been given a restricted meaning by courts. The premise underlying the courts' restrictive approach to interpretation of privative clauses is the background "that Parliament would be prima facie expected to respect" common law principles, particularly the powerful principle concerning access to the courts to adjudicate disputes: "The more fundamental the rights, and the greater the extent to which they would be

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185 At [249].

186 *Migration Act 1958* (Cth), s 5(1) definition of "privative clause decision".

187 *Migration Act 1958* (Cth), s 5(1) definition of "purported privative clause decision".

infringed ... the less likely it is that such an intention will be ascribed to Parliament"[188].

180 Since the *Migration Act* did not permit either the Minister's liberty or the Minister's power under s 351(1) to be exercised by any other person, the 2016 Ministerial Instructions could not have any statutory basis[189]. They could not empower any action under the *Migration Act*. Nor did the 2016 Ministerial Instructions purport to do so. They purported to provide the manner in which officials could advise and assist the Minister similar to the non-statutory general liberties of "acquisition of information and categorisation of requests" under the 2009 Ministerial Instructions, which had been said by French CJ and Kiefel J in 2012 to be "an executive function incidental to the administration of the Act"[190].

181 For this reason, although the effect of the actions of the departmental officials in Mr Davis' and DCM20's cases was to exercise the personal liberty of the Minister to consider whether to exercise the personal override power, their actions did not purport to do so. They purported to be actions that advised and assisted the Minister. In other words, they purported only to be action "under" the non-statutory 2016 Ministerial Instructions. The decision by the departmental officials not to refer the requests by Mr Davis and DCM20 to the Minister was neither a liberty exercised, nor one that was purported to be exercised, under the *Migration Act*.

Departing from previous reasoning in this Court

182 A consequence of this decision is that the reasoning of this Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[191], *Minister for Immigration and Border Protection v SZSSJ*[192], and several decisions of single Justices of this Court must now be regarded, at least, as containing inadequate or erroneous assumptions or reasoning. Those controversial decisions were the subject of extensive submissions in these appeals. It is unnecessary to consider whether those

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188 *Stephens v The Queen* (2022) 96 ALJR 871 at 879-880 [33]-[34]; 404 ALR 367 at 376, quoting in part *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

189 See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 653 [46], 655 [50]-[51]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 199 [47].

190 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 655 [51].

191 (2012) 246 CLR 636.

192 (2016) 259 CLR 180.

decisions need to be overruled or whether the results in those cases can be distinguished, because the reasoning relevant to these appeals was not the subject of argument in those cases[193]. It suffices to identify the extent to which those decisions must now be seen to have been based on flawed assumptions or reasoning.

183 The background to the controversial decisions was the unanimous joint judgment of this Court in *Plaintiff M61/2010E v The Commonwealth*[194]. In that case, this Court held that departmental officials were subject to the obligation of procedural fairness in their advice and assistance to the Minister when the Minister was considering whether to exercise a personal override power under the *Migration Act* (the exercise of which would affect the applicant's liberty). Importantly, however, the Court said that procedural fairness also conditioned steps taken in relation to the Minister's liberty to consider whether to exercise their personal override power[195].

184 In *Plaintiff S10/2011*, the issue was whether departmental officials were required to afford procedural fairness to four applicants who had requested that the Minister exercise in their favour statutory powers contained in, or similar to those in, s 351 of the *Migration Act*. The officials had not referred requests by three applicants to the Minister. The request of a fourth applicant had been referred to the Minister and the Minister's response was "taken to have been a refusal to consider the exercise of the power"[196]. This Court unanimously held that procedural fairness was not required in the process concerning any of the applicants.

185 In the joint reasons of French CJ and Kiefel J, their Honours said that the issue of the 2009 Ministerial Instructions "did not involve a decision on the part of the Minister, acting under the relevant section, to consider the exercise of the power conferred"[197]. Their Honours' reasoning must mean that the 2009 Ministerial Instructions did not reflect any consideration by the Minister about whether to exercise the power. Hence, on this reasoning, at least in relation to three of the applicants, the Minister had not exercised any liberty to consider whether the

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193 *Felton v Mulligan* (1971) 124 CLR 367 at 413; *Baker v The Queen* [1975] AC 774 at 787-789; *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79]; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]. See also Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 158-161.

194 (2010) 243 CLR 319.

195 (2010) 243 CLR 319 at 354 [78].

196 (2012) 246 CLR 636 at 645 [16].

197 (2012) 246 CLR 636 at 653 [46].

power should be exercised. Therefore, the departmental officials must have, in substance, exercised a liberty that they did not have in deciding that the requests would not be considered by the Minister. But, contrary to the conclusion reached by a majority of this Court on the present appeals, their Honours did not suggest that there might be any difficulty with such a result.

186 A different approach was taken in the joint reasons of Gummow, Hayne, Crennan and Bell JJ. Their Honours said that the effect of the 2009 Ministerial Instructions was to implement a decision made by the Minister whereby the Minister had "determined in advance the circumstances in which he or she wishes to be put in a position to consider exercise of the discretionary powers by the advice of department officers"[198]. On that reasoning, it was the Minister who had exercised the liberty under the *Migration Act*, although their Honours held that the relevant provisions, on their proper construction, were not conditioned upon an implication of procedural fairness[199]. The decision in *Plaintiff M61/2010E* was distinguished on the basis that it involved different provisions, concerning offshore entry persons[200].

187 In their joint reasons, Gummow, Hayne, Crennan and Bell JJ relied upon two decisions of the Federal Court to conclude that it was within the competence of the Minister to make the 2009 Ministerial Instructions to implement "an advance determination" of the circumstances in which the Minister wishes to be put in a position to consider the exercise of powers similar to those in s 351.

188 In the first of those decisions, in the passage cited by their Honours, the Full Court of the Federal Court held that so long as an officer was acting in accordance with the Minister's instructions, the officer had no duty to refer the application to the Minister[201]. In the second of those decisions, in the first of the paragraphs cited by their Honours, Lindgren J held that[202]:

> "The Minister's decision not to consider exercising his power ... comprises his decision just referred to operating upon the subjective judgment formed by [the departmental officer]. There is no suggestion in the evidence that the Minister intended anything other than that provided the officer in good faith formed the view that the 'unique' or 'exceptional

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198 (2012) 246 CLR 636 at 665 [91].

199 (2012) 246 CLR 636 at 667-668 [98]-[100].

200 (2012) 246 CLR 636 at 656-657 [59], 662 [79].

201 *Bedlington v Chong* (1998) 87 FCR 75 at 80-81.

202 *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 522 [63].

circumstances' criterion was not met, the Minister did not wish to consider exercising his ... power."

189 The assumption underlying their Honours' joint reasons appears to be that so long as departmental officials are acting in good faith, any amount of subjective evaluation will not deprive the departmental officials' actions of the character of mere assistance to implement the exercise of the Minister's liberty, embodied in the advance determination by the Minister. To the extent that that assumption is capable of being extended to the 2016 Ministerial Instructions it is an assumption that is contrary to the result of these appeals.

190 In *SZSSJ*[203], this Court considered and explained the effect of the reasons in *Plaintiff S10/2011*. In a joint judgment, the Court repeatedly described the actions of officials under administrative processes, such as the 2009 Ministerial Instructions, as "informing the Minister"[204] or actions "to assist the Minister"[205]. The Court said that the effect of the various reasons in *Plaintiff S10/2011* was that under the 2009 Ministerial Instructions "where the Department had not referred a case to the Minister, no statutory power had been engaged"[206] and the assistance to the Minister to make the decision had "no statutory basis"[207]. The Court did not acknowledge that the exercise by the Minister of a personal liberty to consider a request was action under the *Migration Act*. Nor did the Court recognise that there may be a point at which an official's actions could, in substance, amount to the exercise of the Minister's personal liberty.

191 An assumption underlying the reasons in *SZSSJ*, like the joint reasons of Gummow, Hayne, Crennan and Bell JJ in *Plaintiff S10/2011*, may have been that the exercise of a liberty as to whether or not to consider a request will remain that of the Minister, no matter how much subjective evaluation is undertaken in any good faith decision by a departmental official not to bring the request to the attention of the Minister. As Mortimer J observed in the Full Court in these appeals[208], subsequent decisions of single Justices of this Court may have

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203 (2016) 259 CLR 180.

204 (2016) 259 CLR 180 at 197 [41], [42], 198 [44].

205 (2016) 259 CLR 180 at 200 [54], 200-201 [56].

206 (2016) 259 CLR 180 at 199 [47].

207 (2016) 259 CLR 180 at 200 [54].

208 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 61-62 [150]-[151].

proceeded on the same assumption[209]. To those decisions can be added a decision of my own, sitting also as a single Justice[210].

192 The actions of the departmental officials, on this assumption, are only the exercise of a "common law" liberty to advise or assist the Minister, such that their actions will not require any statutory basis. For the reasons explained above, the unqualified assumptions or unqualified reasoning in these cases is incorrect. There is a point beyond which the evaluative scope given to the departmental officials is sufficiently broad that their decisions, in substance, amount to an exercise of the personal liberty of the Minister under the *Migration Act* to consider a request. The decisions of the departmental officials in relation to Mr Davis and DCM20, purporting only to be under the 2016 Ministerial Instructions, went beyond that point.

Conclusion

193 Mr Davis and DCM20 have now resided in Australia for, respectively, over 25 years and around 30 years. Both are fully integrated into the Australian community. The lives of other Australian citizens depend upon them both. But they have never been legally entitled to remain permanently in Australia. Each of their requests for the Minister to consider exercising a personal override power was their last attempt to avoid deportation.

194 It would have been a simple matter for the Commonwealth Parliament to have included an additional sub-section, s 351(8), permitting departmental officials, as either delegates or agents, to exercise a liberty to decide whether to refer to the Minister an application for the exercise of the personal override power. If they were acting as delegates, such a provision would have permitted departmental officials to exercise the liberty on their own behalf. If they were acting as agents, such a provision would have permitted departmental officials to exercise the liberty on the Minister's behalf. But the Commonwealth Parliament did not do so. The liberty to consider an application, like the power itself, was made personal to the Minister. The departmental officials could not lawfully exercise the Minister's personal liberty to refuse to consider the requests by Mr Davis and DCM20. In substance, that is what they did.

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209 *Plaintiff S330/2018 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] HCATrans 028; *Plaintiff S28/2018 v Minister for Home Affairs* [2018] HCATrans 168. See also *Plaintiff S53/2019 v Minister for Immigration, Citizenship and Multicultural Affairs* (2019) 94 ALJR 1 at 2 [7]; 374 ALR 438 at 439.

210 *Plaintiff S322/2018 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] HCATrans 096.

195 I agree with the declarations and orders proposed by Kiefel CJ, Gageler and Gleeson JJ.

196 STEWARD J. I regret that I am unable to agree with my colleagues. But these appeals are important. Some governmental processes sound in, or produce, an exercise of power that will have legal consequences on rights and obligations. But many such processes are not of that kind. Such processes might involve a public servant deciding to do something, and in that sense only it might be said that a "decision" has been made; but that decision may only have practical consequences that fall short of legal outcomes. These appeals highlight the importance in public law of distinguishing between decisions which affect legal rights and obligations and those which do not. Here, each "decision" said to have exceeded the executive power of the Commonwealth had no legal consequences. Each only had practical consequences. Each "decision" was an anterior step that could have led, but ultimately did not lead, to an exercise of power affecting rights and obligations. The result is that the rights and obligations of each appellant remain untouched, and the Minister is not obliged to do anything at all.

197 In that respect, it is well to remember what Brennan J said in *Attorney-General (NSW) v Quin*[211]:

> "At common law judicial review does not consist in assessing the legal effect of the steps taken preliminary to the exercise of a power but in a determination of the legality of the exercise or purported exercise of the power. The preliminary steps may be relevant to the legality of the exercise of the power but they are not themselves the subject of review."

The statutory power

198 The relevant parts of s 351 of the *Migration Act 1958* (Cth) ("the Act") are set out in the reasons of the plurality. It is well established that the power to substitute a more favourable decision is one reposed in the Minister personally (described as a "substantive decision")[212]. The power is enlivened when the Minister thinks that it is in the "public interest to do so"[213]. It is also clear that a decision to consider whether to exercise the power to substitute a more favourable decision must also be made personally by the Minister (described as a "procedural decision")[214]. Whether the Minister has, in a given case, made a procedural

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211 (1990) 170 CLR 1 at 26.

212 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 200 [53] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

213 *Migration Act 1958* (Cth), s 351(1).

214 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 200 [53] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

decision and then a substantive decision is a question of fact[215]. Here, it was not in dispute that the Minister made neither type of decision in the case of each appellant**.**

199 This dichotomy is not, however, an exhaustive expression of all that s 351 involves. That is because s 351(7) provides that the Minister is not under any duty to consider whether to exercise the power conferred by s 351(1), "whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances". Sub-section (7) provides the contrary intention that expressly defeats the ordinary rule that the conferral of a statutory power or discretion implies a duty to consider an application for the exercise of that power or discretion. It is critical to the outcome of the two appeals. The reference in sub-s (7) to the making of requests evinces a parliamentary recognition that, given the conferral of such an important non-compellable dispensing power on the Minister, the Minister's Department ("the Department") is bound to receive a great many requests for intervention. These would need to be administered in some way. But the administration of this feature of the statutory scheme is not on this occasion expressed to be something the Minister must do "personally". Rather, Parliament must be taken to have intended that the Minister is entitled to administer this aspect of the statutory scheme through the Department without any personal involvement[216]. That is what the Minister did here by issuing the "Minister's guidelines on ministerial powers (s351, s417 and s501J)" ("the 2016 Guidelines").

200 The lawfulness of proceeding in this way was recognised by all Justices of this Court in *Minister for Immigration and Border Protection v SZSSJ*[217]. Amongst other things, that case concerned analogous provisions of the Act (ss 48B, 195A and 417) which conferred upon the Minister similar non-compellable personal powers. After referring to the Minister's ability to make a procedural and then a substantive decision, this Court said[218]:

> "If the Minister has not made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the

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215 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 200 [55] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

216 An analogous recognition of the practical necessities of the administration of government may be found in *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 12 per Gibbs CJ; see also *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563 per Lord Greene MR.

217 (2016) 259 CLR 180.

218 (2016) 259 CLR 180 at 200 [54] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

> Department on the Minister's instructions to assist the Minister to make the procedural decision has no statutory basis and does not attract a requirement to afford procedural fairness."

201 Importantly, the Department's administration of ministerial instructions concerning how it is to deal with the receipt of requests to exercise the power conferred by s 351 does not necessarily require an assessment of what is in the public interest. No departmental officer is required to reach, or is capable of reaching, a conclusion, one way or the other, as to what is in the public interest. Nor is the Minister in any way bound to follow what the Department might recommend. Nor, for the purposes of deciding whether to *consider* exercising the power in s 351(1) (the procedural step), is the Minister necessarily confined to what is in the public interest. The Minister might decide to consider intervening for a range of different reasons, including, for example, because of media coverage in relation to a given case. It is only once a positive procedural decision has been made that the Minister must then decide what is in the public interest with respect to the request before him or her[219]. But until that substantive decision is reached, any ministerial or departmental consideration of public interest factors has no bearing on the legal effect of the statutory decision-making process under s 351.

The Guidelines

The 2016 Guidelines

202 The 2016 Guidelines were said to be "invalid" because they authorised an impermissible delegation to the Department of the Minister's personal powers under s 351. However, for the reasons which follow, the 2016 Guidelines do not require officers of the Department to exercise statutory power. The procedures mandated by them do not oblige an officer of the Department to mimic an exercise of the Minister's power to decide whether it is in the "public interest" to substitute a more favourable decision, or indeed whether to consider an exercise of such a power. That is not what the 2016 Guidelines address. Nor can an application of the 2016 Guidelines be characterised as an abdication of power; that is because unless and until the Minister personally makes a procedural decision, no power has yet been exercised and there is nothing to abdicate. Moreover, it was agreed by all parties that the 2016 Guidelines do not have any force at law; at their highest, their existence might found some form of "legitimate expectation" about their

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219 It is an express requirement of the Act that if the Minister makes a substantive decision that it is in the public interest to substitute a more favourable decision, he or she must then table reasons for that public interest decision before each House of Parliament: s 351(4)-(6).

application, but, in this country, that is an insufficient basis for the securing of public law remedies[220].

203 A more detailed consideration of the 2016 Guidelines supports these conclusions. The 2016 Guidelines describe their function or purpose as follows:

> "The purpose of these guidelines is to:
>
> - explain the circumstances in which [the Minister] may wish to consider intervening in a case
> - explain how a person may request that [the Minister] consider intervening in their case
> - explain when [the Minister's] Department should refer a case to [him or her]
> - confirm that if a case does not meet these guidelines, [the Minister] do[es] not wish to consider intervening in that case."

204 The 2016 Guidelines then expressly state that "[w]hat is and what is not in the public interest is for [the Minister] to determine". In other words, on no view could it be said that the 2016 Guidelines authorise the Department to make that very decision. Instead, the 2016 Guidelines regulate, on the Minister's instructions, how the Department is to administer the many requests it receives which seek to engage the power conferred by s 351(1), in circumstances where the Minister is under no obligation or duty to consider whether or not to exercise that power. As such, the 2016 Guidelines do not call for the exercise of any power, whether statutory or non-statutory in nature. Like so many governmental processes which require the administration of something, they are a precursor to the exercise of power (if any). And because the 2016 Guidelines do not have the force of law, their application by departmental officers cannot lead to any legal consequences.

205 The 2016 Guidelines exist as a rational means of sorting through the many requests the Department no doubt receives. The criteria are directed at that task. Under the heading "Ministerial intervention principles", the Minister has set out a series of expectations about, amongst other things, when he or she would be unlikely to intervene. But the 2016 Guidelines also state that "consideration of a

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220 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 38-41 per Brennan J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 27-28 [81]-[83] per McHugh and Gummow JJ, 36-38 [116]-[121] per Hayne J, 45-48 [140]-[148] per Callinan J; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 334-335 [28]-[30] per Kiefel, Bell and Keane JJ, 343 [61] per Gageler and Gordon JJ.

case for intervention is at [the Minister's] discretion and is not an extension of the visa process".

206 What follows is a section headed "Cases that should be brought to my attention". This section has two sub-headings. The first is "Unique or exceptional circumstances". These are said to be matters that "may be referred to [the Minister] for possible consideration of the use of [his or her] intervention powers". A series of possible unique or exceptional circumstances are listed. These include, for example, "strong compassionate circumstances" and the presence of "exceptional economic, scientific, cultural or other benefit [that] would result from the person being permitted to remain in Australia". Under the next sub-heading – "Other relevant information" – the 2016 Guidelines specify the information the Minister will need where cases are referred to him or her. These include, for example, the interests of any children, whether there are any "character" concerns, and the person's level of integration into the Australian community.

207 It may be accepted that the circumstances listed under these sub-headings are directed at issues relevant to what might be thought to be in the public interest. It may also be accepted that the 2016 Guidelines oblige departmental officers to exercise some degree of judgment. As will be explained below, the same was true in relation to the earlier 2009 version of these guidelines ("Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)" ("the 2009 Guidelines")). For the purposes of sorting out which requests should be brought to the attention of the Minister, that is hardly surprising. Directing departmental officers to consider which requests are most likely to satisfy the Minister's public interest threshold is an entirely sensible way of dealing with them administratively. But, importantly, the criteria listed in the 2016 Guidelines are not exhaustive of what the Minister might consider to be in the "public interest" for the purposes of his or her power under s 351(1). Nor, in sorting through in this way requests that are received, can it be said that departmental officers are thereby exercising the power reposed in the Minister. They are instead assisting the Minister in determining whether he or she should or should not, in the context of an entirely non-compellable power, consider whether to exercise that power.

208 There is next a section headed "Cases that should not be brought to my attention". These include cases which do not satisfy the foregoing guidelines for referral, and which are accompanied by one or more listed circumstances. Those circumstances include, for example, where a person has had a visa cancelled on character grounds or because they breached their visa conditions, or where the person has an extant application for merits review of a visa decision. Where the case is one which is not to be brought to the attention of the Minister, the 2016 Guidelines specify that the "Department will finalise [it] without referral to [the Minister] and advise the person or their authorised representative in writing".

209 What then follows in the 2016 Guidelines are instructions concerning how to request ministerial intervention. There are the following sub-headings: "Who

can make a request?"; "How to make a request"; "How requests for Ministerial intervention will be progressed" (with different rules applicable to first requests and repeat requests); "Outcome of Minister's consideration"; and "Removal policy". All of these topics address how the Department is to administer the receipt of requests to exercise the power conferred by s 351(1).

210 The content under one sub-heading is particularly relevant. It is entitled "Minister's powers not limited by Minister's guidelines" and states the following:

> "[The Minister's] powers to intervene in an individual case, where [he or she] believe[s] it is in the public interest to do so, exist whether or not the case is brought to [his or her] attention in the manner described above, as long as a decision has been made by a relevant review tribunal and that decision continues to exist ...
>
> [The Minister] may consider intervening in cases where the circumstances do not fall within the unique or exceptional circumstances as described in section 4 of these guidelines, if [the Minister] consider[s] it to be in the public interest.
>
> Where [the Minister] believe[s] it is appropriate, [he or she] will seek further information to help [him or her] to determine whether to consider intervening in a case."

211 The foregoing paragraphs elucidate what an application of the 2016 Guidelines can in fact "finalise". Where a request is made and no referral to the Minister follows, from a practical perspective the likely result is that no positive exercise of the power conferred by s 351 of the Act will ever be made. That is because the Minister is likely to be unaware of the request. But in such a case, no statutory power will have been exercised. Where a referral is made, once again there are only practical consequences. That is because it is for the Minister then to decide whether to make a procedural decision to consider it. Referral increases the probability both that a procedural decision and then a substantive decision will be made. But until a procedural decision is made, no power is ever exercised.

212 In contrast, it does not follow that, where a referral is not made, an exercise of the power conferred by s 351 will never, or can never, arise. That is because all parties accepted that the Minister was free to ignore his or her own Department, its recommendations, and the 2016 Guidelines, and exercise the power whenever it was in the public interest to do so. In that respect, the Minister's capacity to know about any request that had been made was not limited to what the Department had referred for consideration. This is expressly consistent with the passage from the 2016 Guidelines set out above[221]. It follows that when the Department decides not

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221 See [210].

to refer a request to the Minister, there is a "conclusive effect" – but only as a practical matter, not as a legal outcome. As French CJ and Kiefel J observed in relation to the 2009 Guidelines concerning s 351 (addressed below) in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[222]:

> "That question arises if the plaintiffs were to establish that the inquiries made, and the submissions prepared, by officers of the Department of Immigration and Citizenship ... pursuant to the ministerial guidelines were themselves capable of affecting, defeating or prejudicing rights, interests or legitimate expectations. They were not."

213 Moreover, it is a misnomer to say that in the case of each appellant a "decision" was made by the Department, if that word is intended to refer to a decision which legally interferes with or alters rights and obligations. A more accurate description of what occurred in each case is that the Department did not refer either request to the Minister: that is, it declined to make a referral.

214 The foregoing does not elevate form over substance. It is a recognition of when statutory power is or is not exercised for the purposes of s 351. And it faithfully preserves the legal reality that the 2016 Guidelines do not have the force of law. In any event, there are dangers in relying on the concepts of form and substance to erode the critical distinction between legal and practical consequences.

215 One further aspect of the 2016 Guidelines should be noted: it is what they say about "repeat requests"[223]. They state that the Minister does not want to consider repeat requests save in "limited circumstances". That threshold will be reached where the Department is satisfied that there has been a significant change in circumstances since the previous request which raises new substantive issues, and that these issues are unique or exceptional in the sense described in the 2016 Guidelines.

216 Three observations should be made in relation to the 2016 Guidelines.

217 First, the foregoing description of what the 2016 Guidelines entail justifies their characterisation as a sensible administrative mechanism for the processing of requests received for the exercise of the power conferred by s 351 of the Act. The faithful application of those guidelines by an officer of the Department thus cannot

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222 (2012) 246 CLR 636 at 642 [3].

223 A request is defined by the 2016 Guidelines to be a "repeat request" if any Minister, current or previous, has "previously received a request to intervene in the person's case (whether for the present or any previous visa decision) under any of the powers covered in these guidelines".

be seen as an attempt to exercise the Minister's procedural or substantive powers. The application of the 2016 Guidelines is an anterior step to the possible exercise of these powers. In other words, if it is a question of fact whether the Minister has made a procedural decision or a substantive decision under s 351, then it must also be a question of fact whether the Department has here sought to exercise either power. For the foregoing reasons, it has not.

218 Secondly, nothing in the language of s 351 prevents the issue by the Minister of guidelines of the foregoing kind which are directed at sorting through the large number of requests the Minister's Department no doubt receives. The 2016 Guidelines are no more than a formal expression of the Minister's reasonable request to the Department to bring to his or her attention the most meritorious requests for consideration. It would be an absurd result if the Minister could not lawfully seek such assistance from departmental officers.

219 Thirdly, the language of s 351 does not in any way limit the instructions the Minister may give for the purposes of administering the receipt of requests to "objective" matters, whatever that term might mean. The 2009 Guidelines, described below and considered by this Court in *Plaintiff S10* and *SZSSJ*, contained many of the same evaluative or non-objective criteria found in the 2016 Guidelines. The validity of the 2009 Guidelines was endorsed in both cases. With great respect to my colleagues, the distinction between objective and non-objective criteria for the purposes of administering a Department of State is not supported by the *Constitution* or by the language of s 351 of the Act. It is practically unworkable and unsupported by authority.

The 2009 Guidelines

220 The 2009 Guidelines were very similar to the 2016 Guidelines. They assumed some prominence in these appeals because of what this Court had earlier said about them in *Plaintiff S10* and *SZSSJ* (as to which see below).

221 Like the 2016 Guidelines, the 2009 Guidelines explained the circumstances in which the Minister might wish to consider exercising his or her power and when departmental officers were to refer cases to the Minister for consideration. And again, like the 2016 Guidelines, they required departmental officers to perform a very similar evaluative exercise in determining whether there existed in relation to a given request "unique or exceptional circumstances". The function or purpose of the 2009 Guidelines was really the same as that of the 2016 Guidelines: the sorting out of which requests were to go to the Minister by an application of criteria that gave rise to matters for evaluative judgment.

222 Two aspects of the 2009 Guidelines should be noted. First, initial requests found by the Department not to involve unique or exceptional circumstances were nonetheless brought to the attention of the Minister "in schedule format, so that [the Minister] may indicate" whether he or she wished to consider the exercise of

the power conferred by s 351. The appellants relied greatly on this difference. But again, the provision of this "schedule" had no consequences at law, and legally affected no rights and obligations; it merely, perhaps marginally so, increased the probability that the Minister might exercise his or her "procedural" power and then his or her "substantive" power in relation to one or more of the requests in the schedule.

223 Nor can the mere omission of the schedule from the 2016 Guidelines justify a characterisation of their application by the Department as an act in excess of federal executive power. For that characterisation to be tenable, it would have to be accepted that the Minister is compelled to view, and make a procedural decision either to consider or not to consider, every request made for the exercise of the dispensing power under s 351. But as already explained, that conclusion cannot be supported by the text and purpose of s 351. Considered in context, whether with the schedule from the 2009 Guidelines or without it, the 2016 Guidelines remain what they are: an administrative means of screening the many requests received by the Department.

224 Secondly, the schedule required by the 2009 Guidelines only applied to initial requests, not repeat requests. Just like the 2016 Guidelines, the 2009 Guidelines provided that the Minister "generally" did not want to see repeat requests unless the Department formed the view that there had been a significant change in circumstances which raised new, substantive issues not previously considered, and which, "in the opinion[] of the [D]epartment", involved unique or exceptional circumstances (or had been referred to the Department by a "review tribunal member"). Again, just like the 2016 Guidelines, the 2009 Guidelines called for the Department to undertake an evaluative assessment to determine whether a given request did or did not meet these requirements. The 2009 Guidelines also specified that eight other categories of requests did not need to be brought to the Minister's attention. For example, where it may have been open to an applicant to make a valid application for a "Partner visa onshore", the Department was to reply on behalf of the Minister that he or she did not wish to consider exercising his or her power conferred by s 351.

Plaintiff S10* and *SZSSJ

225 The appellants needed to rely upon the first difference between the 2016 and 2009 Guidelines set out above because this Court determined in *Plaintiff S10* that the 2009 Guidelines were valid and did not, when applied, affect legal rights and obligations. The appellants submitted that the 2016 Guidelines are radically different because, under them, the Minister does not receive any "schedule" of refused initial requests. Without the receipt of that "schedule", the Minister, it was said, had effectively abandoned the exercise of his or her power to the Department.

226 A consideration of *Plaintiff S10* and *SZSSJ* does not support the distinction sought to be drawn by the appellants. Instead, it shows that the two guidelines are

materially the same: neither affected rights and obligations; neither, when applied by the Department, constituted an exercise of power; and each, when issued, was an entirely valid exercise of the Minister's executive power as a Minister of State pursuant to s 64 of the *Constitution* and as part of the execution and maintenance of the laws of the Commonwealth pursuant to s 61 of the *Constitution*.

227 As to the validity of the 2009 Guidelines, Gummow, Hayne, Crennan and Bell JJ said in *Plaintiff S10*[224]:

> "The terms of the guidelines provide criteria to distinguish between *requests which will not be referred to the Minister* and those which may be referred to the Minister for consideration whether to exercise the relevant power. By these directions the Minister has determined in advance the circumstances in which he or she wishes to be put in a position to consider exercise of the discretionary powers by the advice of department officers. *It was within the competence of the Minister to do so*". (emphasis added)

228 The reference in the foregoing passage to requests "which will not be referred to the Minister" was a clear acknowledgment by their Honours that the 2009 Guidelines provided for this outcome in, for example, the case of repeat requests. Yet this did not render the application of the 2009 Guidelines an impermissible delegation of power or an act which exceeded the executive power of the Commonwealth. That is precisely because whether a departmental referral is or is not made, no statutory power is exercised. As French CJ and Kiefel J said in *Plaintiff S10*[225]:

> "If, on ministerial instructions, certain classes of request or case *are not even to be submitted to him or her for consideration*, the position in law is unchanged. There is no exercise of a statutory power under the Act conditioned upon compliance with the requirements of procedural fairness.
>
> ...
>
> The plaintiffs' submissions that the issue of ministerial guidelines in relation to the dispensing provisions involved a decision by the Minister to decide to consider the exercise of the powers conferred by those provisions, should be rejected. So too should the proposition that the processes followed under the guidelines were steps towards the exercise of the ministerial powers." (emphasis added)

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224 (2012) 246 CLR 636 at 665 [91].

225 (2012) 246 CLR 636 at 655 [50]-[52].

229 The foregoing passage was expressly approved in *SZSSJ*[226]. Earlier, in *Plaintiff S10*, French CJ and Kiefel J accepted a submission that the 2009 Guidelines did no more than facilitate the provision of advice. Their Honours said[227]:

> "It was submitted for the Minister and the Secretary that, properly understood, each of the guidelines in this case does no more than facilitate the provision of advice to the Minister in particular cases and otherwise operate as a screening mechanism in relation to any requests which the Minister has decided are not to be brought to his or her attention. The issue of the guidelines itself did not involve a decision on the part of the Minister, acting under the relevant section, to consider the exercise of the power conferred by it. That submission should be accepted."

230 With respect, the foregoing conclusion applies equally to the 2016 Guidelines. The possibility that more cases under those guidelines will not be referred to the Minister than under the 2009 Guidelines does not deny the conclusion that in each case the purpose of each of the guidelines is advisory and neither calls for an exercise of power by the Department. The difference between the two guidelines is only administrative in nature.

231 That the difference is of no relevant moment is also reflected in the fact that in *Plaintiff S10* it was understood by this Court that the Department had not referred the cases of some of the plaintiffs to the Minister[228]. But this did not result in a conclusion that in those cases there had been an act in excess of power, even though, it will be recalled, the criteria for the consideration of repeat requests under the 2009 Guidelines included evaluative, non-objective issues for analysis (just like the 2016 Guidelines). Nor did it otherwise render that part of the 2009 Guidelines invalid.

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226 (2016) 259 CLR 180 at 199 [47], [50] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

227 (2012) 246 CLR 636 at 653 [46].

228 See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 643 [7], [10] per French CJ and Kiefel J; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 199 [46] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

232 In *SZSSJ*, all members of this Court reached the same conclusion about how the 2009 Guidelines operated. The Court summarised the relevant principles to be derived from *Plaintiff S10* as follows[229]:

> "Members of the Court [in *Plaintiff S10*], with the possible exception only of Heydon J, interpreted the guidelines as directed to when the Department was to refer cases to the Minister in order to allow the Minister to decide whether or not to consider exercising a non-compellable power: *where the Department had not referred a case to the Minister, no statutory power had been engaged*; where the Department had referred a case to the Minister and the Minister had indicated that he would 'not intervene', the Minister had made a personal decision that he would not consider exercising any of the non-compellable powers". (emphasis added)

233 It is true that the appellants' argument in these appeals – that the non-referral of cases to the Minister was an effective abandonment of power – was not one directly addressed in either *Plaintiff S10* or *SZSSJ*. But it is the decisive conclusion reached in both decisions that the act of non-referral did not involve any actual exercise of power which renders that argument unsustainable.

Judicial review of power

234 The foregoing is supported by fundamental principles of public law. First, judicial review is concerned with the lawful exercise of executive power[230]. As Brennan J explained in *Quin*[231]:

> "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government."

235 Power, it should be accepted in this context, is the capacity to interfere with or legally alter rights, obligations and legally recognised interests. For the purposes of the *Constitution*, this type of power has three relevant sources. As Brennan J observed in *Davis v The Commonwealth*[232]:

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229 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 199 [47] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

230 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 26 per Brennan J.

231 (1990) 170 CLR 1 at 35.

232 (1988) 166 CLR 79 at 108-109; see also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 97 [132] per Gageler J.

> "[A]n act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity. The relevant statute defines the scope of a power or capacity in the first category, but there is no express criterion by which non-statutory powers and capacities may be classified as falling within the executive power of the Commonwealth."

236 An exercise of power, in this context, is not, for example, influencing a decision maker; it is not facilitating an exercise of power; it is not advising on an exercise of power; and it is not providing merely administrative support to an exercise of power. Subject to any statutory modification of the common law, the ability to influence, facilitate, advise upon and support an exercise of power may have practical consequences; but none of those acts can be amenable to judicial review unless it constitutes in and of itself an exercise of power, or is a necessary legal condition for the exercise of power. Otherwise, those acts are all steps anterior to an exercise of power.

237 The observations of the Full Court of the Supreme Court of South Australia in *L v South Australia*[233] are apposite. The plaintiffs in that case sought judicial review in relation to a report published by a governmental child protection unit that recommended the removal of foster children from the plaintiffs' care. Kourakis CJ defined "power" as[234]:

> "the legal authority to affect a legal right or interest by abrogating, diminishing, limiting or extending it. It does not refer to the financial, human and other resources of a person, or the executive government, to influence conduct in fact, nor to any imbalance between the power, in that sense, of one person when pitted against another."

238 As his Honour went on to conclude, it is critical in the exercise of a court's supervisory jurisdiction not "to conflate the question of practical economic and social power with a legal power to affect existing rights and interests"[235].

239 For the reasons already given, the application of the 2016 Guidelines to each appellant did not constitute an exercise of power amenable to judicial review. Each application of the 2016 Guidelines was an anterior exercise designed to

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233 (2017) 129 SASR 180.

234 (2017) 129 SASR 180 at 216 [136].

235 (2017) 129 SASR 180 at 221 [152]; cf *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121.

facilitate the provision in some cases of advice to the Minister and otherwise to operate as a screening mechanism for requests the Minister did not generally wish to consider[236]. That is what this Court decided in relation to the 2009 Guidelines; the omission of the schedule, described above, from the 2016 Guidelines makes no difference to that outcome.

Holding a relevant legal right or interest

240 The appellants' case suffered from another important but related difficulty. Whilst they arguably had standing to bring these proceedings, they never held any relevant legal right or interest that could be altered or interfered with by an exercise of power. That is precisely because the Minister was under no duty to consider whether to make a procedural decision or a substantive decision under s 351 of the Act. In that respect, the Solicitor-General of the Commonwealth's submission that it would have been entirely lawful for the Minister to have instructed the Department that he or she would never exercise the power conferred by s 351 should be accepted. Neither appellant could compel any contrary outcome. It follows that the appellants only had an expectation – perhaps a legitimate expectation – that the 2016 Guidelines would be applied accurately. But such an expectation will not, in this country, justify the imposition of public law remedies. As Brennan J observed in *Quin*[237]:

> "[W]hen an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual's legitimate expectations against adverse exercises of the power? I have no doubt that the answer is: none. Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power."

241 In argument, the only legal interest or right that the appellants asserted could have been affected by the application of the 2016 Guidelines to their pending requests was their possible eligibility for a bridging visa pursuant to cl 050.212(6) of Sch 2 to the *Migration Regulations 1994* (Cth). Entitlement for the issue of this visa arises when an applicant makes a request for the Minister to exercise his or her power under s 351(1) of the Act, subject to other requirements in cl 050.212 being met. Visas of this type are issued with a date of expiration which may or may not correspond to the time taken by the Department to consider a request[238].

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236 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 653 [46] per French CJ and Kiefel J.

237 (1990) 170 CLR 1 at 35.

238 *Migration Regulations 1994* (Cth), Sch 2, cl 050.517.

They also cannot be issued to a person who has made a repeat request for the exercise of the s 351 power[239]. It was not clear whether either of the appellants held a bridging visa under cl 050.212(6) or of another kind at the time of their requests and throughout these appeals[240].

242 Having previously made three requests for ministerial intervention under s 351 of the Act, DCM20 cannot have been legally eligible for a bridging visa under cl 050.212(6) regardless of the outcome of her fourth request, the non-referral of which was the subject of her appeal. On the other hand, assuming for present purposes that Mr Davis did hold such a bridging visa, the holding of this visa was also legally unaffected by the application of the 2016 Guidelines to his circumstances. His legal entitlement to this visa arose regardless of how his request was to be addressed by the Department and the Department's recommendation not to refer his request to the Minister could not affect the characterisation of any future request made by him as a repeat request. At most, such a recommendation simply made it more likely that another request might be made in the future, at which point, like DCM20, Mr Davis would not be eligible for the grant of another bridging visa of the same kind.

Remedies and islands of power

243 Two more matters should be addressed.

244 First, there is the issue of what remedies may be available. Here, each appellant sought a declaration that the 2016 Guidelines are "inconsistent with and repugnant to" s 351 of the Act. Given that the 2016 Guidelines have no legal effect, it is immediately difficult to see how any such repugnance or inconsistency can arise. In any event, the majority favour a different declaration, namely that each "decision made ... in purported compliance with section [10] of the 2016 [Guidelines] exceeded the executive power of the Commonwealth"[241]. With great respect, there was no obligation of compliance and, for the reasons given already, there was no exercise of executive power when the Department declined to refer either request to the Minister.

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239 *Migration Regulations 1994* (Cth), Sch 2, cl 050.212(6)(c)(i).

240 See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 29 [11] per Kenny J, 47 [85] per Griffiths J, 55 [119] per Mortimer J.

241 See reasons of Kiefel CJ, Gageler and Gleeson JJ at [63]-[64], Gordon J at [66], Edelman J at [195], Jagot J at [324].

245 In *Quin*, Brennan J warned against the making of declarations where "the availability of a substantive remedy is doubtful"[242]. Here, what in substance can either appellant achieve? The majority's proposed declarations secure nothing. That is because if the Department's consideration of each request was a nullity, neither appellant can, as a result, force the Minister to consider their requests anew. They have no legal right to advance their respective cases. Nor do the proposed declarations in any way touch upon or concern the Minister's statutory power to make a procedural decision and, if needed, a substantive decision in relation to either appellant. Save for the future administration generally by the Department of the receipt of requests to exercise the power conferred by s 351, the proposed declarations are inutile.

246 Secondly, in *Kirk v Industrial Court (NSW)*, it was said[243]:

> "To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint."

247 It might be thought that the inability to seek judicial review of the application of the 2016 Guidelines to each of the requests made by the appellants is "to create islands of power immune from supervision and restraint". But that is not so, precisely because no power has here been exercised. Consistently with *Quin*, the internal processes of a Department of State, which do not involve the exercise of power as described in these reasons, are normally immune from judicial scrutiny. Any other conclusion would permit unnecessary and unwieldy challenges to the administration of government before any statutory or executive power is in fact exercised.

Legal unreasonableness

248 It follows from the foregoing reasoning that because the act of declining to make each referral was not an exercise of power, it could not be subject to judicial review on the ground of legal unreasonableness. That doctrine has in Australia historically existed only as an implication which follows from a grant of statutory power[244]. The cases referenced by the Full Court below support that proposition.

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242 (1990) 170 CLR 1 at 31.

243 (2010) 239 CLR 531 at 581 [99] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

244 See, eg, *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 per Kitto J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36 per Brennan CJ; *Re Refugee*

Rooke's Case[245] concerned the exercise of a statutory discretion conferred by the *Statute of Sewers 1531* (23 Hen VIII c 5). It was that power that had to be exercised "with the rule of reason and law"[246]. Similarly, *Sharp v Wakefield*[247] concerned the exercise of a statutory discretion conferred by successive Acts which commenced with the *Alehouse Act 1828* (9 Geo IV c 61). The discretion was one which could not lawfully be exercised in an "arbitrary, vague, and fanciful" way[248]. There is otherwise no authority in Australia so far that supports the existence of a freestanding measure of reasonableness which conditions the exercise of all power other than that conferred by statute.

249 I otherwise respectfully agree with the conclusion reached by all of the judges of the Full Court below that the application of the 2016 Guidelines in the case of each appellant was not legally unreasonable[249]. In the case of Mr Davis, a man who has led a blameless and law-abiding life for a considerable period of time in this country, the initial reasons for declining to refer his case to the Minister might fairly be characterised as ungenerous and somewhat unsatisfactory. The subsequent reasons treated Mr Davis' follow-up request – seeking reconsideration of certain "elements" that had not been addressed by the Department – as a "repeat request". As such, these reasons might fairly be considered to be perhaps even more ungenerous and unsatisfactory. But the boundaries of "decisional freedom"

Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at 100-101 [40] per Gaudron and Gummow JJ; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350-351 [26]-[28] per French CJ, 362-363 [63]-[64] per Hayne, Kiefel and Bell JJ.

245 (1597) 5 Co Rep 99b [77 ER 209].

246 (1597) 5 Co Rep 99b at 100a [77 ER 209 at 210]. See also *Keighley's Case* (1609) 10 Co Rep 139a at 140a [77 ER 1136 at 1138]; *Estwick v City of London* (1647) Style 42 at 43 [82 ER 515 at 516]; *R v Commissioners of the Fens* (1666) 2 Keble 43 [84 ER 28].

247 [1891] AC 173.

248 [1891] AC 173 at 179 per Lord Halsbury LC.

249 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 at 27 [3] per Kenny J, 38 [54]-[55] per Besanko J, 51 [97] per Griffiths J, 54 [118] per Mortimer J, 94-95 [324]-[329], 101-103 [356]-[365] per Charlesworth J.

will often encompass reasoning which might be unsatisfactory, but which is nonetheless lawful[250].

Conclusion

250 The appeals should be dismissed.

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250 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350-351 [28] per French CJ.

251 JAGOT J. These two appeals should be allowed. Whatever its precise scope and nature, the executive power referred to in s 61 of the *Constitution* did not enable the Minister to issue, and the officers of the Minister's department to implement, instructions which purported to require officers of the department to decide matters within the zone of exclusive Ministerial personal decision-making power created by s 351 of the *Migration Act 1958* (Cth) ("the Act").

252 The zone of exclusive Ministerial personal decision-making power created by s 351 of the Act qualifies both an exercise of the statutory power in s 351(1) and an exercise of non-statutory executive power under s 61 of the *Constitution* in connection with s 351(1).

253 Without impermissibly acting within that exclusive zone, departmental officers may implement any decision of the Minister under s 351(1), be that a decision about a particular request, classes of requests (existing or prospective), or all requests (existing or prospective). They may also provide all such assistance, advice, and analysis the Minister may require so that the Minister may exercise any aspect of the s 351(1) power.

254 In contrast to these forms of permissible conduct, the instructions from the Minister to the department in issue in these appeals impermissibly required the departmental officers to decide matters within the zone of exclusive Ministerial personal decision-making power created by s 351 of the Act. This is because the instructions required the departmental officers to decide that the request of each appellant did not meet certain evaluative "public interest" criteria and, without referral to the Minister, to finalise the request. In finalising the request of each appellant for a more favourable decision under s 351(1) of the Act in purported compliance with the Minister's instructions, the departmental officers acted impermissibly.

Background

255 Having failed in their respective applications to the relevant tribunals[251] to obtain the grant of a visa, each appellant requested the Minister to exercise power under s 351(1) of the Act. Section 351 provides that:

> "(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 349 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

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251 Now the Administrative Appeals Tribunal ("the Tribunal").

...

(3) The power under subsection (1) may only be exercised by the Minister personally.

...

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances."

256 In each case, an officer of the Minister's department decided that the request should not be referred to the Minister and should be "finalised" by the department. These decisions were made applying an instruction from the Minister to the department issued in March 2016, "Minister's guidelines on ministerial powers (s351, s417 and s501J)" ("the Minister's Instructions 2016"). The Minister's Instructions 2016 were not issued as directions from the Minister to a person or body having functions or powers under the Act in accordance with s 499.

257 Each appellant challenged the decision of the departmental officer primarily on the ground that the decision was legally unreasonable and sought consequential orders to the effect that their request for Ministerial intervention under s 351(1) was not finalised. Having failed at first instance[252], each appellant then appealed to the Full Court of the Federal Court of Australia.

258 The Full Court heard and determined the appeals together[253]. The appeals below proceeded on the basis that the departmental officers' assessment of each appellant's request and the officers' resulting decisions not to refer the requests to the Minister and to finalise the requests in purported compliance with the Minister's Instructions 2016 did not involve any exercise of statutory power but, rather, were "the exercise of non-statutory powers" derived from ss 61 and 64 of the *Constitution*[254].

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252 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 791; *DCM20 v Secretary, Department of Home Affairs* [2020] FCA 1022.

253 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23 ("*Davis v Minister*").

254 *Davis v Minister* (2021) 288 FCR 23 at 85 [284], 89-90 [306] per Charlesworth J, Kenny J agreeing at 29 [12]-[14], Besanko J agreeing at 38 [54]-[55], Griffiths J agreeing at 38 [56], 41-42 [63]-[64], 48 [88], Mortimer J agreeing at 54 [117], 66 [174]-[175].

259 The Full Court dismissed each appeal on the basis that, although the impugned decisions of the departmental officers were amenable to judicial review on the ground of legal unreasonableness, the decisions were not legally unreasonable[255]. In so doing, the Full Court (by majority) also refused to grant Mr Davis leave to raise a second ground in his appeal challenging the lawfulness of the Minister's Instructions 2016[256].

260 Mr Davis was granted special leave to appeal including on the new second ground and, during the hearing of the appeals, sought leave to amend his notice of appeal to seek additional declaratory relief to the effect that the Minister's Instructions 2016 are inconsistent with and repugnant to ss 351, 417, and 501J of the Act. During the hearing of the appeals, DCM20 sought leave to amend her notice of appeal to raise the second ground and to seek a declaration in the same terms as Mr Davis. Leave to amend and special leave to raise the second ground as sought should be granted.

261 Sections 417 and 501J of the Act, like s 351, give the Minister a personal and non-compellable power to substitute for a decision of the Tribunal a decision more favourable to the applicant if the Minister thinks it is in the public interest to do so.

262 In accordance with the position of the parties below, they proceeded in this Court on the basis that the issue and implementation of the Minister's Instructions 2016 did not involve the exercise of any statutory power but, rather, involved the exercise of executive power referred to in ss 61 and 64 of the *Constitution*.

263 The new ground concerning the legal status of the Minister's Instructions 2016 logically precedes the dispute between the parties as to whether the actions of the departmental officers are amenable to judicial review on the ground of legal unreasonableness. As the new ground should succeed, it is the focus of these reasons.

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255 *Davis v Minister* (2021) 288 FCR 23 at 27 [3] per Kenny J, 37 [49]-[50], 38 [54]-[55] per Besanko J, 50-51 [96]-[97], 53 [112]-[113] per Griffiths J, 54 [116]-[118] per Mortimer J, 89 [302], 95 [327], 103 [363] per Charlesworth J.

256 *Davis v Minister* (2021) 288 FCR 23 at 95 [330]-[332] per Charlesworth J, Kenny and Griffiths JJ agreeing at 37 [47], 53-54 [114(b)] respectively.

The power involved

264 Chapter II of the *Constitution* concerns the executive power of the Commonwealth[257]. The executive power of the Commonwealth is "all that power of a polity that is not legislative or judicial power"[258]. By s 61, the "executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". By s 62, there "shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth". By s 63, the "provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council".

265 Section 64 concerns Ministers of State and provides, relevantly, that:

> "The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish."

266 By s 65, Ministers "shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs". Section 67 concerns the appointment of civil servants and provides that:

> "Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority."

267 Section 51 provides that the Parliament "shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to", relevantly:

> "(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal

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257 In contrast to the legislative power of the Commonwealth, which is vested in Federal Parliament (s 1) and is subject to Ch I of the *Constitution*, and the judicial power of the Commonwealth, which is vested in this Court (s 71) and is subject to Ch III of the *Constitution*.

258 *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 468 [78].

> Judicature, or in any department or officer of the Commonwealth."

268 Under s 75, this Court has original jurisdiction in all matters, relevantly:

> "(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
>
> ...
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth."

269 In the present cases, the Minister issued the Minister's Instructions 2016 to the department and the officers of the department purported to comply with those Instructions for the purposes of, but not by exercise of any power under, the Act. Accordingly, the relevant provision is s 61 of the *Constitution* insofar as it refers to executive power extending to the "execution and maintenance ... of the laws of the Commonwealth"[259]. This aspect of s 61 of the *Constitution* has been said to be "a function characteristically to be performed by execution of statutory powers"[260], but is not so confined[261]. In providing that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth", s 61, as Isaacs J said, "marks the external boundaries of the Commonwealth executive power, so far as that is conferred by the Constitution, but it leaves entirely untouched the definition of that power and

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259 That is, the power exercised was a non-statutory and non-prerogative power as described in *Davis v The Commonwealth* (1988) 166 CLR 79 at 108. Having identified the prerogative powers as those enjoyed by the Crown alone, Brennan J said that "an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity". See also *Clough v Leahy* (1904) 2 CLR 139 at 156.

260 *Davis v The Commonwealth* (1988) 166 CLR 79 at 109.

261 eg, *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 455, 464; *Williams v The Commonwealth* (2012) 248 CLR 156 at 191 [34], 342 [484].

its ascertainment in any given instance"[262]. As such, this is the "essential starting-point, and the extent it marks out cannot be exceeded"[263].

The Minister's Instructions 2016

270 The Minister's Instructions 2016, while called "Minister's guidelines on ministerial powers (s351, s417 and s501J)", are appropriately identified as instructions from the Minister as an officer appointed under s 64 of the *Constitution* to other officers of the Executive Government of the Commonwealth appointed under s 67. This is reinforced by the fact that the document identifies itself as a "departmental instruction" which is "part of the centralised departmental instructions system".

271 The principle on which the present cases are to be resolved, that if an exercise of executive power is confined by statute effect must be given to that statutory limitation, depends on the substance and not the form of the Minister's Instructions 2016.

272 The Minister's Instructions 2016 explain their purpose in s 1 as being to:

> "• explain the circumstances in which I may wish to consider intervening in a case
>
> • explain how a person may request that I consider intervening in their case
>
> • explain when my Department should refer a case to me
>
> • confirm that if a case does not meet these guidelines, I do not wish to consider intervening in that case."

273 In s 2, which explains the powers in ss 351, 417, and 501J, the Minister's Instructions 2016 explain that:

> "What is and what is not in the public interest is for me to determine."

274 Section 3 of the Minister's Instructions 2016 explains some general principles, such as that it is the Minister's "general expectation that a person who has not been granted a visa through the statutory visa process will leave Australia".

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262 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437.

263 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 438.

275 The Minister's Instructions 2016 next contain the heading "Cases that should be brought to my attention". Section 4 which immediately follows is headed "Unique or exceptional circumstances". It provides that cases "that have one or more unique or exceptional circumstances, such as those described below, may be referred to me for possible consideration of the use of my intervention powers". The description below includes, for example:

> "• strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit ...
>
> • compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person
>
> ...
>
> • circumstances not anticipated by relevant legislation; or clearly unintended consequences of legislation; or the application of relevant legislation leads to unfair or unreasonable results in a particular case".

276 Another section which follows is headed "Cases that should not be brought to my attention". Section 7 is headed "Inappropriate to consider". It says that:

> "Cases which do not meet these guidelines for referral, and with the types of circumstances described below, are inappropriate for me to consider. The Department will finalise these cases without referral to me and advise the person or their authorised representative in writing".

277 The subsequent list includes such matters as "the person's visa has been cancelled because they breached their visa conditions", "the person has had a visa refused because they did not comply with the conditions of a previous visa", or "the person has been refused a visa or has had a visa cancelled on character grounds".

278 The next section of the Minister's Instructions 2016 is headed "Requesting Ministerial intervention". Section 8 specifies who can make a request for intervention ("generally only ... a person who is the subject of the request or their authorised representative"). Section 9 specifies how to make a request (in writing). Section 10 specifies how requests for Ministerial intervention will be progressed.

279 Section 10.1 deals with "First requests". It says that a "request is a 'first request' if I or another Minister ... have not previously received a request to intervene in the person's case ... under any of the powers covered in these guidelines". Section 10.1 continues:

> "If the Department assesses that the case has unique or exceptional circumstances such as those described in section 4 of these guidelines, it will be brought to my attention in a submission. I may consider intervening if I think it is in the public interest to do so.
>
> If the Department assesses that the case does not have unique or exceptional circumstances such as those described in section 4 of these guidelines and is inappropriate for me to consider, as described in section 7 of these guidelines, it will not be brought to my attention.
>
> If the Department assesses that the case does not have unique or exceptional circumstances such as those described in section 4 of these guidelines, and is not inappropriate for me to consider, it will be finalised by the Department without referral to me.
>
> If I do not wish to intervene or consider intervening in the case, whether or not it has been referred to me, the Department will reply on my behalf to the person or their authorised representative that I do not wish to intervene or consider intervening in that case."

280 Section 10.2 concerns repeat requests. It provides that a "request is a 'repeat request' if I or another Minister (current or previous) have previously received a request to intervene in the person's case ... under any of the powers covered in these guidelines". Section 10.2 continues:

> "I do not wish to consider repeat requests. Where I or another Minister (current or previous) have declined to intervene or consider intervening in a case, I expect the person concerned to leave Australia.
>
> In limited circumstances, a repeat request may be referred to me if:
>
> - the Department is satisfied there has been a significant change in circumstances since the previous request(s) which raises new, substantive issues that were not provided before or considered in a previous request; and
>
> - the Department assesses that these new, substantive issues fall within the unique or exceptional circumstances described in section 4 of these guidelines.
>
> Otherwise, the Department should reply on my behalf to the person or their authorised representative that I do not wish to consider intervening in the case."

281 Section 12 provides that:

> "My powers to intervene in an individual case, where I believe it is in the public interest to do so, exist whether or not the case is brought to my attention in the manner described above, as long as a decision has been made by a relevant review tribunal and that decision continues to exist (for example, the review tribunal decision has not been overturned by a court).
>
> I may consider intervening in cases where the circumstances do not fall within the unique or exceptional circumstances as described in section 4 of these guidelines, if I consider it to be in the public interest.
>
> Where I believe it is appropriate, I will seek further information to help me to determine whether to consider intervening in a case."

282 As will be explained, the key point about the Minister's Instructions 2016 is that departmental officers are to assess if the case to which the request relates has unique or exceptional circumstances such as those described in s 4 of the Instructions. If not, and subject to the Minister's overriding power to intervene in any case as recorded in s 12, the department is to finalise the request without referral to the Minister.

The dispute about the Minister's Instructions 2016

The appellants' challenges

283 The appellants' principal contention was that, to the extent the Minister's Instructions 2016 "delegate power to a Departmental officer to finalise a request without notice to the Minister on the basis that it does not raise unique or exceptional circumstances or involve the public interest, the [Instructions] are inconsistent with the personal and non-delegable discretionary powers conferred on the Minister by s 351(1) and (3)" of the Act.

284 This contention raises two further issues: first, the jurisdiction of the Full Court of the Federal Court of Australia to hear and determine the appeals against the orders dismissing each appellant's originating application, and second, the standing of the appellants, which, in federal jurisdiction, is related to the existence of a matter or justiciable controversy involving "some immediate right, duty or liability to be established by the determination of the Court"[264]. These further

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264 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; see also *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 368 [85]; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 245-246 [29]-[31], 249-250 [49], 256-257 [79]; 399 ALR 214 at 223, 228, 237.

issues are readily resolved in respect of the challenges to the Minister's Instructions 2016 and the declaratory relief sought in consequence.

Jurisdiction

285 Section 476A of the Act limits the jurisdiction of the Federal Court. It provides, in sub-s (1), that "[d]espite any other law, including section 39B of the *Judiciary Act 1903* ... the Federal Court has original jurisdiction in relation to a migration decision if, and only if" specified criteria are satisfied. For present purposes, the key words in this provision are "in relation to a migration decision". That is, the jurisdiction the Federal Court would otherwise have under, relevantly, s 39B of the *Judiciary Act 1903* (Cth) is not excluded in the present cases if the matter is not "in relation to a migration decision".

286 A "migration decision" is defined in s 5(1) of the Act to mean a "privative clause decision", a "purported privative clause decision", a "non-privative clause decision", or an "AAT Act [*Administrative Appeals Tribunal Act 1975* (Cth)] migration decision". Of these, the first three are relevant. The meanings the Act gives to each of these three terms in ss 5E, 474(2), and 474(6) require the impugned decision to be made, proposed to be made, or required to be made, in effect, under the Act. As noted, the Minister issued the Minister's Instructions 2016 to the department and the officers of the department purported to implement those Instructions for the purposes of, but not by exercise of any power under, the Act.

287 It follows that the limit on the jurisdiction of the Federal Court imposed by s 476A of the Act was not engaged in the present cases. The Federal Court had jurisdiction to hear and determine the appeals under, at least, s 39B(1), (1A)(b), and (1A)(c) of the *Judiciary Act*. Accordingly, this Court has jurisdiction to hear and determine the appeals under s 73(ii) of the *Constitution*. In so doing, this Court "may give such judgment as ought to have been given in the first instance" as provided for in s 37 of the *Judiciary Act*.

Standing/"matter"

288 In the context of the challenges to the decisions of the departmental officers on the ground of legal unreasonableness, the appellants contended that finalisation of their respective requests by the departmental officers without referral to the Minister in purported compliance with the Minister's Instructions 2016: (a) foreclosed the possibility of the Minister exercising power to substitute a more favourable decision; (b) rendered any further request a "repeat request" under the Minister's Instructions 2016; and (c) excluded their eligibility for the grant of a bridging visa[265]. Accordingly, the appellants said that their legal rights were affected by the impugned decisions such as to render the decisions capable of

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265 By operation of cl 050.212(6)(c) of Sch 2 to the *Migration Regulations 1994* (Cth).

judicial review at the suit of each appellant. In response, the Solicitor-General of the Commonwealth submitted that the decisions were not amenable to judicial review as the officer's conduct in each case was incapable of affecting any legal right of the appellants[266]. This was said to result from the fact that the Minister had no duty to consider exercising any power under s 351(1) by operation of s 351(7) of the Act.

289 This dispute between the parties need not be resolved. The new ground the subject of the grants of leave in this Court relates to the legal status of the Minister's Instructions 2016 and the actions of the departmental officers under those Instructions. The relief sought involves related declarations as of right. It was not (and could not be) suggested that the appellants did not each have a "real", "sufficient", "special", or "sufficient material" interest[267] in respect of these matters to support their claims for declaratory relief. The implementation of the Minister's Instructions 2016 resulted in each appellant's request for the exercise of Ministerial power under s 351(1) of the Act being finalised without referral to the Minister. If that implementation exceeded the executive authority of the departmental officers, each appellant's request for Ministerial intervention would remain undetermined in law[268]. Accordingly, an appropriately framed declaration would produce

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266 Citing, in support, eg, *The Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 585; *Griffith University v Tang* (2005) 221 CLR 99 at 128 [80]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 641-642 [2]-[3], 665 [91] (citing *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 522-523 [63]-[66]) ("*Plaintiff S10*"); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 380 [184]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 98 [134]-[135]; cf *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 353 [76] ("*Plaintiff M61*") (in which the Minister's consideration of a statutory power "affected [the claimants'] rights and interests directly because the decision to consider the exercise of those powers, with the consequential need to make inquiries, prolonged their detention for so long as the assessment and any necessary review took to complete").

267 eg, *The Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 71; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36, 41-42, 43, 44, 62-63, 72-76; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 265-266 [46], 267 [50], 280-284 [92]-[103].

268 cf *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300, in which the Minister's functions were "without any identified statutory foundation, undefined by any identified statutory obligation or control and devoid of any direct

"foreseeable consequences"[269] for each appellant. It follows that there is a matter in each appeal and each appellant has the requisite standing to pursue that matter[270].

Exceeding power

290 The scope of executive power under s 61 of the *Constitution*[271] in the present cases involves the fundamental concept of parliamentary supremacy. Parliamentary supremacy dictates that "it is of the very nature of executive power in a system of responsible government that it is susceptible to control by the exercise of legislative power by Parliament"[272]. It follows that the "Executive cannot change or add to the law; it can only execute it"[273]. In the words of Brennan J[274]:

> "The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy."

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statutory or legal effect"; *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 at 31-33 per Kiefel J, Sackville J agreeing at 30.

269 *Plaintiff M61* (2010) 243 CLR 319 at 359-360 [103], citing *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188, 189; 18 ALR 55 at 69, 71. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 75 [59], 76 [64], 90 [112], 122 [230], 152 [350].

270 *Croome v Tasmania* (1997) 191 CLR 119 at 125.

271 See, in respect of the concept of "capacity" in the context of the exercise of executive power, *Williams v The Commonwealth* (2012) 248 CLR 156 at 252-253 [201]-[203].

272 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 441 (footnote omitted), see also at 459 referring to *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 at 526, 537-540, 549-550, 561-562, 575-576 and *Brown v West* (1990) 169 CLR 195 at 205; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 70 [85].

273 *R v Kidman* (1915) 20 CLR 425 at 441. See also *Williams v The Commonwealth* (2012) 248 CLR 156 at 232 [135].

274 *A v Hayden* (1984) 156 CLR 532 at 580.

291 The relevant constitutional principle is that[275]:

> "Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope."

292 This being so, the next question involves the construction of the Act, in particular s 351 itself. The key aspects of s 351 are that: (a) sub-s (1) vests the relevant power in the Minister (to substitute for a decision of the Tribunal a decision more favourable to the applicant); (b) by sub-s (1), that power is contingent on the Minister thinking it is in the public interest to do so; (c) by sub-s (2), the Minister does not have to comply with certain provisions of the Act or the whole of the *Migration Regulations 1994* (Cth); (d) by sub-s (3), the power may only be exercised by the Minister personally; (e) by sub-s (4), if the Minister substitutes a decision under sub-s (1), the Minister is to cause a statement to be laid before each House of Parliament that sets out specified matters including the reasons for the decision; and (f) by sub-s (7), the Minister has no duty to consider exercising the power in any circumstances. These provisions, operating together, create the zone of exclusive Ministerial personal decision-making power to which I have referred.

293 Section 351(3), construed in the context of the whole provision, has several consequences. It excludes the capacity which the Minister otherwise would have under s 496(1) of the Act to delegate the exercise of the power in s 351(1). It also qualifies the operation of what is known as the *Carltona* principle, which is an exception to the "obvious proposition that a statute which on its proper construction confers a power on A does not permit the power to be exercised by B"[276]. In *Carltona Ltd v Commissioners of Works*[277], Lord Greene MR explained that, given the nature and number of decisions required to be made under the regulation there in question, the regulation could not be construed as meaning that the "minister in person should direct his mind to the matter"[278]. Rather, the

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275 *Brown v West* (1990) 169 CLR 195 at 202. See also, eg, *Davis v The Commonwealth* (1988) 166 CLR 79 at 108; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 600-601 [279].

276 *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Q)* (1979) 142 CLR 460 at 481.

277 [1943] 2 All ER 560.

278 [1943] 2 All ER 560 at 563.

Minister's departmental officers could act as the Minister's decision-making agents.

294 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[279], Mason J explained that the *Carltona* principle "partly depends on the special position of constitutional responsibility which Ministers occupy and on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally"[280]. The application of the principle depends on whether the "nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the repository personally because administrative necessity indicated that it was impractical for [the repository] to act otherwise than through [the repository's] officers or officers responsible to [the repository]"[281].

295 Section 351 unequivocally conveys Parliament's requirement that the power in s 351(1) not be exercisable by any person other than the Minister personally. Section 351 does not exclude that, if the Minister wishes to consider exercising the power in s 351(1), the Minister may obtain assistance and advice from officers of the department. The fact that a Minister's appreciation of a case to be considered may depend "to a great extent"[282] on the analysis and advice of departmental officers does not mean that the Minister, in deciding a response to a request based on that analysis and advice, is not personally making the decision.

296 A power such as that in s 351 has been characterised as involving two aspects: a procedural aspect enabling the Minister to consider exercising the power; and a substantive aspect enabling the Minister to exercise or not exercise the power[283].

297 Five points should be made now.

298 First, this procedural and substantive distinction is necessary because s 351(7) refers to considering exercising the power in s 351(1) and, thereby, subdivides the power into the consideration of its exercise and its exercise. The distinction drawn in s 351(7) reflects that, depending on the terms of the statute, the statutory vesting of a power may carry with it an express or implied duty to

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279 (1986) 162 CLR 24.

280 (1986) 162 CLR 24 at 38, citing *O'Reilly v State Bank of Victoria Commissioners* (1982) 153 CLR 1 at 11.

281 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38.

282 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 65.

283 eg, *Plaintiff M61* (2010) 243 CLR 319 at 350 [70].

consider the exercise of the power in certain circumstances[284]. In this case, any such potential duty is expressly excluded by s 351(7). Further, as s 351(7) provides that there is no duty to consider exercising the power, it must also follow that there is no duty to exercise the power[285].

299 Second, the Minister does not need to deal with any or all requests by separating the procedural and substantive aspects of the power. If the Minister chooses, the Minister can make a single decision (to exercise or not to exercise the power to substitute a more favourable decision) about a, or certain classes of, request, or all requests. Of course, as a practical matter, the extent to which the Minister can consider the public interest in the context of making (or refusing to make) a procedural decision about a particular request may be constrained by a lack of knowledge of the details of the request. The same lack of knowledge does not necessarily apply to Ministerial procedural decisions about certain classes of request or all requests in which the public interest might depend on common features of the class or common circumstances. In any event, whatever the level of detail available, the Minister's view as to the public interest conditions all decisions which s 351(1) empowers the Minister to make, be they positive or negative decisions.

300 Third, while the power in s 351(1) involves two aspects (the procedural and the substantive), both aspects give rise to a positive and a negative decision-making potential. The procedural aspect, enabling the Minister to consider exercising the power, is capable of a positive decision ("I will consider exercising my power") or a negative decision ("I will not consider exercising my power"). The substantive aspect, enabling the Minister to exercise or not exercise the power, is also capable of a positive decision ("I will exercise my power") or a negative decision ("I will not exercise my power"). Accordingly, the fact that s 351(1) is expressed in terms of the positive decision only ("... the Minister may substitute ...") does not mean that a negative procedural or substantive decision is not a decision under s 351(1).

301 Fourth, not all statutory or non-statutory powers are able to be disaggregated. Nor are all conceptual distinctions useful. As explained, given the terms of s 351(7), the procedural and substantive aspects of the power in s 351(1)

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284 eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 374-375 [102]-[103], referring to *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 88 (applying *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223 and *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034) and *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 17-18 (applying *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189).

285 *Plaintiff M61* (2010) 243 CLR 319 at 350 [70].

must be distinguished. But no further disaggregation of the power in s 351(1) of the Act is possible. However, once distinctions of this kind have been introduced, clarity of language in describing actions or non-actions is critical. The earlier authorities[286], when viewed from the perspective of the issues in the present matters, must be read with this in mind.

302 Fifth, and critically for the present appeals, the zone of exclusive Ministerial personal decision-making power created by s 351 of the Act applies to the whole power in s 351(1). It applies to the procedural aspect of that power (deciding in the public interest to consider or not to consider exercising the power) and to the substantive aspect of that power (deciding in the public interest to exercise the power or not to exercise the power).

303 *Plaintiff M61/2010E v The Commonwealth*[287], *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[288], and *Minister for Immigration and Border Protection v SZSSJ*[289], on close analysis, do not support the Solicitor-General's position[290].

304 In *Plaintiff M61*, the Minister had made a positive procedural decision and the steps taken by departmental officers were directed towards the Minister deciding whether to make a positive substantive decision. As the claimants were in detention, the steps taken directly affected their liberty and were conditioned on the observance of procedural fairness[291].

305 In *Plaintiff S10*, the issue was whether the consideration of requests for a more favourable decision by the Minister by departmental officers under the 2009 version of the Minister's Instructions ("the Minister's Instructions 2009") – referred

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286 eg, *Plaintiff M61* (2010) 243 CLR 319 at 350-351 [70]-[71], 353 [77]; *Plaintiff S10* (2012) 246 CLR 636 at 653 [46], 665 [91]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 195 [33], 200 [54] ("*SZSSJ*").

287 (2010) 243 CLR 319.

288 (2012) 246 CLR 636.

289 (2016) 259 CLR 180.

290 In *Davis v Minister* (2021) 288 FCR 23 at 62 [155], Mortimer J reached much the same conclusion, principally by reference to her Honour's succinct statement at 58 [136]: "Yet the power in s 351 is a power personal to the Minister."

291 *Plaintiff M61* (2010) 243 CLR 319 at 353-354 [78].

to in *Plaintiff S10* as "the guidelines" – was subject to a duty of procedural fairness. The answer given was that it was not[292].

306 In *SZSSJ*, the difference between cases in which the Minister has declined to consider the exercise of the substantive power and cases in which the Minister has not so declined was explained in these terms[293]:

> "[P]rocesses undertaken by the Department to assist in the Minister's consideration of the possible exercise of a non-compellable power derive their character from what the Minister personally has or has not done. If the Minister has made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department to assist the Minister's consideration has a statutory basis in that prior procedural decision of the Minister. Having that statutory basis, the process attracts an implied statutory requirement to afford procedural fairness where the process has the effect of prolonging immigration detention. If the Minister has not made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department on the Minister's instructions to assist the Minister to make the procedural decision has no statutory basis and does not attract a requirement to afford procedural fairness."

307 In the passage from *SZSSJ* quoted above, the condition "[i]f the Minister has not made a personal procedural decision ...", in context, means that the Minister has not made a positive or a negative procedural decision. This is apparent from the subsequent statement about the department assisting the Minister to make the procedural decision, which, of necessity, must encompass both a positive and a negative procedural decision. In *Plaintiff S10*, one request had been referred to the Minister and the Minister had decided not to consider exercising the power, one repeat request was not referred to the Minister at all, and two other repeat requests were referred to the Minister, who decided to not "intervene"[294].

308 The foundation of the distinction between a personal Ministerial decision to not "intervene" and a negative procedural decision is not immediately apparent. But, as will be explained, the foundation of that distinction is not critical to the resolution of the present cases.

309 In *Plaintiff S10*, it was concluded that the Minister's Instructions 2009 did no more than "facilitate the provision of advice to the Minister in particular cases

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292 *Plaintiff S10* (2012) 246 CLR 636 at 642 [4], 666 [96].

293 (2016) 259 CLR 180 at 200 [54].

294 (2012) 246 CLR 636 at 643 [7], [10], 645 [16], 645-646 [21], 664 [89].

and otherwise operate as a screening mechanism in relation to any requests which the Minister has decided are not to be brought to his or her attention"[295] or represented "decisions by the Minister that if a case is assessed as not meeting the guidelines, the Minister does not wish to consider the exercise of the dispensing power, and if a case is assessed favourably then the Minister does wish to consider that exercise"[296]. These characterisations of the Minister's Instructions 2009 depended on both the arguments put in *Plaintiff S10* and, to some extent, the substantive effect of the principal provisions of the Minister's Instructions 2009[297].

310 In *Plaintiff S10*, no argument was put that the implementation of the Minister's Instructions 2009 involved decisions of departmental officers within the zone of exclusive Ministerial personal decision-making power created by s 351 of the Act[298]. It follows that the statements in *Plaintiff S10* about the Minister's Instructions 2009 are to be understood in the context of the issues for decision in that case.

311 The same observation applies to *SZSSJ*. The statement in *SZSSJ* – that, if the Minister has not made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the department on the Minister's instructions to assist the Minister to make the procedural decision has no statutory basis[299] – does not engage with the appellants' arguments in the present cases. Again, it was not suggested in *SZSSJ* that the issuing and implementation of the Minister's Instructions 2009 exceeded a limit on executive power imposed by s 351.

312 It may be accepted that the Minister may issue instructions to the department that: (a) the Minister has made a negative procedural decision under s 351(1) of the Act that the Minister does not want to consider any requests to substitute a more favourable decision under s 351(1); or (b) the Minister has made a positive and/or negative procedural decision under s 351(1) of the Act that the Minister does or does not want to consider certain requests to substitute a more favourable decision under s 351(1)[300]; or (c) the Minister does not want to be put

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295 (2012) 246 CLR 636 at 653 [46].

296 (2012) 246 CLR 636 at 665 [91].

297 As Mortimer J recognised in *Davis v Minister* (2021) 288 FCR 23 at 59-62 [141]-[155].

298 This is apparent from *Plaintiff S10* (2012) 246 CLR 636 at 641-642 [2], 651 [39]-[40], 655 [52].

299 (2016) 259 CLR 180 at 200 [54].

300 eg, *Bedlington v Chong* (1998) 87 FCR 75 at 80-81.

in a position to make a procedural decision (negative or positive) about any or only certain requests under s 351(1) of the Act. These propositions follow from s 351(7), which excludes any duty on the part of the Minister to consider whether to exercise the power under s 351(1)[301].

313 What does not follow is that more confined instructions concerning only certain kinds of requests necessarily do not involve impermissible actions of departmental officers within the zone of exclusive Ministerial personal decision-making power created by s 351 of the Act.

314 The question whether the instructions conform to the limit on both statutory and executive powers prescribed by s 351 was never posed in *Plaintiff M61*, *Plaintiff S10*, or *SZSSJ*. As a result, the statements in those cases on which the Solicitor-General relies[302] do not answer the appellants' cases.

315 This question is answered by determining whether, as a matter of substance and not form, the instruction or relevant part thereof purports to enable a departmental officer to decide a matter within the zone of exclusive Ministerial personal decision-making power created by s 351 of the Act. This constraint imposed by s 351 limits departmental officers in the exercise of both executive non-statutory power and statutory power.

316 In the case of the request of each appellant in the present cases, the departmental officer finalised the request by implementing s 10.2 of the Minister's Instructions 2016 (concerning repeat requests). The officers decided that the requests would not be referred to the Minister and would be finalised by the department because, as provided for in s 10.2, the department was not satisfied that there had been a significant change in circumstances since the previous request which presented unique or exceptional circumstances as described in s 4 of the Minister's Instructions 2016.

317 In applying s 4 of the Minister's Instructions 2016 to each request, the departmental officers were required to evaluate whether the circumstances on which each appellant relied involved, for example, "strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit", or "compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person", or

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301 See footnote 284.

302 eg, *Plaintiff M61* (2010) 243 CLR 319 at 350-351 [69]-[71]; *Plaintiff S10* (2012) 246 CLR 636 at 653 [46]-[47], 665 [91]; *SZSSJ* (2016) 259 CLR 180 at 197-200 [41]-[55].

"circumstances not anticipated by relevant legislation; or clearly unintended consequences of legislation; or [where] the application of relevant legislation leads to unfair or unreasonable results in a particular case".

318 In performing this evaluative task and deciding to finalise the request without referral to the Minister, the departmental officers both decided that the Minister should not make a procedural decision about the request and, in substance, made a negative procedural decision about the request. In so doing, the departmental officers acted beyond the executive power, which was confined by s 351 of the Act.

319 This conclusion is not gainsaid by the fact that the Minister's Instructions 2016 say that what is and what is not in the public interest is for the Minister to determine[303] and that the Minister may intervene whether the case is brought to the Minister's attention or not[304]. The Minister's Instructions 2016, by the operation of s 4 of that document, required the departmental officers to decide matters within the zone of exclusive Ministerial personal decision-making power created by s 351 of the Act. That was impermissible.

320 As noted, the Minister's Instructions 2009 were considered in *Plaintiff S10*, but no argument was put in that case that the substance of those Instructions exceeded the limits of executive power. Accordingly, *Plaintiff S10* is not authority to the contrary of the appellants' arguments in the present cases.

321 There is also at least one key difference between the Minister's Instructions 2009 and the Minister's Instructions 2016. It is that s 16 of the Minister's Instructions 2009 provided that, for initial requests that the departmental officers considered did not involve unique or exceptional circumstances, the Minister instructed that the department was to "bring the case to my attention through a short summary of the issues in schedule format, so that I may indicate whether I wish to consider the exercise of my power". This is an important difference from s 10.1 of the Minister's Instructions 2016 because it means that, under the Minister's Instructions 2009, the department's consideration or evaluation, as a matter of substance, could not be said to involve any aspect of the Minister's personal power in s 351(1). The department's consideration or evaluation under s 16 of the Minister's Instructions 2009 was necessarily in the nature of advice, analysis, and assistance to the Minister to enable the Minister to decide whether to make a procedural (and substantive) decision or not[305].

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303 Minister's Instructions 2016, s 2.

304 Minister's Instructions 2016, s 12.

305 As concluded in *Plaintiff S10* (2012) 246 CLR 636 at 653 [46]-[47], 665 [91].

322 If s 17 of the Minister's Instructions 2009 (concerning repeat requests) had been the subject of the arguments put in the present cases (which it was not), several further issues would have required analysis. The fact that there is no such analysis in *Plaintiff S10* reinforces that the Court was not dealing with the issues to which the present cases give rise. It would have been relevant that, in contrast to the Minister's Instructions 2016, s 17 of the Minister's Instructions 2009 characterises a "repeat request" as one that has previously been considered by a Minister. The Minister's Instructions 2016 characterise a "repeat request" as one that a Minister had "previously received" (which, in the context of the Minister's Instructions 2016, would be taken to mean received but not considered as permitted by s 10.1). Further, the Minister's Instructions 2009 instructed the departmental officers to decide if they were satisfied there had been a significant change in circumstances which raised new, substantive issues and which, in the opinion of the departmental officers, fell "within the ambit of" the public interest provisions of the Minister's Instructions 2009.

323 It is not that these differences are necessarily sufficiently material to distinguish the substantive operation of the Minister's Instructions 2009 from the Minister's Instructions 2016 in respect of repeat requests. It is that the absence of analysis of the substantive operation of s 17 of the Minister's Instructions 2009 in *Plaintiff S10* confirms that no argument was put in that case that the Instructions exceeded the executive power of the Minister (to issue) and/or the departmental officers (to implement) given the terms of s 351 (and the equivalent Ministerial personal and non-compellable power in the public interest provisions in ss 48B, 195A, and 417 of the Act).

324 For these reasons, the orders and declarations proposed by Kiefel CJ, Gageler and Gleeson JJ should be made.