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TO CUT A LONG STORY SHORT: *MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS V MCQUEEN* (2024) 418 ALR 133

I Introduction

In *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* ('*McQueen*'),[1] the High Court of Australia considered whether the Minister for Immigration, Citizenship and Multicultural Affairs ('Minister') was permitted to rely solely upon a departmental summary of representations when personally exercising their power under s 501CA(4) of the *Migration Act 1958* (Cth) ('*Migration Act*'). This provision empowers the Minister or their delegate to revoke the mandatory cancellation of a visa where satisfied that the individual either passes the character test or there exists 'another reason' to do so.

The fundamental question raised by *McQueen* is this: what is required for the Minister to discharge their duty to personally consider representations, where those representations are 'an exercise in persuasion' and 'the odds are already stacked against the individual affected'?[2] On this issue, the High Court's answer was unanimous: exclusive reliance upon a summary prepared by the Minister's department is sufficient for the Minister to lawfully reach the state of satisfaction required by s 501CA(4). In so finding, the High Court reversed the prior decisions of the primary judge (Colvin J)[3] and the Full Court of the Federal Court of Australia.[4]

The approach of the Full Federal Court is, respectfully, preferable to that of the High Court. This is because the unique practical and statutory context of s 501CA(4) necessitates that the Minister's satisfaction be formed by personally and directly considering the representations as made.[5] In finding to the contrary, the High Court seemingly favoured administrative efficiency over apparent legislative intention.

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1 (2024) 418 ALR 133 ('*McQueen*').

2 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595, 616 [80] ('*McQueen* (FCFCA)').

3 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2022] FCA 258 ('*McQueen* (FCA)').

4 *McQueen* (FCFCA) (n 2).

5 Ibid 621 [103].

Part II sets out the legal background to *McQueen*. Part III outlines the facts of the case and Part IV discusses the decisions of the primary judge and the Full Federal Court. Part V outlines the *McQueen* judgment and Part VI comments on such, ultimately arguing that the High Court's construction of s 501CA(4) fails to give proper consideration to the statutory context of that power and the potentially devastating consequences attending its exercise.

II Background

A *The* Migration Act

The *Migration Act* confers significant powers to the Minister. Unless expressly excluded, the Minister may delegate any of these statutory powers to a person in writing.[6]

Section 501(3A) of the *Migration Act* requires that the Minister cancel a visa where satisfied that the visa-holder: (1) does not pass the character test,[7] because they either have a substantial criminal record[8] or have committed a sexually-based offence involving a child;[9] and (2) is serving a sentence of imprisonment on a full-time basis in a custodial institution. This cancellation is mandatory — once satisfied of these objective facts, cancellation must occur. Upon cancellation, the Minister must give the person a written notice and invite them to make representations to the Minister about revocation of the original decision.[10]

By operation of s 501CA(4), the Minister has the power to revoke the original decision if: (1) the person makes representations in accordance with the Minister's invitation; and (2) the Minister is satisfied that the person either passes the character test, or that there is another reason why the original decision should be revoked. Critically, merits review by the Administrative Review Tribunal is only available where this power is exercised by a delegate,[11] not by the Minister personally.[12]

Absent any previous error 'affecting the Minister's state of satisfaction under s 501(3A)(a) that the person did not satisfy the character test', the function of the provision is to provide an opportunity for the affected person to persuade the Minister to revoke the decision.[13] Unlike s 501(3A), s 501CA(4) grants the Minister

6 *Migration Act 1958* (Cth) s 496(1) ('*Migration Act*').

7 Ibid s 501(6).

8 Ibid ss 501(6)(a), (7).

9 Ibid s 501(6)(e).

10 Ibid s 501CA(3).

11 *Migration Act* (n 6) s 500(1)(ba).

12 Ibid s 501CA(7).

13 *McQueen* (n 1) 147 [44] (Jagot and Beech-Jones JJ).

a wide discretion,[14] with the reference to 'another reason' being 'unlimited'.[15] However, the applicant's representations have been interpreted to be a 'mandatory relevant consideration'.[16] The corollary of this is that a failure to consider a 'substantial, clearly articulated argument advanced as demonstrating a reason why a cancellation decision should be revoked' may amount to jurisdictional error.[17] Until *McQueen*, the High Court had not addressed the degree of engagement required with the representations for the lawful ministerial exercise of the s 501CA(4) power.

III The Facts

Mr McQueen was a citizen and former marine of the United States who resided in Australia under a resident return visa.[18] In 2019, Mr McQueen was sentenced to a term of imprisonment for drug related offences.[19] As a consequence, his visa was mandatorily cancelled on 13 November 2019.[20] On 22 November 2019, Mr McQueen made representations to the Minister, which comprised over 200 pages,[21] seeking revocation of the decision to cancel his visa.[22] His failing of the character test was not challenged. Rather, Mr McQueen argued there was 'another reason' for revocation.[23] Mr McQueen's representations highlighted concerns for his family, which he had cultivated during his 22 years in Australia, and in particular a fear that he, his partner, and their children, if relocated to the United States, would face racism and isolation.[24]

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14 *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 383 ALR 194, 201 [36].

15 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, 614 [70] (Edelman J) ('*Plaintiff M1/2021*').

16 *Tran v Minister for Immigration and Border Protection* [2019] FCAFC 126, [121]. See also: *Goundar v Minister for Immigration and Border Protection* (2016) 160 ALD 123, 133 [56]; *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492, 502 [47]; *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643, 649 [18]–[19], 655 [49]. See further *Migration Act* (n 6) s 501CA(4)(a).

17 *Navoto v Minister for Home Affairs* [2019] FCAFC 135, [85], citing *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, 538 [30]. See also: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398, 406 [13]; *Plaintiff M1/2021* (n 15) 598–9 [24].

18 Paul Karp, '"Sign Here": High Court Finds No Requirement for Minister to Read Submissions on Visa Decisions', *The Guardian* (online, 10 April 2024) <https://www.theguardian.com/australia-news/2024/apr/10/alex-hawke-andrew-giles-visa-cancellation-case-details>.

19 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* [2023] HCAASP 44; *McQueen* (FCA) (n 3) [1].

20 *McQueen* (FCA) (n 3) [1].

21 Ibid [75].

22 Ibid [2].

23 *McQueen* (FCFCA) (n 2) 598–9 [4].

24 *McQueen* (FCA) (n 3) [15].

It was not until 11 December 2020 that a senior advisor to the then Minister, Alex Hawke, suggested that a decision on the McQueen matter be made.[25] By this time, Mr McQueen's visa had been cancelled for over a year, and it had been six months since he had completed his prison sentence.[26] As he was a non-citizen in Australia's migration zone without a valid visa, Mr McQueen had been transferred to immigration detention.[27]

The Minister, having chosen to personally exercise the s 501CA(4) power, was provided by the Department of Home Affairs ('Department') with: (1) a 13-page summary of Mr McQueen's representations; (2) a 15-page set of draft reasons; and (3) Mr McQueen's representations themselves.[28] Adopting the Department's draft reasons, the Minister refused to revoke the cancellation decision on 27 April 2021.[29] In what was described by the Full Federal Court as a 'bizarre factual situation',[30] this decision was recorded by way of 'a photograph of a ring binder, resting on the lap of a person and beneath the steering wheel of a car, open at a document headed "Attachment 1", with option (c) circled, and with a signature and a date'.[31] Although there was no apparent need for urgency,[32] the Minister sent this confirmatory photograph a mere 30 hours after receiving the McQueen brief.[33] During this time, the Minister had travelled by car from Canberra to Sydney — roughly a three-hour drive — as well as, presumably, dealing with other parliamentary business and resting.[34] Therefore, the Full Federal Court opined that 'the realistic "window" in which the Minister made a decision was substantially less than 30 hours'.[35] This factual finding was not challenged on appeal.

A *Decision of Colvin J*

Mr McQueen sought judicial review of the Minister's decision on four grounds: (1) the Minister had not made the decision personally, but rather had 'rubber stamped' the Department's draft reasons; (2) the Minister failed to give proper, genuine, and realistic consideration to the merits of Mr McQueen's representations; (3) the Minister failed to respond to a substantial and clearly articulated argument, being Mr McQueen's fear of racial persecution if relocated to the United States; and (4) defects in the Minister's reasoning process rendered it 'legally unreasonable,

25 *McQueen* (FCFCA) (n 2) 598–9 [4].

26 Ibid.

27 Ibid; *Migration Act* (n 6) ss 5, 189.

28 *McQueen* (n 1) 134–5 [1]–[2].

29 Ibid 135 [3]; *McQueen* (FCFCA) (n 2) 601 [19].

30 *McQueen* (FCFCA) (n 2) 614 [72].

31 Ibid 603–4 [23].

32 Ibid 609 [47].

33 Ibid.

34 Ibid 609 [48].

35 Ibid.

illogical or irrational'.[36] The second ground was upheld,[37] while the first,[38] third[39] and fourth[40] were rejected.

In considering the second ground, Colvin J relied upon the principles in *Tickner v Chapman* ('*Tickner*')[41] and subsequent authorities,[42] concluding that

> where the Minister's task requires the consideration of representations made, the Minister must consider the representations personally and in most instances that will require a consideration of the representations themselves (either because the deliberative obligation requires their personal consideration or because the detail and nuance of such representations is apt to be lost through any attempt to summarise them …[43]

Justice Colvin proceeded to make several findings of fact, including that the Minister: (1) made no change to the draft reasons; (2) made no notation on the materials other than circling and signing where indicated; (3) did not request a countervailing set of draft reasons to consider; (4) was directed by 'sign here' stickers; and (5) had 'quite limited time' between receiving the materials and making the decision.[44] Additionally, the nature of the forms indicated that personal consideration by the Minister was not necessary.[45] For these reasons, his Honour found that the Minister did not read Mr McQueen's representations, but instead relied solely on the summary and draft reasons.[46]

Having made these findings, Colvin J considered that it was not possible for the Minister to 'discern the full sense and content of the representations made without

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36 *McQueen* (FCA) (n 3) [15].

37 Ibid [90].

38 Ibid [89].

39 Ibid [98].

40 Ibid [99], [105].

41 (1995) 57 FCR 451 ('*Tickner*').

42 *McQueen* (FCA) (n 3) [48]–[73], referring to: *Tickner* (n 41); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ('*Peko-Wallsend*'); *Bushell v Secretary of State for the Environment* [1981] AC 75; *Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia v Douglas* (1996) 67 FCR 40; *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* (2008) 251 ALR 80; *Williams v Minister for Justice and Customs of the Commonwealth of Australia* (2007) 157 FCR 286; *Tervonen v Minister for Justice and Customs (No 2)* (2007) 98 ALD 589; *ERY19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 170 ALD 83; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352.

43 *McQueen* (FCA) (n 3) [73].

44 Ibid [35]–[36].

45 Ibid [79].

46 Ibid [79]–[80], [84].

regard to the documents in which the representations were expressed'.[47] As such, his Honour held that the state of satisfaction required by s 501CA(4) could only be reached by the Minister 'personally considering and understanding the representations made and that required him to read the attachments to the [Department's] Submission'.[48] Insofar as the Minister had relied solely on departmental summaries, he had 'failed to undertake his deliberative task of forming a personal state of satisfaction by considering and understanding the representations'.[49]

B *The Full Federal Court*

The Minister appealed to the Full Federal Court, raising two grounds of appeal: (1) the trial judge erred in finding the Minister did not read Mr McQueen's representations; and (2) in any event, reliance on the summary and draft reasons constituted a 'proper, genuine and realistic consideration' of Mr McQueen's representations.[50]

The Full Federal Court rejected both grounds of appeal. First, it found that, on the balance of probabilities, the Minister did not read Mr McQueen's representations.[51] Second, and in further agreement with Colvin J, it was held that the statutory scheme required the Minister to 'personally and directly consider the representations made in support of revocation'.[52] The Full Federal Court concluded that 'the reader gains quite a different impression from reading Mr McQueen's narrative as he writes it'[53] vis-à-vis a 'rather bland summary' of this narrative by the Department.[54] Further, there were notable omissions in the summary, chiefly, Mr McQueen's handwritten letter to the Western Australian Prisoners Review Board, which the Court accepted 'had an impact' on the Board.[55] Moreover, because the Minister's decision could not be reviewed, Mr McQueen's representations could not be 'added to, or explained, or emphasised; they stand or fall as they are'.[56] As a result, it was held that the Minister could not rely solely on the summary in making his decision.[57]

Central to the Full Federal Court's reasoning was its distinguishing of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* ('*Peko-Wallsend*'),[58] in which it was held that reliance on a departmental summary is generally permissible in administrative

47 Ibid [85].

48 Ibid [90].

49 Ibid [85].

50 *McQueen* (FCFCA) (n 2) 599–600 [10].

51 Ibid 608–14 [44]–[73].

52 Ibid 626 [130].

53 Ibid 622 [109].

54 Ibid 625 [121].

55 Ibid 623 [113]–[116].

56 Ibid 618 [89].

57 Ibid 626 [128]–[130].

58 *Peko-Wallsend* (n 42).

decision-making. *Peko-Wallsend* was distinguished in three respects. First, the matter in *Peko-Wallsend* only arrived before the Minister after there had been an inquiry and recommendations made by the Land Commissioner. Second, Gibbs CJ's contemplation that a Minister may rely 'entirely on a departmental summary'[59] could not be applied at face value to every statutory power, particularly where the power differs in respect of where a right of merits review is afforded; and third, the profound consequences of s 501CA(4) concern liberty, unlike the power in *Peko-Wallsend*.[60] For these reasons, the power in *Peko-Wallsend* was considered 'quite unlike' s 501CA(4).[61]

The Full Federal Court also restricted the application of Kiefel J's remarks in *Tickner*, where her Honour stated:

> I have earlier said that the Minister may seek the assistance of his staff. A 'consideration' of the representations does not in my view require him to personally read each representation. But it may be as well for him to do so, for if his staff are to convey what is contained within them they must do so in a way which provides a full account of what is in them. If they do not, the Minister will not have considered something he is obliged to, and in this respect the observations of Gibbs CJ in *Peko-Wallsend* at 30 as to what results are apposite. It may vitiate his decision.[62]

The Full Federal Court identified that, in *Tickner*, the relevant power was non-delegable and concerned the public interest, whereas the *McQueen* power was delegable and personal.[63] Further, in *Tickner* the Minister had received 400 representations from the public, while in *McQueen*, the Minister only needed to consider Mr McQueen's representations.[64] Moreover, the Court considered Kiefel J's reasoning to be obiter which went further than the position taken by the other members of the Court. The Court interpreted Kiefel J's remarks to impliedly accept that how much of an applicant's representations the Minister must read is a question of fact and degree.[65] This limited reading of Kiefel J's remarks was also adopted by Colvin J at first instance, his Honour concluding that 'all members of the Court [in *Tickner*] found that the Minister was required to consider the representations personally'.[66]

Taken altogether, the Court held that these distinctions justified its departure from the general permissibility of reliance on summaries provided for by *Peko-Wallsend* and the obiter in *Tickner*, in the context of s 501CA(4). More broadly, the Court's finding was directed at ensuring 'that it is the repository of the power whose mind

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59 Ibid 31 (Gibbs CJ).

60 *McQueen* (FCFCA) (n 2) 618 [90].

61 Ibid 617 [87].

62 *Tickner* (n 41) 497 (Kiefel J).

63 *McQueen* (FCFCA) (n 2) 620 [98].

64 Ibid 620 [98].

65 Ibid 621 [101]–[102], referring to *Tickner* (n 41) 407 (Kiefel J).

66 *McQueen* (FCA) (n 3) [56].

is directed to whether or not they are persuaded by the content of representations … not whether they are persuaded by a third party's summary of the representations'.[67]

IV The High Court's Decision

The Minister was granted special leave to be heard by the High Court as if on appeal. Like the prior decisions of the Federal Court and Full Federal Court, the High Court was not concerned with the merits of the Minister's decision, but rather the process used to reach that decision.[68]

The Minister did not challenge the finding that he relied solely on the Department's summary and draft reasons in making his decision.[69] Rather, it was argued that the courts below erred in concluding that the Minister 'must personally and directly consider the representations made in support of revocation'.[70] The Minister's submissions lamented the Full Court's assurance that its decision 'did not consign the Minister to a legal obligation to read every word on every page of every document' when 'it is difficult to see how this can be avoided if … the Minister cannot rely on a Departmental summary'.[71]

In two separate judgments, the High Court unanimously held that the Minister's necessary consideration of the representations could be achieved by 'relying upon a departmental summary of them, so long as that summary is accurate and contains a full account of the essential content'.[72]

A *The Majority: Gageler CJ, Gordon, Edelman, Steward, and Gleeson JJ*

The majority began by canvassing what they coined the 'orthodox principles' of administrative decision-making.[73] From the authorities, chiefly *Peko-Wallsend*, it was gleaned that '[a] Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts',[74] and that '[r]eliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function'.[75] As such, 'the Minister may personally make a statutory decision while relying on the department's summary, provided the Minister does

67 *McQueen* (FCFCA) (n 2) 621 [103].

68 See *McQueen* (n 1) 135–6 [6].

69 Ibid 135 [4], 137 [7].

70 Ibid 135 [5], quoting *McQueen* (FCFCA) (n 2) 626 [130].

71 Minister for Immigration, Citizenship and Multicultural Affairs, 'Applicant's Submissions', Submission in *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen*, P2/2023, 29 September 2023, 10 [37].

72 *McQueen* (n 1) 143 [28].

73 Ibid 142 [26].

74 Ibid 140–1 [19], quoting *Peko-Wallsend* (n 42) 65–6.

75 Ibid.

in fact have regard to all relevant considerations that condition the exercise of the power'.[76] The majority seemingly rejected the Full Federal Court's limited reading of Kiefel J's remarks in *Tickner*, quoting her Honour as affirming these orthodox principles from *Peko-Wallsend*.[77]

Having laid this groundwork, the majority moved to consider whether, as a matter of statutory construction, the discretion in s 501CA(4) lay outside these orthodox principles. It was noted from the outset that this section, by necessary implication, 'obliged the decision-maker to consider the representations received in reaching the state of satisfaction'.[78] However, the High Court departed from the lower court rulings as to what this obligation required.

The majority began by identifying that '[t]he breadth of the power conferred by s 501CA of the [Migration] Act renders it impossible, nor … desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation'.[79] Their Honours accepted that it is generally permissible for a minister to place reliance on their department to organise material and prepare summaries.[80] However, they disagreed with the Full Federal Court's divergence from these principles in the context of s 501CA(4) for two reasons.

First, there was nothing in the wording of s 501CA(4) that disturbed the application of these principles. Noting that s 501CA(4) was silent as to the content or method of the Minister forming the required state of satisfaction, the majority held that to imply a mandatory personal consideration of the representations would conflict with the aforementioned principle against formulating absolute rules.[81] Put another way, personally reading all the submissions was not the only way for the Minister to discharge the deliberative function in s 501CA(4) — and to imply this would be erroneous.

Second, in the majority view, the bases upon which *Peko-Wallsend* was distinguished from the s 501CA(4) power had no bearing on how the Minister must reach the required state of satisfaction and therefore did not justify a departure from the foundational principles.[82] Their Honours considered that nothing said by any of the judges in *Tickner* 'contradicts what was said in *Peko-Wallsend*. Nor does it deny the validity of the course of action undertaken here by the Minister.'[83]

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76 *McQueen* (n 1) 140–1 [19], quoting *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, 236 [91].

77 See *McQueen* (n 1) 141 [21].

78 Ibid 142 [26].

79 Ibid 135–6 [6], quoting *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398, 407 [15].

80 *McQueen* (n 1) 140–1 [19].

81 Ibid 142–3 [26]–[28].

82 Ibid 143 [30].

83 Ibid 144 [32].

For these reasons, the majority concluded that it was 'not a condition of the valid exercise of the power conferred by s 501CA(4) for the Minister, when exercising the power personally, to personally read and examine the … material received in every case'.[84] Because the courts below had not found the Department's summary omitted 'essential content of the respondent's representations', jurisdictional error was not established.[85]

A *The Minority: Jagot and Beech-Jones JJ*

Justices Jagot and Beech-Jones agreed with the majority's ultimate finding. Like the majority, their Honours implied in s 501CA(4) a requirement that the Minister 'consider the representations'.[86]

Justices Jagot and Beech-Jones confirmed that the onus falls upon the person challenging the decision to identify reasons why reliance upon a summary had the legal consequence that the Minister did not consider the representations. Their Honours considered that this legal conclusion would not be justified merely by identifying: (1) any matter, irrespective of importance, in the representations not included in the summary; (2) 'fine differences of emphasis and degree'; (3) differences in wording and form; or (4) differences in tone or emotional impact.[87]

In the specific context of s 501CA(4), their Honours held that the principle in *Plaintiff M1/2021 v Minister for Home Affairs* — that a delegate exercising this power was required to 'read, identify, understand and evaluate the representations'[88] — could not be taken to mean that 'if it is proved that a decision-maker has not examined the representations themselves, any resulting decision is subject to jurisdictional error by reason of a failure to consider'.[89] Their Honours ultimately reached the same conclusion as the majority: personal and direct consideration of the representations was not the only way for the Minister to discharge the duty of consideration.[90] Therefore, the Minister's reliance upon the summary did not give rise to jurisdictional error.

Mr McQueen sought to raise a further issue regarding the inadequacy of the departmental summary, without filing a notice of contention.[91] Unlike the majority, Jagot and Beech-Jones JJ addressed this argument but concluded it was misconceived for three reasons.[92] First, the characterisation of the Department's summary as

84 Ibid 144 [33].

85 Ibid 145 [37].

86 Ibid 147 [44].

87 Ibid 148 [48].

88 Ibid 607 [50].

89 Ibid.

90 Ibid 148–9 [49].

91 Ibid 144 [35].

92 Ibid 145 [36].

not giving a full sense of the representations was not a finding of fact.[93] Second, summaries necessarily edit and condense representations — so long as this is done in an accurate manner that retains the material information, that summary is not inadequate.[94] Finally, given that no argument had been raised that the summary was incorrect or failed to include any representation, a characterisation of the materials as not giving a 'full account' could not found jurisdictional error.[95]

V Comment

Both the majority and minority in *McQueen* adopted *Peko-Wallsend* and departed from the ratio in *Tickner*. The rationale for this is, respectfully, dubious.

As the Full Federal Court rightly observed, '[t]he power in s 501CA(4) is quite unlike the statutory power in *Peko-Wallsend*'.[96] In that case, the decision-making power was conditional on a full inquiry and report by the Land Commission.[97] In contra-distinction, the Department was not required by s 501CA(4) to produce a summary. It logically follows that the report in *Peko-Wallsend* could more readily be relied upon than the summary in *McQueen* — the former was a statutory requirement; the latter was not. Indeed, Brennan J highlighted that had the statutory scheme in *Peko-Wallsend* not mandated a report by the Land Commission, the Minister would have been required to personally consider the benefits and detriments of their decision on interested parties.[98] Thus, the remarks in *Peko-Wallsend* are particular to the statutory scheme considered there, which manifested 'Parliament's intention that the Minister should have regard to the Commissioner's report'.[99] No such intention arises from the s 501 scheme.

The better analogy appears to be with *Tickner*. Although the High Court was correct that the provision in *Tickner* expressly required the Minister to give 'due consideration to any representations', and no such express words exist in s 501CA(4), both the majority and the minority implied words to this effect into the provision.[100] Having made this implication, the analogy with *Tickner* is strong. Like s 501CA(4), *Tickner* concerned 'a broad power conferred for public purposes',[101] which was 'capable of affecting very seriously the interests of third parties'.[102] The Minister in *Tickner*

93 Ibid.

94 Ibid.

95 Ibid.

96 *McQueen* (FCFCA) (n 2) 617 [87].

97 See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 11(1), 50(1)(a).

98 *Peko-Wallsend* (n 42) 56–7.

99 Ibid 57.

100 *McQueen* (n 1) 142 [26] (Gageler CJ, Gordon, Edelman, Steward, and Gleeson JJ), 147 [44] (Jagot and Beech-Jones JJ).

101 *McQueen* (FCFCA) (n 2) 620 [98].

102 *Tickner* (n 41) 462 (Black CJ).

was required to 'personally consider the report and any representations attached to it'.[103] In light of this, it is strongly arguable that the Minister was similarly required to personally consider Mr McQueen's representations.

These observations demonstrate that the 'orthodox principles' of administrative decision-making 'cannot simply be picked up and applied at face value to every statutory power reposed in a Minister' — rather, the specific statutory context must be the starting point for this analysis.[104] In the present context, it is essential to note that s 501CA(4) is a power of 'last resort' for those who have had their visas mandatorily cancelled.[105] It carries 'the most profound of consequences for an individual' insofar as it affects their ability to remain lawfully within Australia — a factor which the High Court, respectfully, did not afford appropriate weight to.[106] It is within this context that the affected individual engages in the act of persuasion — and in which the concerns regarding ministerial reliance upon summaries must be understood.

A departmental summary may technically provide the material information required to give a full account of the relevant representations. By and large, however, a summary 'is not capable of giving the reader the same sense or understanding of those pleas and the facts to which they refer, as the reader would obtain from reading the source documents'.[107] Indeed, in Mr McQueen's case, the Full Federal Court found that the summaries were 'rather bland'[108] and identified several factors 'lost in the summary but gained from reading the representations'[109] such as the sense of narrative,[110] the emphasis achieved through repetition,[111] the gravity of the Parole Board's reasons,[112] the vivid description of Mr McQueen's family's difficulties[113] and the emotional force of the handwritten materials.[114] The High Court acknowledged that these contextual matters may have been overlooked by the Minister, given Mr McQueen's representations '"may" have given the Minister a "different impression" about the material' than the Department's summary.[115] The Minister appeared to rely on what Allsop CJ called a '[m]echanical formulaic

103 Ibid.

104 *McQueen* (FCFCA) (n 2) 618 [89].

105 Ibid 618 [90].

106 Ibid.

107 Ibid 625 [121].

108 Ibid.

109 Ibid.

110 Ibid 622 [108]–[109], 623 [113].

111 Ibid 625 [120].

112 Ibid 623–4 [113]–[119].

113 Ibid 624 [119], 625 [122].

114 Ibid 625 [124].

115 *McQueen* (n 1) 145 [37].

expression and pre-digested shorthand'[116] of Mr McQueen's representations — this much is clear from the summary's brevity and omissions.[117] This approach risks 'a lack of the necessary reflection upon the whole consideration of the human consequences involved' in exercising this discretion.[118] Given the significant consequences attending s 501CA(4), this approach cannot be accepted. Such practices would impermissibly dilute the Minister's deliberative task.

If the deliberative task is deciding whether the Minister has been persuaded of the existence of 'another reason' to revoke the cancellation of a visa, then the persuasive factors which contribute towards that decision are critical. Where the Minister chooses to personally exercise that power, the Minister ought to be persuaded by the representations as made, rather than 'by a third party's summary of the representations'.[119] Particularly where such summaries run the risk of being overly prescriptive, there is a 'danger' that the decision-maker may be persuaded 'not by the material and the representations made by an individual, but by the reasoning and views of her or his officers responsible for drafting' the materials.[120] Critically, this provision is an occasion where 'Parliament has given the Minister a choice as to whether to exercise the power personally or delegate it, and has attached different consequences — in terms of merits review — depending on the choice made'.[121] While Jagot and Beech-Jones JJ dismissed this as a basis for departure from the orthodox principles,[122] their Honours reasons for doing so are, respectfully, unclear. Indeed, it would seem that the preclusion of an avenue for review would lead to a heightened responsibility upon the Minister to personally consider the representations as made.

VI Conclusion

The Minister and their Department are entrusted with significant decision-making powers under the *Migration Act*. These wide-ranging responsibilities bring about a substantial workload, and the consequences of their decisions can affect individual lives in deeply personal ways.

As a result, when determining the standard required of our executive decision-makers, there is a perennial tension between achieving administrative efficiency and the pursuit of justice. This tension was exemplified in *McQueen*, where the

116 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628, 630 [3] ('*Hands*').

117 See above nn 55–7 and accompanying text.

118 *Hands* (n 116) 630 [3].

119 *McQueen* (FCFCA) (n 2) 621 [103].

120 *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595, 606 [23] (Mortimer J).

121 *McQueen* (FCFCA) (n 2) 617–18 [89].

122 Ibid 603–4 [3].

High Court was tasked with determining the level of engagement with representations required by the Minister when exercising the s 501CA(4) power. While the desire for efficiency is of indubitable importance, the High Court seems to have, respectfully, leaned too heavily in its favour at the cost of justice. This is evident in two key respects: first, the High Court failed to consider better authority in *Tickner*, instead defaulting to the supposed 'orthodoxy' in *Peko-Wallsend*; and second, the Court afforded insufficient weight to the unique statutory context of s 501CA(4) and the gravity of the human consequences attending that context.

Ultimately, where persuasion is the last resort, the repository of the power should be required to personally and directly consider the representations made in support of revocation. This was the finding of the Full Federal Court and was, respectfully, the correct approach. To do otherwise would be to cut a long (and important) story short.