HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS APPLICANT

AND

JOSEPH LEON McQUEEN RESPONDENT

Minister for Immigration, Citizenship and Multicultural Affairs v McQueen
[2024] HCA 11
Date of Hearing: 14 December 2023
Date of Judgment: 10 April 2024
P2/2023

ORDER

1. *Special leave to appeal is granted.*

2. *Appeal allowed.*

3. *Set aside order 1 of the orders made by the Full Court of the Federal Court of Australia on 13 December 2022 and in its place order that:*

   (a) the appeal be allowed; and

   (b) orders 1, 2 and 3 made by the Federal Court of Australia on 23 March 2022 be set aside and in their place order that the proceeding be dismissed.

4. *The appellant pay the respondent's costs in this Court.*

On appeal from the Federal Court of Australia

Representation

P D Herzfeld SC with N A Wootton for the applicant (instructed by Australian Government Solicitor)

L G De Ferrari SC with J D Donnelly for the respondent (instructed by Zarifi Lawyers)

CATCHWORDS

Minister for Immigration, Citizenship and Multicultural Affairs v McQueen

Immigration – Visas – Cancellation of visa – Revocation of cancellation decision – Where respondent's visa mandatorily cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where respondent made representations seeking revocation of cancellation decision under s 501CA(4) – Where Minister provided by Department of Home Affairs with submission summarising respondent's representations, draft statement of reasons, copies of respondent's representations and other relevant material – Where Minister decided to personally exercise power under s 501CA(4) to revoke cancellation decision – Where Minister decided not to revoke cancellation decision – Where Minister read only departmental submission and draft statement of reasons – Where s 501CA(4) obliges Minister to "read, identify, understand and evaluate" representations – Whether Minister required to personally read some or all of respondent's representations to form state of satisfaction whether "another reason" existed to revoke cancellation of respondent's visa – Whether Minister entitled to rely upon summary of representations contained in departmental submission – Whether summary provided adequate and accurate.

Words and phrases – "another reason", "cancellation decision", "directly consider", "duty of consideration", "jurisdictional error", "personally examine", "personally exercise", "read, identify, understand and evaluate", "representation", "revocation", "submission", "summary", "visa".

Migration Act 1958 (Cth), ss 501(3A), 501(6), 501CA(4).

1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND GLEESON JJ. The respondent is a citizen of the United States of America whose visa was mandatorily cancelled ("the cancellation decision") in 2019 pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ("the Act") because the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ("the Minister") was satisfied that the respondent did not pass the "character test" as defined in s 501(6) of the Act. Consequentially, the respondent made representations to the Minister seeking revocation of the cancellation decision pursuant to s 501CA(4) of the Act. For that purpose, the Minister was supplied by the Department of Home Affairs ("the Department") with a 13-page "Submission" which summarised those representations; a 15-page draft statement of reasons in support of a decision not to revoke the cancellation decision; and copies of all of the actual representations made by the respondent, and on his behalf, as well as other relevant material.

2 The representations and other material comprised 213 pages. They included the respondent's handwritten request for revocation of the cancellation decision, letters and emails of support from his Australian partner, his children under his care and other individuals, letters and emails relating to the respondent's time in prison, certificates confirming the completion of certain courses, medical information and other correspondence. The material also included a record of the decision of the Prisoners Review Board of Western Australia providing for the respondent's conditional release on parole on the basis that the Board found that he "would not present an unacceptable risk to the safety of the community".

3 The Minister was entitled to delegate the exercise of the power to revoke the cancellation decision conferred by s 501CA(4).[1] However, he chose to exercise that power personally. On 14 April 2021, the Minister decided that he was not satisfied that there was "another reason" why the cancellation decision should be revoked.[2] For that purpose, he adopted as his reasons for decision the draft reasons which the Department had given to him. It is settled law that a Minister may adopt draft reasons prepared by a departmental officer, provided that such reasons actually represent why the Minister had reached his or her decision.[3]

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1 Section 496 of the Act.

2 Section 501CA(4)(b)(ii) of the Act.

3 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at 408 [19] per Keane, Gordon, Edelman, Steward and Gleeson JJ.

4 In making his decision, it is now accepted that the Minister only read the Submission and the draft reasons. He did not read or otherwise consider any of the actual representations made by the respondent, or on his behalf, or the other material described above.

5 The Full Court of the Federal Court of Australia decided that, having determined to exercise the power in s 501CA(4) personally, the Minister "must personally and directly consider the representations made in support of revocation".[4] The Minister sought special leave to appeal against that decision. On 11 August 2023, Gordon and Gleeson JJ ordered that the application be referred to be heard by the Full Court of this Court as if on appeal. For the reasons given below, the application for special leave should be granted, and the appeal should be allowed.

The power of revocation

6 Upon the Minister receiving representations about revocation from the person whose visa has been cancelled, s 501CA(4) confers upon the Minister a broad power to revoke a decision to cancel a visa, made pursuant to s 501(3A) of the Act, if the Minister is satisfied: that the person has passed the "character test"[5] (s 501CA(4)(b)(i)); or that there is otherwise "another reason why the original decision should be revoked" (s 501CA(4)(b)(ii)). It is unnecessary to set out the applicable statutory scheme. Two recent decisions of this Court have already done so.[6] Three features of that scheme should, however, be set out:

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4 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 626 [130] per Mortimer, Banks-Smith and O'Sullivan JJ.

5 See s 501(6) of the Act.

6 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at 406-409 [13]-[22] per Keane, Gordon, Edelman, Steward and Gleeson JJ; *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 592-601 [10]-[30] per Kiefel CJ, Keane, Gordon and Steward JJ.

(a) First, whilst there is no express statutory obligation to do so, the Minister, or his or her delegate, nonetheless "must read, identify, understand and evaluate the representations" received.[7] That is to say no more than that:[8]

> "[T]he decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker."

In that respect, the use in this context by judges of expressions such as "active intellectual process" and "proper, genuine and realistic consideration", in determining whether representations have been considered, does not invite a court to undertake any form of review of the merits of a decision.[9]

(b) Secondly, "[t]he breadth of the power conferred by s 501CA of the Act renders it impossible, nor is it desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation".[10] Save in one respect, the provision is silent as to the methods that might be deployed in the formation by the decision-maker of his or her state of satisfaction. The one exception is that the Act permits that state of satisfaction to be held either by the Minister personally or by a delegate. But otherwise, s 501CA(4) does not in any way prescribe the form in which

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7 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 598 [24] per Kiefel CJ, Keane, Gordon and Steward JJ.

8 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 598-599 [24] per Kiefel CJ, Keane, Gordon and Steward JJ (footnote omitted).

9 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 599-600 [26] per Kiefel CJ, Keane, Gordon and Steward JJ.

10 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at 407 [15] per Keane, Gordon, Edelman, Steward and Gleeson JJ.

the Minister must receive information about representations made to him or her.

(c) Thirdly, it follows that "there may be few mandatorily relevant matters that the Minister must consider in applying s 501CA(4)(b)(ii)".[11] It is now well settled that no particular statement in the representations given should be characterised as a mandatorily relevant consideration, as distinct from the "representations as a whole".[12] That proposition assists in informing the legal parameters of the decision-maker's enforceable duties for the purposes of s 501CA(4)(b)(ii).

The proceedings below

7 Before the primary judge, and then the Full Court, the Minister did not concede that he had limited his consideration of the materials to the Submission and the draft reasons. He relied, for example, on a statement in those draft reasons, which he had adopted, that he had "considered the representations made by [the respondent] and the documents he has submitted in support of his representations".[13] However, neither the primary judge nor the Full Court accepted that the Minister had read anything beyond the Submission and the draft reasons.[14] Before this Court, the Minister did not challenge that finding. It follows that the accuracy of the statement made in the draft reasons that the Minister had considered the documents the respondent had submitted should not now be accepted.

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11 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at 406 [13] per Keane, Gordon, Edelman, Steward and Gleeson JJ.

12 *Goundar v Minister for Immigration and Border Protection* (2016) 160 ALD 123 at 133 [56] per Robertson J; *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at 331-332 [41] per Besanko, Barker and Bromwich JJ.

13 See para 7 of the draft reasons; a similar statement was made at para 11.

14 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [80] per Colvin J; *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 608-614 [44]-[73] per Mortimer, Banks-Smith and O'Sullivan JJ.

The departmental materials

8 The Submission to the Minister commenced with five "recommendations" for the Minister to consider. The first was to note that the respondent had applied for revocation of the cancellation decision; the Minister noted this. Secondly, the Submission invited the Minister to consider whether to "consider this case personally or refer it to the departmental delegate"; the Minister indicated that he wished to consider the case personally. Thirdly, it recommended that if the Minister was to consider the case "personally", he should record his decision and sign the "Decision Page" attached; the Minister specified in response that he would "not revoke" the cancellation decision. Fourthly, it recommended that if the Minister did not revoke the cancellation decision and agreed with the draft statement of reasons, he should sign the draft statement of reasons "with any amendments you consider necessary"; the Minister indicated that he had signed that statement. Finally, it asked the Minister to note that if he did not revoke the cancellation decision, the respondent would remain in detention until his removal from Australia; the Minister noted this.

9 Two more matters should be mentioned. There was some consideration of the fact that in this case proof of the Minister's decision took the form of the production of a photograph of a ring binder, resting on the lap of a person in a car, open at the decision page of the draft reasons, which the Minister had signed and dated. That evidence had assumed significance before the Courts below, as it related to what the Minister had or had not directly read. Secondly, both the primary judge and the Full Court made much of the fact that the Submission did not expressly require or suggest that the Minister should directly consider the actual representations submitted by, and on behalf of, the respondent.[15] It was not in dispute that the Minister was given all of the material provided by the respondent, and that the Submission directed the Minister in clear terms to where particular representations might be found within those materials. Inferentially, the Department went to the trouble of pinpointing those references so that the Minister could, if he so wished, interrogate the materials more directly. In that respect, it

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15 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [79] per Colvin J; *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 610-611 [56] per Mortimer, Banks-Smith and O'Sullivan JJ.

was never suggested that the Minister had failed entirely to turn his mind to whether he should or should not undertake that exercise.[16]

The primary judge

10 The primary judge emphasised that the Minister had made an election personally to exercise the power conferred by s 501CA(4). This, it was said by the primary judge, had consequences. It obliged the Minister to give the "necessary personal proper, genuine and realistic consideration to the merits of the representations".[17] That could only be achieved by the Minister "personally considering and understanding the representations made" and that required him to read "the attachments" to the Submission.[18] The summary of those materials in the Submission was no adequate substitute for the Minister's "deliberative task of forming a personal state of satisfaction".[19] That was because:[20]

> "It was not possible to discern the full sense and content of the representations made without regard to the documents in which the representations were expressed."

The Full Court

11 The Full Court agreed with the primary judge. Their Honours emphasised that the choice to exercise the power personally obliged the Minister to "personally and directly consider the representations made in support of revocation".[21] That

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16 cf *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at 385 [138] per Griffiths, White and Bromwich JJ.

17 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [90] per Colvin J.

18 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [90] per Colvin J.

19 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [85] per Colvin J.

20 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [85] per Colvin J.

21 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 626 [130] per Mortimer, Banks-Smith and O'Sullivan JJ.

was especially so, it was said, because the representations to which s 501CA(4) are directed comprise "an exercise in persuasion, when the odds are already stacked against the individual affected".[22] That conclusion was said to be supported by a number of propositions.

12 First, the power in s 501CA(4) "affects liberty".[23] Secondly, when it is exercised personally by the Minister, there can be no merits review in the Administrative Appeals Tribunal.[24] Because of this, the representations made to the Minister can never be "added to, or explained, or emphasised; they stand or fall as they are".[25]

13 Thirdly, the Full Court relied upon a series of examples which were intended to demonstrate both the importance of a direct examination of the representations and the disadvantages of relying exclusively on a "third-party selection" of this information, which here had been presented by the Department in summary form and in a different and particular order.[26] Those examples are addressed below. For present purposes, one example will suffice. The respondent had offered, in his own handwriting, the following response to his risk of reoffending:[27]

> "I risk the chance of destroying my life and my childrens lives. I know that I have learnt a valuable lesson from my offending and incarceration. And

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22 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 616 [80] per Mortimer, Banks-Smith and O'Sullivan JJ.

23 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 618 [90] per Mortimer, Banks-Smith and O'Sullivan JJ.

24 See ss 500(1)(ba) and 501CA(7) of the Act.

25 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 618 [89] per Mortimer, Banks-Smith and O'Sullivan JJ.

26 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 622 [108] per Mortimer, Banks-Smith and O'Sullivan JJ. The Department had followed the format in *Direction No 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.*

27 Reproduced in *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 622 [111].

> that is that we have a choice in life and that is you do the right things and abide by the law or you risk losing everything you love and cherish in life. Nothing in this world is more important than raising our children and watching them grow into responsible adults in the future."

14 The Full Court reasoned that "[i]n terms of the persuasive exercise, the reader may gain quite a different impression seeing [the response] written in [the respondent's] own script, in answer to this specific question".[28] The other examples given illustrated the different impressions that might be formed from an actual examination of the materials, and which may bear upon the persuasiveness of what had been represented, such as the repetition of the pleas from the respondent and his partner.[29] So much should not be doubted. But whether these possibilities reveal the making of an error of law is another matter.

15 Fourthly, the Full Court reasoned that the Minister would not be required "to read every word on every page of every document" and that "[d]iffering levels of attention might justifiably be given by the decision-maker to different documents forming part of the representations".[30] But in the context of a contention that direct examination of the documents is a condition for the lawful exercise of the power conferred by s 501CA(4), it was never made clear what level of interrogation would suffice.

16 Finally, the Full Court distinguished a number of authorities which supported the proposition that a Minister may rely upon his or her department to provide the Minister with useful, accurate summaries, and that a Minister is not required to undertake the task of reading everything received by his or her department. These principally included: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*;[31] *Tickner v Chapman*;[32] and *Carrascalao v Minister for Immigration*

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28 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 623 [112] per Mortimer, Banks-Smith and O'Sullivan JJ.

29 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 625 [120] per Mortimer, Banks-Smith and O'Sullivan JJ.

30 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 621 [103] per Mortimer, Banks-Smith and O'Sullivan JJ.

31 (1986) 162 CLR 24.

32 (1995) 57 FCR 451.

and Border Protection.[33] These decisions, said by the Minister to have established an "orthodox" position, are considered below.

Exercising ministerial power personally

17 Not all statutory powers conferred upon a Minister of the Crown need be exercised personally. Depending upon Parliament's intention, some powers may be able to be delegated to an officer of a department to be exercised by that person and in his or her name.[34] Other powers may be capable of being exercised by a departmental officer, but on behalf of a Minister.[35] Whether a power is delegable or exercisable by an agent is ultimately a question of statutory construction.

18 When, as here, a Minister exercises a power personally, the law recognises that he or she does not work alone but makes decisions with the assistance of his or her department. The law treats the collective knowledge and experience of the department as the Minister's own knowledge and experience. As Lord Diplock said in *Bushell v Environment Secretary*:[36]

> "Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise."

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33 (2017) 252 FCR 352.

34 *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 93-94 per Brennan J; *Northern Land Council v Quall* (2020) 271 CLR 394 at 428 [77] per Nettle and Edelman JJ.

35 *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; *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 128 [33].

36 [1981] AC 75 at 95, cited by Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 66.

19 The foregoing permits a Minister to rely on his or her department to sift and organise material received, to prepare summaries of information, and to prioritise correspondence. Generally, there is no obligation on a Minister to read each and every relevant document in order to exercise a power personally. These principles were described by Brennan J in *Peko-Wallsend* as follows:[37]

> "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."

20 Relying on the work of a governmental department does not immunise the Minister from errors of law made by departmental officers. Attribution of the knowledge of the department to the Minister means that the mistakes of the department are also those of the Minister. As Gibbs CJ observed in *Peko-Wallsend*:[38]

> "[I]f the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the

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37 (1986) 162 CLR 24 at 65-66.

38 (1986) 162 CLR 24 at 31. See also *R (On the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [73] per Keene LJ.

consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law."

21 The foregoing principles were affirmed by the Full Court of the Federal Court in *Tickner v Chapman*, where Kiefel J said:[39]

> "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."

22 They were again endorsed by the Full Court of the Federal Court in relation to the Minister's power to cancel a visa pursuant to s 501(3) of the Act in *Carrascalao v Minister for Immigration and Border Protection*.[40] The Full Court there expressed the following three qualifications to the general principle that a Minister may rely on departmental summaries of material: first, reliance upon a materially deficient summary may give rise to an inference that the decision-making process was improper; secondly, the use of a summary may not be appropriate when it seeks to capture a substantive argument if the force of the submission is thereby lost; and thirdly, account must be taken by a Minister of any statement in a summary which advises the Minister to consider a particular document or documents.[41] In *Carrascalao*, it had not been suggested that the summary relied upon had been inaccurate or incomplete, or did not convey the force of any argument made. As a result, the Minister was entitled to rely upon it. Because that summary also directed the Minister to the material itself (which was

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39 (1995) 57 FCR 451 at 497. See also at 464 per Black CJ, 477 per Burchett J.

40 (2017) 252 FCR 352.

41 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at 367-368 [61] per Griffiths, White and Bromwich JJ.

attached to the summary) the Minister was also obliged to turn his mind to whether he needed to refer to that material directly.[42]

23 Most recently in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, in the context of a consideration of s 351 of the Act, Kiefel CJ, Gageler and Gleeson JJ expressly approved of the passage from Brennan J in *Peko-Wallsend* set out above.[43] It was said to express correctly the ordinary relationship between a Minister and a department when exercising a discretionary statutory power.[44] Gordon J also said:[45]

> "[T]he 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. In such a case, the department is assisting the Minister; it is not exercising a power on the Minister's behalf."

24 The Full Court did not consider the decision of this Court in *Davis*, since the decision was handed down after the publication of the Full Court's reasons.

25 Of course, a Minister's ability to rely on the work of his or her department in exercising statutory powers, and the extent of that reliance, will depend upon the particular statutory power in question. It is open to Parliament to confer a power which either expressly or impliedly obliges the Minister to directly read and understand particular documents or submissions, or only some of these. And, as the Full Court observed in *Carrascalao*, where a department requests a Minister to directly engage with a submission or other document, whether for reasons of good governance or because it is required by law, at the very least the Minister

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42 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at 381-382 [125], 385 [138] per Griffiths, White and Bromwich JJ.

43 (2023) 97 ALJR 214 at 226 [25]; 408 ALR 381 at 391-392.

44 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 226 [25] per Kiefel CJ, Gageler and Gleeson JJ; 408 ALR 381 at 391.

45 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 236 [91] (footnote omitted), see also at 270 [295] per Jagot J; 408 ALR 381 at 406, 453.

must turn his or her mind to considering whether to undertake that task.[46] But otherwise, and in the usual case, the expressions of principle set out above correctly describe a Minister's relationship with the work of a department when personally exercising a statutory power. In that respect, the applicant Minister here was correct to describe these principles as "orthodox".

Is s 501CA(4) different?

26 The question is whether Parliament intended that the power conferred by s 501CA(4) lie outside these orthodox principles. Section 501CA(4), by necessary implication, obliges the decision-maker to consider the representations received in reaching the state of satisfaction. That obligation conditions the formation of the relevant state of satisfaction. The question is what that obligation requires. Does the obligation oblige the Minister personally to read all of the submissions and material received pursuant to s 501CA(3) and (4), or at least some of them? Certainly, there is no express requirement to do so. As mentioned above, s 501CA(4) is silent as to how, or by what method, the Minister is to form the state of satisfaction required by s 501CA(4), save that by reason of s 496 he or she may delegate that task to an officer of the Department.

27 Nor does s 501CA(4) impliedly mandate personal interrogation of the materials received. Such a conclusion conflicts with this Court's observation against the formulation of any "absolute rules" about how the power conferred by s 501CA must be exercised.[47]

28 It is a matter for the Minister to determine how to be satisfied as to whether "another reason" exists to justify revocation of a cancellation decision. Naturally, that can include personally reading and understanding all of the submissions. But that is not the only way the Minister's function may be discharged. There is no barrier to the Minister reading and understanding the representations made by an applicant by other methods including the method of relying only upon a departmental summary of them, so long as that summary is accurate and contains a full account of the essential content.

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46 (2017) 252 FCR 352 at 381-382 [125], 385 [138] per Griffiths, White and Bromwich JJ.

47 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at 407 [15] per Keane, Gordon, Edelman, Steward and Gleeson JJ.

29 Nonetheless, the Full Court reached the conclusion that, because of the nature of the s 501CA(4) power, an implication of personal examination was justified, and, as a result, the cases in support of the "orthodox" rule were said to be distinguishable. It is therefore necessary to examine those cases again.

30 *Peko-Wallsend* concerned s 11 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Pursuant to that provision, where the Aboriginal Land Commissioner had made a report recommending a grant of land "for the benefit of Aboriginals", and the Minister was satisfied that such a grant should take place, the Minister was obliged to recommend that course of action to the Governor-General. The Full Court reasoned that this power differed from that in s 501CA(4) in three ways.[48] First, the matter in *Peko-Wallsend* could not come before the Minister until there had been a full inquiry followed by recommendations of the Aboriginal Land Commissioner. Secondly, and unlike the power considered in *Peko-Wallsend*, the Minister had a choice here to delegate the exercise of power, which, if made, would have afforded the respondent a right of merits review in the Administrative Appeals Tribunal. Thirdly, the power in s 501CA(4) affects "liberty" in the sense described above. With respect, none of these considerations support a contention that the Minister was not entitled to rely solely on the summary prepared by the Department, at least where that summary is accurate, complete and fair. None of the points of distinction address how the Minister may reach the required state of satisfaction.

31 The Full Court also distinguished what Kiefel J said in *Tickner v Chapman*, set out above, and did so in two ways.[49] First, Kiefel J's observation was said to be only an obiter dicta observation that went further than what the other judges on that Court (Black CJ and Burchett J) had reasoned. Secondly, it was said that Kiefel J was merely saying that the Minister was not obliged to read every representation received. But the reasoning in *Tickner*, and in particular the reasons of Black CJ, must be understood having regard to the language of the statutory provision there in question. That was s 10(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which conferred on the Minister, upon receiving an application by or on behalf of an Aboriginal person, a power to make declarations protecting specified areas from injury or desecration. Amongst other things, the exercise of the power required the Minister to receive a report

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48 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 617-618 [87]-[90] per Mortimer, Banks-Smith and O'Sullivan JJ.

49 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 621 [102] per Mortimer, Banks-Smith and O'Sullivan JJ.

which gave "due consideration to any representations" made to its author from members of the public.[50] Section 10(1)(c), in turn, obliged the Minister to consider both the report "and any representations attached to the report". There is no equivalent language in s 501CA(4). In any event, notwithstanding such language, Black CJ also accepted the necessity and validity of the Minister receiving assistance from the department, including, where appropriate, summaries of the representations. Black CJ thus said:[51]

> "This does not mean that the Minister is denied the assistance of a staff member in the process of considering the representations. A staff member might, for example, sort the representations into categories. He or she might put together all the representations that are in common form so that they can be considered together. In some cases, a summary of technical supporting material, such as legal and financial documents, might be provided and it would certainly be in order, in my view, for a competent staff member to assist the Minister by making sure that supporting technical documents were what they purported to be. I would not rule out the possibility of some representations being quite capable of effective summary, yet there would be other cases where nothing short of personal reading of a representation would constitute proper consideration of it."

32 None of the foregoing contradicts what was said in *Peko-Wallsend*. Nor does it deny the validity of the course of action undertaken here by the Minister. It merely reflects the application of the orthodox principle to a particular statutory context. The fact that the power in *Tickner v Chapman* was non-delegable justifies no contrary conclusion. The consequence, observed by the Full Court below, that non-delegation of the power conferred by s 501CA(4) will preclude any merits review in the Administrative Appeals Tribunal does not justify any contrary conclusion.

33 For the foregoing reasons, it is not a condition of the valid exercise of the power conferred by s 501CA(4) for the Minister, when personally exercising that power, personally to read and examine the submissions, representations and other material received in every case. The Minister may rely instead upon departmental briefs and submissions which accurately summarise and order that material.

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50 Section 10(3) of that Act.

51 *Tickner v Chapman* (1995) 57 FCR 451 at 464.

Inadequacy of Submission and draft reasons

34 The Minister's application for special leave to appeal raised only one ground of appeal, namely whether s 501CA(4) does not "permit the Minister to rely on a Departmental synthesis or summary of a person's representations but requires the Minister to read the actual documents submitted by the person". This raised for consideration whether reliance upon such a synthesis or summary, regardless of its accuracy and completeness, was of itself a jurisdictional error. For the reasons given above, it was not. That issue should be decided in favour of the Minister.

35 The respondent sought to raise, without filing a notice of contention, a second issue, namely whether the summary in the Submission and draft reasons was "deficient". He relied upon the statement made by the primary judge, and accepted by the Full Court, that it was not possible to discern "the full sense and content of the representations made" from those documents.[52] This was said to be an unchallenged finding of fact.

36 Without deciding whether the respondent was entitled to rely upon this alternative contention, it is nonetheless misconceived for three reasons. In the first place, the statement of the primary judge was not a finding of fact; it was instead a characterisation of the Department's work. Secondly, the observation that the summaries did not convey the "full sense and content" of the representations is one that might be made about any summary of material. A summary will, of necessity, edit the material received; it will reduce the quantum of the representations to the essence of what is needed for a Minister to reach the state of satisfaction mandated by s 501CA(4). So long as the representations are appropriate to be summarised and that process of distillation is accurate and provides a full account of the essential content, it will be lawful for the Minister to read the summary and nothing more. Thirdly, the primary judge's conclusion falls short of identifying jurisdictional error. It was not at any stage suggested that any part of the content of the Submission and draft reasons was actually incorrect in describing the representations received. Nor was it contended that any particular representation had failed to be included. Even if this had occurred, it would not necessarily follow, for the reasons given, that the Minister had thereby failed to take into consideration a mandatorily relevant matter.

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52 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [85] per Colvin J; *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 618 [91] per Mortimer, Banks-Smith and O'Sullivan JJ.

37 Apart from the foregoing observation of the primary judge, the respondent also relied upon the examples given by the Full Court which demonstrated that a direct examination of, for example, the handwritten submissions of the respondent "may" have given the Minister a "different impression" about the material.[53] The examples given concern: matters of detail (the respondent's perceptions about the raising of his children); the handwritten, rather than typed, nature of the representations; the colour of the language used by the respondent; and the detail of an annexure, being a letter from the respondent to the Prisoners Review Board. All of these are matters of elaboration or further detail. None could be said to be part of the essential content of the respondent's representations. With respect, the examples fall far short of the identification of jurisdictional error and invite speculation concerning the merits or persuasive capacity of the material received by the Department.

38 The respondent made no other contention that the Submission and draft reasons had, in any given instance, failed to be accurate, or had been in some identified way incomplete, or had failed materially in conveying the force of any substantive argument in the respondent's representations, or that there was something peculiar about a particular given representation that made a summary of it inappropriate. Nor did the respondent contend that the Minister had failed to have regard to those representations "as a whole".[54]

Disposition

39 Special leave to appeal should be granted, and the appeal should be allowed. The Minister agreed to pay the costs of the respondent in this Court regardless of the outcome. Nor did the Minister seek to disturb the costs orders made in favour of the respondent in the proceedings below. Order 1 of the orders of the Full Court should be set aside and in its place it be ordered that:

(a) the appeal be allowed; and

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53 See, eg, *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 622-623 [111]-[112] per Mortimer, Banks-Smith and O'Sullivan JJ.

54 *Goundar v Minister for Immigration and Border Protection* (2016) 160 ALD 123 at 133 [56] per Robertson J; *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at 331-332 [41] per Besanko, Barker and Bromwich JJ.

(b) orders 1, 2 and 3 made by the Federal Court on 23 March 2022 be set aside and in their place it be ordered that the proceeding be dismissed.

40 JAGOT AND BEECH-JONES JJ. Section 501CA(4) of the *Migration Act 1958* (Cth) ("the Migration Act") enables the Minister to revoke a decision under s 501(3A) to cancel a visa that has been granted to a person if the person makes representations in accordance with the Minister's invitation to do so and the Minister is satisfied, relevantly, that there is "another reason" why the cancellation decision[55] should be revoked. Where the Minister has decided to exercise that power personally, rather than permit a delegate to do so, does that provision, which implicitly imposes a statutory duty on the Minister to consider the person's representations, require the Minister to personally examine the person's representations as made, or, may the Minister discharge the duty to consider the person's representations by examining other documents referring to and summarising those representations?

41 The question arises because in the present case it was found by the primary judge, and confirmed on appeal, that before deciding not to revoke the cancellation of the respondent's visa the Minister did not examine the respondent's representations as attached to the brief to the Minister but, instead, examined the Department's summary of those representations and draft reasons for the decision.[56]

42 The Full Court of the Federal Court of Australia concluded that, because the Minister had chosen personally to exercise the power in s 501CA(4), the Minister could only lawfully be satisfied "that there is another reason why the [cancellation] decision should be revoked" or not within the meaning of s 501CA(4)(b)(ii) of the Migration Act if the Minister had "directly considered" (meaning, in this context, examined) the respondent's representations, and not merely "another person's summary of them".[57] On this basis, the Full Court said that "it was permissible for [the] Minister to be *assisted* by Departmental summaries", but such summaries "do not relieve the repository of the power from the obligation to directly consider the representations made".[58] In context, by

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55 Called the "original decision" in s 501CA.

56 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [35]-[36], [80]; *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 608-609 [44].

57 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 616 [82].

58 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 616 [84] (emphasis in original).

"directly consider", the Full Court meant that, having chosen to exercise the power, the Minister must personally examine the representations as made.[59]

43 For the following reasons, we consider that the Full Court erred in so concluding.

44 The grave consequences for a person whose visa is cancelled under s 501(3A) of the Migration Act may be accepted. In the circumstances specified in that provision – including that the person is serving a sentence of imprisonment on a full-time basis in a custodial institution for certain kinds of criminal offences – the Minister or the Minister's delegate must cancel the person's visa. The person will then become an unlawful non-citizen liable to deportation from Australia on completion of their sentence of imprisonment.[60] Leaving aside the possibility that there was error affecting the Minister's state of satisfaction under s 501(3A)(a) that the person did not satisfy the character test, the only purpose of the person being invited to make, and making, representations to the Minister about the revocation of the cancellation decision is to persuade the Minister to be satisfied that there is another reason why the cancellation decision should be revoked. This context is the basis for the undisputed implied statutory duty of the Minister to consider the person's representations before deciding if the Minister is satisfied (or not) that there is another reason why the cancellation decision should be revoked. That is, it goes without saying that a duty on the Minister to "consider the representations" is to be implied from the subject matter, scope and purpose of the relevant provision, s 501CA(4), construed in the context of the Migration Act as a whole.[61] The issue is not the existence of that duty of consideration. The issue is the ways in which, having chosen to exercise the power personally, the Minister may discharge that duty of considering the representations: must the Minister examine the representations as made, or may the Minister consider the representations by examining a departmental summary of those representations and, in this case, draft reasons for the decision?

45 It will be apparent from this formulation that the question of a failure to consider is not to be equated to a mere failure to consider *a matter in* or *the form of* the representations. The question whether there has been a failure to consider a matter in or the form of the representations is relevant only if it means that the decision-maker failed to consider *the representations*. Whether a decision-maker has failed to consider the representations is a question to be answered objectively

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59 Or, presumably, a copy of those representations albeit one reflecting the form in which the representations were made.

60 *Migration Act 1958* (Cth), ss 196, 198.

61 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

by reference to the whole of the representations and the whole of the material in fact considered by the decision-maker in the context of the decision required to be made. For a failure to consider a matter in or the form of the representations to constitute a failure to consider the representations, the matter or the relevant aspect of their form must be of such objective importance to the decision to be made (in this case, the decision whether there is another reason to revoke the cancellation decision) that it can reasonably be said that there has been a failure to consider the representations themselves. As Brennan J said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:[62]

> "A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within [the decision-maker's] knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered."

46 Whether the legal consequence that the decision-maker has failed to consider representations will follow from the decision-maker examining other material summarising or referring to the representations will depend on both "the nature, form and content of the representations" and "the length, clarity and degree of relevance of the representations", as well as the material in fact relied on by the decision-maker, evaluated within the statutory context of the decision to be made and the "bounds of rationality and reasonableness".[63]

47 It follows that it is for the person challenging the validity of the decision to identify the matter in, or the particular aspect of the form of, the representations which, by reason of the fact that the Minister did not personally examine the representations but instead relied on the departmental summary of those representations and draft reasons for the decision, is said to lead to the legal consequence that the Minister did not consider the representations.

48 In the case of the duty s 501CA(4) imposes on the Minister, this legal consequence does not follow from the person challenging the validity of the decision identifying no more than: (a) *any* matter, regardless of its objective importance, in the representations not conveyed by the material on which the Minister relied; (b) fine differences of emphasis and degree between the representations and the material on which the Minister relied; (c) the fact of mere differences in wording between the representations and the material on which the Minister relied; (d) the fact of mere differences between the form of the

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62 (1986) 162 CLR 24 at 61.

63 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 599 [25].

representations (eg, in handwriting) and the form of the material on which the Minister relied (eg, typed); or (e) the fact of some differences in the tone or emotional impact of the representations as compared to the material on which the Minister relied. No such facts, in isolation or together, are of such importance as to give "shape and substance" to the representations. Nor does that legal consequence follow from an inference that the Minister did not turn their mind to the question whether they needed to examine the representations themselves. The observation in *Carrascalao v Minister for Immigration and Border Protection*, that "the Minister had to ... make an assessment as to whether he needed to refer to any or all of the detailed attachments in order to obtain a complete understanding of the merits of the cases",[64] depended on the terms of the material on which the Minister was there relying, including material which directed the Minister to the attached representations, but, even then, that departmental direction may well have been superfluous depending on the nature of the matter in the representations that was not conveyed by the material.

49 These conclusions are not informed or affected by the *Carltona* principle.[65] *Carltona* concerns acts of departmental officers as agents for ministerial decision-makers.[66] There is no scope for that principle operating in respect of s 501CA(4) where the Minister has chosen to exercise the power personally. This does not mean, however, that the Minister can only consider representations by examining (let alone reading every word in) the representations as made. The immateriality of the *Carltona* principle to this case means only that, the Minister having decided to exercise the power personally, no part of the s 501CA(4) power was exercisable by a delegate or agent. But the duty on which the power is implicitly conditioned is the Minister's consideration of the representations. It is no part of the Minister's exercise of the statutory power for a departmental officer to prepare material summarising the representations. "Consideration", moreover, in this context, has a legal meaning requiring identification of the precise matter to be considered (the representations) and the statutory context of the decision to be made, both of which inform the "bounds of rationality and reasonableness" as they apply to the duty of consideration. We are unable to agree that, within this framework, it is to be concluded that the Minister may only discharge the duty of consideration by examining the representations as made and in the form in which they were made. Once this is accepted, and it being common ground that the duty

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64 (2017) 252 FCR 352 at 381-382 [125].

65 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

66 See, generally, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 37-38; *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 226 [27], 236 [91], 244-245 [139], 270 [293]-[294]; 408 ALR 381 at 392, 405-406, 417, 452-453.

of consideration does not require every word of the representations to be read, it follows that the Minister's duty of consideration under s 501CA(4) is no different from that which Brennan J described in *Peko-Wallsend*. It is a duty discharged by the Minister personally bringing to mind "the salient facts which give shape and substance to the matter", the matter being the representations.

50 Statements of apparent principle from other cases must be considered in their specific context. Accordingly, when the plurality in *Plaintiff M1/2021 v Minister for Home Affairs* said that the decision-maker must "read, identify, understand and evaluate the representations" and must "have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them",[67] they cannot be understood to have meant 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, any more than they could have meant that if it is proved that a decision-maker has not read every word in the representations, any resulting decision is subject to jurisdictional error by reason of a failure to consider.

51 Further, in *Tickner v Chapman*, in dealing with a power exercisable only by the Minister personally, Black CJ said that he "would not rule out the possibility of some representations being quite capable of effective summary", whilst contemplating that "there would be other cases where nothing short of personal reading of a representation would constitute proper consideration of it".[68] It is in this context that his Honour's statement, that "the Minister must personally consider the representations and it is the representations that must be contemplated, not another document which is thought by someone else 'adequately to reflect' the representations",[69] must be understood. The point is not that another document prepared by another person can never suffice to enable the Minister to discharge the duty personally to consider the representations. Rather, the point is that the other document may or may not do so. And that question is to be answered by reference to established principle as discussed above.

52 Insofar as Black CJ contemplated that the form of the representations may be important, the example his Honour gave was of a representation containing photographs. His Honour's point was that unless the summary on which the Minister relied contained the photographs it could not be said that the Minister had discharged the duty of considering the representations. That may be so in a

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67 (2022) 275 CLR 582 at 598 [24].

68 (1995) 57 FCR 451 at 464.

69 (1995) 57 FCR 451 at 464.

particular case although it would depend on, at least, the statutory context, the significance of the photographs, and the adequacy of any summary given to the decision-maker so far as it concerned the photographs. Even so, Black CJ's example of photographs remains a significant distance from the proposition that in order to discharge the duty to consider the representations the Minister must examine the representations as made and in the form in which they were made.

53 While the primary judge concluded, and the Full Court accepted, that, in this case, it "was not possible to discern the full sense and content of the representations made without regard to the documents in which the representations were expressed",[70] the relevant question was whether the departmental summary of those representations and draft reasons for the decision on which the Minister relied to make the decision enabled the Minister to discharge the duty of consideration or not. The statement that the "full sense and content of the representations made" could not be discerned from the departmental summary of the representations and draft reasons for the decision does not, without more, answer that question.

54 The Full Court's observation that "[c]omplete reliance on a summary prepared by Departmental officers is an assessment of the worth of the representations by others"[71] impermissibly excludes the possibility that a summary may convey to the decision-maker all matters in and about the representations that are necessary to support the legal conclusion that the decision-maker has considered the representations. As the Full Court observed, the Minister need not read every word in a representation, because "some representations may lack substance. Others might be repetitive. Some might be tangential."[72] If that is so (and it is), then it cannot be said that the Minister considering only a summary and draft reasons for the decision necessarily involved the Minister breaching the duty to consider the representations.

55 The Full Court also gave examples of "the importance of considering the representations as opposed to a summary prepared by another in the particular

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70 *McQueen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 3]* [2022] FCA 258 at [85]; *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 618 [91].

71 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 621 [100].

72 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 621 [103].

circumstances of this case".[73] In doing so, however, the Full Court's focus was not the question whether a failure to consider a matter identified to be of importance amounted in law to a failure to consider the representations. In the appeal in this Court, the respondent relied on these examples but also did not identify how it was that the examples led to the conclusion that the Minister had failed to consider the representations. It is apparent that the Full Court's concern about the examples was that reading the summary and draft reasons for the decision "[was] capable of" or "[were] capable of" leaving, or "may" or "[had the] capacity to" leave, the reader with a "different impression" from reading the representations.[74] That may be so, but the capacity of a reader to form a different impression by reading the representations as made is not the same as a decision-maker in fact failing to bring to mind some matter conveyed by the representations of sufficient importance in the statutory and factual context that it has the legal consequence of the decision-maker failing to consider the representations.

56 Lastly, it should be said that, although the Full Court distinguished *Peko-Wallsend* on the basis that s 501CA(4) is unlike the statutory power considered in that case,[75] the exercise of the Minister's function in *Peko-Wallsend* was a "central feature of the statutory scheme"[76] and the Minister was the "sole forum" for taking into account any detriment that might be occasioned by the exercise of the statutory power.[77] The nature of the decision-making function considered in *Peko-Wallsend* did not make inapposite to the exercise of the Minister's personal power under s 501CA(4) of the Migration Act Brennan J's observation that:[78]

> "[a] Minister may retain ... power to make a decision while relying on [the] Department to draw [the Minister's] attention to the salient facts. But if [the] Department fails to do so, and the validity of the Minister's decision

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73 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 622 [107]. See further at 622-625 [108]-[125].

74 eg, *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 622 [109], 622 [110], 623 [112], 623 [116], 624 [117], 625 [120], 625 [121], 625 [122], 625 [124].

75 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2022) 292 FCR 595 at 617 [88].

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

77 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 44.

78 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 66.

> depends upon [the Minister] having had regard to the salient facts, [the Minister's] ignorance of the facts does not protect the decision."

57 For these reasons, the orders proposed in the reasons of Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ should be made.