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National interest, present tense: A case for a statutory contemporaneity duty in s 501 decisions

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Abstract
This article critiques ministerial 'national interest' decisions under Pt 9 of the *Migration Act 1958* (Cth) ('the *Migration Act*') that exclude natural justice and may rest on stale material. It identifies resulting jurisdictional error risks and proposes tightly scoped reforms – a statutory contemporaneity duty with presumptive freshness windows, engagement with supervening updates, an annexed Currency Schedule, and a brief confirm-or-lapse mechanism – to ensure present tense, probative decision-making.

Keywords
Contemporaneity duty, s 501 (*Migration Act*), staleness, natural justice, jurisdictional error

This article examines the contemporary operation of the Minister for Immigration and Citizenship's personal 'national interest' powers under Pt 9 of the *Migration Act 1958* (Cth), with particular focus on decisions made without natural justice under ss 501(3) and 501BA. It situates the analysis against two doctrinal pillars: first, the High Court's characterisation of 'national interest' as a largely political criterion that may permissibly encompass a wide palette of governmental considerations;[1] and second, Bromberg J's reasoning in *Chetcuti v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*Chetcuti*'),[2] since applied with approval,[3] that the exclusion of natural justice in s 501(5) does not oblige the Minister to seek or consider the most up-to-date material from the affected person.

Together, these propositions create a permissive environment in which personal cancellations or refusals may be made on dated records, despite the statute's present-tense task of forming satisfaction as at the moment of decision. The article identifies the legality risks that flow from staleness – failure to consider mandatory, supervening facts; illogical or irrational reasoning; material factual error; and legal unreasonableness – and argues for targeted reforms (outside of the judicial process) that preserve ministerial agility while restoring temporal discipline and probative integrity in national-interest decision-making.

The statutory regime

Section 501 of the *Migration Act* empowers refusal or cancellation of a visa on character grounds. A delegate may refuse a visa if an applicant does not satisfy the Minister that they pass the character test and may cancel a visa where the Minister reasonably suspects the person fails the test and the person cannot satisfy otherwise (with natural justice applying).

Separately, the Minister personally may refuse or cancel without natural justice if the Minister reasonably suspects the person fails the character test and is satisfied refusal or cancellation is in the national interest, with parliamentary tabling requirements subject to specified exceptions. There is also mandatory cancellation where the person fails the character test because of a substantial criminal record (as

[1] *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75 [11].
[2] [2020] FCA 1758 ('*Chetcuti*').
[3] *Ba v Minister for Immigration and Multicultural Affairs* [2025] FCA 1239 [57]–[59].

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defined below) or child-sex offences, and is serving a full-time custodial sentence.[4]

The character test is failed on specified grounds including: substantial criminal record; convictions connected with immigration detention or s 197A (ie a detainee must not escape from immigration detention); suspected association with criminal groups; suspected involvement in people smuggling, trafficking or serious international crimes; not being of good character having regard to past or present conduct; risk of future criminal conduct, harassment, vilification, inciting discord or danger to the community; child-sex offence findings; specified international-crime charges or indictments; adverse ASIO assessment; or an Interpol notice indicating community risk. A 'substantial criminal record' includes sentences of death or life imprisonment, imprisonment of 12 months or more (including where multiple terms total 12 months or more), and certain findings leading to detention, with concurrent terms counted in full.

Section 501CA applies when a visa is mandatorily cancelled under s 501(3A) while the person is serving a prison sentence. The Minister must promptly give written notice of the cancellation, provide particulars of 'relevant information' (information specifically about the person that formed part of the cancellation reasons), and invite representations – within the prescribed time and manner – about revocation.

The Minister may revoke a mandatory cancellation decision if the person makes representations and the Minister is satisfied the person passes the s 501 character test or there is another reason to revoke. If revoked, the cancellation is taken never to have been made. Detention between cancellation and revocation is lawful and gives no entitlement to damages, demonstrating the cancellation decision still has legal effect in that limited sense. A decision not to revoke under s 501CA(4) is not reviewable under Part 5. Where an administrative decision on a matter is infected by jurisdictional error so it can be said that the decision-maker did not exercise its jurisdiction in making that decision, the decision-maker has power to make a new decision on that matter.[5]

Section 501BA of the *Migration Act* applies when a delegate of the Minister or the Administrative Review Tribunal (the ART) has made a decision under s 501CA to revoke a mandatory cancellation under s 501(3A). The Minister may personally set aside that revocation decision and cancel the person's visa if satisfied that the person does not pass the character test because either (i) s 501(6)(a) applies on the basis of a 'substantial criminal record' under s 501(7)(a), (b) or (c), or (ii) s 501(6)(e) applies, and if the Minister is also satisfied that cancellation is in the national interest. Natural justice does not apply to a decision made under s 501BA(2) – the power can only be exercised by the Minister personally, and such a decision is not reviewable under Part 5.

Decisions made personally by the Minister are not reviewable by the ART.[6] A non-citizen who is the subject of an adverse decision by the Minister under Part 9 of the *Migration Act* has a direct right of appeal to the Federal Court of Australia.[7]

Relevant jurisprudence

In *Chetcuti v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[8] Bromberg J concluded that where s 501(5) excludes natural justice, the Minister is not obliged to consider the most up-to-date information from the affected person.[9] Section 501(5) allows the Minister to be satisfied under s 501(3)(d) (national interest) without first ascertaining the person's views. Accordingly, nothing in the *Migration Act's* 'subject matter, scope and purpose' implies a requirement to consider material provided by the affected person – let alone the most recent such material – before deciding.[10]

The reasoning of Bromberg J in *Chetcuti* has subsequently been applied with approval.[11] Accordingly, on the current state of the authorities in Australia, a Minister who personally makes a national interest decision under Part 9 of the *Migration Act* may do so on the basis of stale information.

Before considering the correctness of *Chetcuti*, it is important to say something about the national-interest criterion.

In *Plaintiff S156/2013 v Minister for Immigration and Border Protection*,[12] six members of the High Court said that 'what is in the national interest is largely a political question'.[13] In *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]*,[14] it was unanimously said that where the criterion to be applied by the Minister requires the Minister to be satisfied that the grant of the visa is 'in the national interest', the decision-maker may properly have regard to a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office.[15]

[4] *Migration Act 1958* (Cth) s 501(3A).
[5] *Re JTBJ and Secretary, Department of Social Services* [2025] ARTA 464 [37]–[39], [45]; *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 [55].
[6] *Migration Act 1958* (Cth) s 476A(1)(c).
[7] Ibid.
[8] [2020] FCA 1758.
[9] Ibid [57].
[10] Ibid.
[11] *CMP25 v Minister for Immigration and Multicultural Affairs* [2025] FCA 480 [69]; *EUF20 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 298 FCR 492 [44] ('*EUF20*'); *Younes v Minister for Immigration and Multicultural Affairs* [2025] FCA 236 [41]; *Candemir v Minister for Home Affairs* (2019) 268 FCR 1 [25]–[26]; *Ozer v Minister for Home Affairs* [2019] FCA 104 [43]–[46]; *Palmer v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 306 FCR 156 [109].
[12] (2014) 254 CLR 28.
[13] Ibid [40].
[14] (2015) 255 CLR 231.
[15] Ibid [18]. See further *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 [50].

Where a Minister exercises a power personally, the law recognises that they do not work alone but make decisions with the assistance of their department. The law treats the collective knowledge and experience of the department as the Minister's own knowledge and experience.[16]

The foregoing permits a Minister to rely on their department to sift and organise materials, prepare summaries and prioritise correspondence and, generally, there is no obligation on a Minister to read every document in order to exercise a power personally.[17]

In summary, where natural justice is excluded under Part 9, *Chetcuti* – since applied with approval – confirms that the Minister may personally decide a national-interest matter on stale information, and the High Court's characterisation of 'national interest' as largely political permits consideration of a broad range of factors, including the government's fortunes and the Minister's continuance in office.

The absurdity of the current position

A Minister's personal cancellation 'in the national interest' based on stale information presents a cluster of legality risks that go well beyond the absence of a hearing obligation.[18] For example, the statutory satisfaction under s 501(3)(d) is necessarily time-bound: it must be formed by reference to facts that rationally bear on Australia's interests at the time.

Staleness directly threatens that requirement because the probative value of many facts (risk indicators, intelligence assessments, diplomatic settings, law-enforcement priorities, the non-citizen's current conduct and circumstances) decays with time.[19] A conclusion that may once have been open can become non-sequitur if the factual predicates have shifted. Thus, even accepting *Chetcuti* and *EUF20*'s baseline – no implied duty to invite fresh material – the Minister still must (i) ask and correctly answer the right legal question, (ii) rely on material that remains logically probative of that question, and (iii) expose an intelligible reasoning path from evidence to conclusion.[20] Staleness is problematic because it can undermine each step.

First, relevant/mandatory considerations: while s 501(5) removes natural justice, it does not erase the duty to consider matters that are 'essential to the exercise of the power' by statute or necessary implication (the classic *Peko-Wallsend*[21] frame). If supervening facts are so centrally connected to national interest that satisfaction could not lawfully be reached without grappling with them – eg verified rehabilitation and years of offence-free living that neutralise earlier risk assessments; a revised security or policing assessment that squarely retracts prior concerns; a material diplomatic realignment; or a development that flips cooperation/public-interest equities – their contemporaneous state becomes a mandatory consideration. Ignoring those developments because the record is old is not a value-neutral choice; it is failure to consider a mandatory matter.

However, it must be acknowledged that the preceding line of argument was rejected in *Vargas*[22] – where the Full Court of the Federal Court of Australia held that the Minister is not required to have regard to *any* particular matter in forming a view about the national interest, or in exercising the resulting discretion under s 501BA. If that view is accepted, the exercise of the 'national interest' power could risk operating in a punitive manner, because it could be exercised without regard to the protection of the Australian community. Yet the power in s 501BA is only enlivened where a non-citizen fails the character test, reflecting that the character regime is inextricably directed to – indeed, materially grounded in – the protection of the Australian community.

Writing in the context of the statutory power in s 501(2) of the *Migration Act 1958* (Cth), Wilcox J (dissenting) in *Huynh*[23] held that it is plainly within the subject matter, scope and purpose of the Act that, in determining how to exercise the discretion conferred by s 501(2), the Minister should have regard to the nature of the person's offence. This is an essential step in assessing the degree of criminality involved in the offence and, therefore, its significance as an indicator of the person's character and the desirability, or otherwise, of excluding the person from Australia.[24]

Second, rationality/illogicality: a state of satisfaction must rest on a rational bridge between the evidence and the conclusion.[25] Where the Minister's reasons uncritically import historical propositions whose currency determines their probative bite, the chain of reasoning risks illogicality (no rational bridge) or irrationality (internal contradiction), because time can transform what once was probative into non-probative background. Staleness therefore creates a mismatch between the evidence's temporal scope and the statutory task's 'as-at decision' lens. The longer and more dynamic the interval, the greater the risk that reliance on old facts defeats the logic of the decision.

Third, in *XMBQ v Minister for Immigration and Multicultural Affairs*,[26] Horan J allowed XMBQ's judicial review, holding that s 501BA(2) of the *Migration Act* carries an implied temporal limit and must be exercised within a reasonable time of the AAT's revocation decision; the Minister's 8 June 2024 decision – made about three years and two months after the AAT's 13 April 2021 revocation – was therefore beyond power and invalid.[27]

[16] *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 98 ALJR 594 [18].
[17] Ibid [19]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 65–66.
[18] *Migration Act 1958* (Cth) s 501(5).
[19] *United States v Frechette*, 583 F 3d 374, 377 (6th Cir, 2009); *United States v Abboud*, 438 F 3d 554, 572 (6th Cir, 2006).
[20] *EUD24 v Minister for Immigration and Citizenship* [2025] FCAFC 128 [34].
[21] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
[22] *Vargas v Minister for Home Affairs* (2021) 286 FCR 387 [61] ('*Vargas*').
[23] *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 ('*Huynh*').
[24] Ibid [43].
[25] *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21 [33]–[35].
[26] [2025] FCA 553 ('*XMBQ*').
[27] Ibid [2].

The Court issued certiorari quashing the decision and ordered costs to the applicant.[28] Other complaints failed: the Minister correctly understood s 501BA as a composite power to set aside and cancel, and a fair-minded observer would not apprehend bias from the Minister's possession of information about pending charges.[29]

XMBQ was the subject of an appeal by the Minister to the Full Court of the Federal Court of Australia. At the time of writing, the appeal was heard on 24 November 2025, and judgment remains reserved. Accordingly, the state of the law in this area is subject to some contestation. Even then, it would not be surprising to see a special leave application to the High Court of Australia down the line.

Unreasonable delay claims have not always succeeded. For example, in *Morgan v Minister for Immigration and Multicultural Affairs*,[30] McDonald J granted an extension of time but dismissed Morgan's judicial review of the Minister's personal decision (5 June 2024) to set aside the AAT's 5 September 2023 revocation and cancel his visa under s 501BA(2).[31] The Court rejected the argument that the Minister misconceived s 501BA by 'bifurcating' national interest and discretionary factors, holding it was permissible to assess the national interest (protection and community expectations) and then weigh personal factors in the discretion.[32] Assuming (without deciding) an implied requirement to act within a 'reasonable time',[33] the nine-month interval after the AAT decision did not itself call for explanation or show unreasonable delay;[34] mandamus was inapposite because s 501BA(2) imposes no duty to decide.[35]

Fourth, material error of fact and materiality doctrine: if the decision proceeds on a critical factual premise that was true then but false now (or materially incomplete now), and there is a realistic possibility the outcome could have been different had the contemporary position been considered, the decision is vulnerable.[36]

Not every factual error makes a decision unlawful.[37] It is certainly possible to envisage a class of case where factual errors in reasons are so egregious that this is probative of a decision which lacks a logical or rational foundation;[38] that any such conclusion, however, would necessarily only follow from a fair reading of reasons as a whole.[39]

Materiality is often readily shown in this setting because currency goes to the heart of the national interest calculus: many of the Minister's evaluative predicates (risk to community,[40] enforcement priorities, foreign relations, public confidence, utility of cooperation) are time-sensitive by nature.

Legal unreasonableness: even in a broad, 'largely political' domain, it can be legally unreasonable[41] to (a) place decisive weight on information whose age or context obviously undermines its reliability without explaining why it remains probative, (b) ignore glaring, outcome-salient developments that are apparent on the very materials the Minister elects to consider (including internal government updates), or (c) reach a conclusion that sits outside the range of lawful outcomes because it treats yesterday's risks as today's realities without analytical engagement. Unreasonableness is especially engaged where the consequences are grave, the decision relies on thin or dated evidence, and the reasons do not acknowledge or justify that imbalance.[42]

Legal unreasonableness will only be made out if the decision has the character of being unreasonable based on some 'underlying jurisdictional error in the decision-making process'[43] or if the decision is otherwise

> plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power.[44]

Fifth, misconception of the statutory task: treating national interest as a static label rather than a present-tense, evidence-linked judgment misconceives the power. The Minister must make a contemporary judgment; reliance on stale material without contemporaneity analysis subtly shifts the task to whether the decision would have been in the national interest at an earlier time – a different question.[45]

[28]Ibid [92].
[29]Ibid [119], [208].
[30][2025] FCA 266.
[31]Ibid [7].
[32]Ibid [40].
[33]Ibid [71].
[34]Ibid [82].
[35]Ibid [70].
[36]*Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 [27].
[37]*CRI026 v The Republic of Nauru* (2018) 92 ALJR 529 [57].
[38]*EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474 [22].
[39]*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, at 271–2; *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 [38].
[40]*EUD24 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1474 [28].
[41]*Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 270.
[42]*Ba v Minister for Immigration and Multicultural Affairs* [2025] FCA 1239.
[43]*Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 [44].
[44]*Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 [11].
[45]Compare *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2025] HCA 33.

For example, in *Ba v Minister for Immigration and Multicultural Affairs*,[46] Neskovcin J allowed Ba's judicial review, quashing the Assistant Minister's 20 March 2025 personal cancellation under s 501BA(2) and awarding costs.[47] Of five grounds, only 'ground five' succeeded: the Assistant Minister acted legally unreasonably by treating dated material (a November 2023 risk assessment) as if current and by using the absence of newer evidence – caused by the choice to exclude natural justice – as a basis to adopt the old assessment and find ongoing risk.[48] The Court rejected complaints that the Minister failed to actively engage with the voluminous record (55 minutes was not determinative), had to consider the most up-to-date information (*Chetcuti* applied), mischaracterised 'family violence', or acted illogically about remorse.

In *GRCF v Minister for Immigration, Citizenship and Multicultural Affairs*,[49] Bennett J quashed the Minister's 21 June 2024 personal cancellation under s 501BA and ordered costs, holding that the reasons were materially illogical and that the Minister unreasonably treated dated evidence as current.[50] The Minister's conclusion that GRCF lacked remorse (drawn from mitigation submissions) was conceded to be illogical, yet it was a significant factor in the national-interest finding and discretionary balance, creating a realistic possibility of a different outcome (grounds 1–2).[51] Separately, the Minister impermissibly assumed, without evidence, that GRCF had not continued psychological treatment up to decision time, an unreasonable use of stale material (ground 3).[52] Other grounds – failure to consider legal consequences (s 197C; criterion 5001) and an implied time limit – were rejected.[53]

Sixth, the 'political question' characterisation has a defined scope and important limits. High Court statements that the national interest is 'largely political'[54] explain why courts are reluctant to imply additional procedural obligations, but they do not insulate such decisions from legality review. If anything, the breadth of potentially relevant considerations heightens – rather than diminishes – the need for the decision-maker to demonstrate that the conclusion reached is legally, not merely politically, sound. That requires the decision-maker to identify and apply the correct legal question, to observe proper boundaries of relevance, and to ground the decision in a probative evidentiary basis. It also requires intelligible reasoning that reveals why the material matters and how it supports the outcome. In that sense, the more 'political' the palette of considerations, the more exacting the court's supervision of the orthodox public-law guardrails.

Seventh, the practical consequences of staleness recur across decision-making files. Risk labels fixed at the time of sentencing, and dated psychological opinions, are too often treated as if they describe the present. That approach ignores later, highly probative developments – long offence-free periods, completion of treatment, stable employment, and verified compliance – which bear directly on current risk. Staleness also arises when historic threat assessments or foreign-policy summaries are preferred over later agency material recording de-escalation or changed diplomatic settings. Older factual narratives can then crowd out contemporary public-interest equities, including caring responsibilities, community contribution or active cooperation with law enforcement, all of which may materially shift the national-interest balance. Finally, basic factual updates – such as changes in address, associates, employment, family circumstances or medical status – are sometimes missed, leaving pivotal risk premises wrong.[55]

Finally, the synthesis: *Chetcuti* and *EUF20* remove any implied duty to seek fresher input from the non-citizen, but they do not authorise decision-making unmoored from contemporaneous, probative facts. A national interest cancellation stands – or falls – on whether the Minister's present-tense satisfaction is (a) anchored in material that still says something reliable about today's statutory question, (b) attentive to essential supervening considerations, and (c) explained by reasons that make the logic of reliance on older evidence transparent. Where those conditions are absent, staleness is not a mere aesthetic flaw; it is a jurisdictional error vector – through failure to consider mandatory matters, illogicality, material factual error and legal unreasonableness – because it severs the rational connection between the evidence and the only question the statute permits: is it, now, in the national interest to cancel?

Reform

Reform should close the 'staleness gap' without undoing Parliament's choice in ss 501(5) and 501BA(3) to exclude natural justice. The *Migration Act* should be amended – by inserting a new Division in Pt 9 (for example, ss 501ZC–501ZF) – to impose a narrow, non-hearing 'contemporaneity duty' whenever the Minister personally exercises a national-interest power.

That duty would require (i) a currency audit identifying each decision-critical proposition and the most recent material on the Departmental record that speaks to its present truth; (ii) a contemporaneity analysis expressly explaining why any relied-upon older material remains probative now (distinguishing structural, enduring facts from time-sensitive assessments); and (iii) engagement with supervening developments on the Department's own files (including later Australian Federal Police (AFP)/Australian Security Intelligence Organisation (ASIO) and law-enforcement notes, diplomatic briefs, and updated risk/rehabilitation evidence).

[46][2025] FCA 1239.
[47]Ibid [98].
[48]Ibid [97].
[49][2025] FCA 415.
[50]Ibid [36].
[51]Ibid [18]–[36].
[52]Ibid [37]–[61].
[53]Ibid [62]–[97].
[54]*Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 [40].
[55]*Ba v Minister for Immigration and Multicultural Affairs* [2025] FCA 1239.

To preserve ministerial agility while restoring legal discipline, the *Migration Act* should set presumptive 'freshness windows' (eg security and policing assessments ordinarily no older than 90 days; risk/rehabilitation and community-impact material ordinarily no older than 6 months) with a statutory power to depart where reasons justify probative weight despite age.

The amendments should codify a short list of mandatory considerations tailored to the national-interest task in the present tense (current community-risk profile, verified offence-free time and treatment adherence, current cooperation/public-interest equities, current foreign-affairs settings,[56] and any material internal update inconsistent with earlier summaries), and require an annexed 'Currency Schedule' to the reasons listing each relied-upon source with its date and an explanation of probative currency.

To deal with urgency, the proposed legislative regime should provide for temporary personal cancellations based on imperfect currency for up to 30 days,[57] coupled with a prompt confirmatory review that satisfies the contemporaneity duty on the updated record; absent confirmation, the temporary decision lapses.

Although personal decisions need not comply with s 499 directions, they remain exposed to judicial review on their reasons.[58] Where reliance is placed on dated material, adequate reasons should (i) acknowledge its age, (ii) explain why it remains probative notwithstanding subsequent events, and (iii) engage with any apparent supervening developments on the face of the record (including later agency briefs). Silence on these points invites the inference that currency was overlooked, reinforcing grounds of unreasonableness, failure to consider a relevant matter, or illogicality.

The minimum lawful discipline for the Minister – even with s 501(5) engaged – requires a currency audit. That audit should identify decision-critical propositions. It should then check what in the file supports their current truth. It should note dates and any later updates. It also requires a contemporaneity analysis. Where evidence is old, the Minister should expressly explain why it still has probative weight now. That may involve distinguishing structural, enduring facts from inherently time-sensitive judgments.

The Minister must engage with supervening developments. The Minister should squarely address the significance of later internal briefs, or changes flagged in the materials relied on. If those developments are discounted, the Minister should explain why. The Minister must undertake reasoned balancing. The reasons should show how older and newer material fit together. They should demonstrate how that combination rationally supports present-tense satisfaction. The Minister must ensure consistency and parity. Where executive practice usually refreshes particular inputs (such as up-to-date AFP/ASIO notes), the reasons should say so. An unexplained departure from that practice risks legal unreasonableness.[59]

Finally, to address the present asymmetry whereby s 499 directions do not bind the Minister personally, Parliament should either (a) amend s 499(2A) to permit a targeted Direction on contemporaneity to bind the Minister for Pt 9 national-interest decisions, or (b) create a new rule-making head of power authorising binding 'Contemporaneity Rules' for such decisions. This package keeps national-interest decisions 'largely political' in scope, but ensures they are made on logically probative, present-tense facts, reducing jurisdictional-error vectors (failure to consider mandatory matters, illogicality, material factual error, and legal unreasonableness) while maintaining executive speed where genuinely necessary.

Conclusion

In sum, the present framework permits national-interest cancellations to be made personally by the Minister without natural justice and, on current authority, even on stale material – yet that stance sits uneasily with the statute's present-tense task and exposes decisions to multiple legality risks (failure to consider mandatory, supervening facts; illogical or irrational reasoning; material factual error; and legal unreasonableness).

A calibrated reform – introducing a narrow, non-hearing contemporaneity duty with presumptive freshness windows, codified present-tense mandatory considerations, an annexed Currency Schedule, and a fast-track confirm-and-lapse mechanism for urgent cases – would preserve executive agility while restoring analytical discipline. Coupled with either a targeted amendment to s 499(2A) or a new rule-making power to bind the Minister on contemporaneity, this package would align national-interest decision-making with the rule-of-law demand for probative, up-to-date facts, reduce jurisdictional-error vectors, and enhance public confidence without re-imposing a hearing obligation that Parliament has chosen to exclude.

Properly crafted, these changes keep the national interest 'largely political' in scope but insist that its application be legally coherent, temporally grounded, and transparently reasoned as at the moment of decision.

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[56]Jason Donnelly, 'Use of a National Interest Criterion in Commonwealth Legislation: Suggested Reforms for Greater Accountability in Executive Decision-Making' (PhD Thesis, University of New South Wales, November 2018) 20.
[57]Compare *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 [326].
[58]*Ba v Minister for Immigration and Multicultural Affairs* [2025] FCA 1239.
[59]*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.