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Procedural Fairness in Application Cases: Is Compellability of Consideration a Critical Safeguard?

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The proposition that governmental actors must extend procedural fairness to applicants for statutory rights, subject only to clear contrary legislation, has become a background assumption of Australian administrative law. However, experience in the migration context highlights a form of legislation that disrupts the presumptive operation of procedural fairness in application cases – namely, legislation for procedural non-compellability. This article describes how non-compellable powers disrupt the presumptive operation of procedural fairness in application cases. Drawing on this analysis, it proposes that an effective doctrinal response to the phenomenon will require courts to re-engage with the common law foundations for procedural fairness to applicants.

It is now a staple of Australian administrative law that governmental actors may be held legally accountable for procedural unfairness to applicants for statutory privileges such as visas, licences or permits ("application cases").[1] To put this in the familiar doctrinal terms established for Australian law in *Kioa v West* (*Kioa*),[2] a statutory decision not to confer a new statutory right has an effect on the applicant's interests that attracts a duty of procedural fairness, subject to clear statutory provision to the contrary. The era when this was doubted[3] seems firmly relegated to history. Experience in the migration context has, however, cast light on a legislative device that complicates the presumptive application of procedural fairness obligations in application cases. In this article, I show how this form of legislation threatens the presumptive engagement of procedural fairness in application cases, and explore the ways that doctrine may develop to mitigate this threat. In doing so, I propose that we see this as a case study of the continuing significance of the common law as a foundation for procedural fairness in application cases.

The legislative device I address in this article is the introduction of a radical, procedural non-compellability in application cases. In the migration context this has been done by enacting "no compellable consideration" clauses for a suite of ministerial discretions to confer visas (or rights to apply for visas) outside the visa application system. "No compellable consideration" clauses stipulate that a statutory decision-maker is not required *to consider* requests for the rights. In the migration context, the legislation does not make any provision for deemed adverse decisions on requests in fact received.[4] This creates the space for atypical administrative action on requests for statutory rights: It

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[1] See M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 416–420.

[2] *Kioa v West* (1985) 159 CLR 550.

[3] A cautious piecemeal approach to procedural fairness in application cases is evident in, eg, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360–362 (Mason J; Stephen J agreeing), 377–378 (Aickin J), 394–395 (Wilson J). The narrower approaches to procedural fairness in application scenarios seen in earlier authorities, including by reference to legitimate expectations, are reflected in, eg, Pamela Tate, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Monash University Law Review* 15, 26–27; Margaret Allars, "Fairness: Writ Large or Small" (1987) 11 *Sydney Law Review* 306, 313–316; DC Hodgson, "Licensing and the Legitimate Expectation" (1985) 9 *Adelaide Law Review* 465.

[4] Contrast procedural non-compellability in the pharmacy licensing context, where the Minister is not required to consider any request to approve a pharmacist to supply pharmaceutical benefits after an adverse statutory decision on an application by the pharmacist, but the legislation expressly provides that if the minister does not make statutory decisions on a request in fact received within a prescribed period, the Minister is taken to have made an adverse statutory decision: *National Health Act 1953* (Cth) ss 90A, 90B, esp s 90B(4), (5).

empowers the statutory decision-maker to implement non-statutory processes that "screen out" requests for statutory rights *without any statutory decision being made*. The decided cases show that "screening out" in the absence of a statutory decision complicates application of the doctrine that determines when administrative action attracts administrative law obligations. For the reasons explored in more detail below, this is a threat to the presumptive application of procedural fairness in application cases that requires an effective doctrinal response from the common law.

I. Introduction

A. Aims and Structure

My first objective in this article is to describe how radical procedural non-compellability in application cases disrupts the presumptive operation of procedural fairness in application cases. I do this in Part II, with reference to key High Court of Australia decisions concerning procedural fairness in non-compellable administrative action in the migration context.[5]

My second objective is to show why an effective doctrinal response to procedural non-compellability requires re-engaging with the common law foundations of procedural fairness. In Part III, I show that the Court's decisions do provide some avenues for extending procedural fairness to official decisions that "screen out" requests in a non-compellable process, but that these do not provide a coherent principled foundation for implying procedural fairness obligations. I argue that an effective response to procedural non-compellability requires that courts articulate, through common law doctrine, when "screening out" of requests for new rights in a non-compellable decision-making process has an effect on individuals that justifies legal accountability for procedural unfairness.

B. Introductory Points

Before turning to the two substantive tasks of this article, I briefly set out the premise that there is presumptive legal accountability for procedural unfairness in application cases in Australian administrative law; clarify the form of non-compellability that is introduced when parliaments enact "no compellable consideration" clauses; and introduce the procedurally non-compellable ministerial powers to confer visas outside the visa application system.

1. Legal Accountability for Procedural Unfairness in Application Cases

The doctrinal propositions that support legal accountability for procedural unfairness in the exercise of statutory powers are well-understood[6] and can be briefly stated. First, it is presumed that procedural fairness operates as a constraint on statutory powers whose exercise is apt to adversely affect a person's rights or interests in a direct and immediate way (the "threshold principle").[7] Second, this presumption applies unless excluded by express words or necessary implication ("the exclusion principle").[8] Third, where procedural fairness conditions a statutory power to make a decision that relevantly affects a person's rights or interests, it operates as a limit on authority to make a final and operative decision *and* those preliminary decisions that have a statutory effect on the final and operative decision. This

[5] In particular *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180; [2016] HCA 29 (*Data Breach Case*), which builds on two key earlier cases: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 (*Offshore Processing Case*); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31.

[6] See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258–259 [11]–[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2010] HCA 23.

[7] See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11]; [2010] HCA 23; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [66] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [75]; [2016] HCA 29.

[8] See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [14] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2010] HCA 23.

statutory effect may take the form of an essential precondition or bar to a final decision, or a mandatory consideration in the final decision-making.[9]

The starting point for this article is that statutory decisions in application cases satisfy the threshold principle for procedural fairness. For reasons discussed in more detail below, this proposition is firmly ensconced in Australian law. It would be considered trite to say that an applicant for a new statutory right has an interest in the resolution of her application that attracts the presumptive application of procedural fairness to a statutory decision on her application (and to any preliminary decision that is a "step in a process" towards the final and operative decision).[10] Importantly, it is no longer considered that procedural fairness is owed to applicants only in those exceptional cases where the administrative action on requests for a right encroaches on anterior or extrinsic[11] legal interests such as personal or commercial reputation,[12] confidentiality[13] or liberty.[14] In the exceptional cases where administration of a statutory power to confer rights does encroach on anterior or extrinsic legal interests, this can provide a distinct and independent basis for implying a duty of fairness. However, the presumptive operation of procedural fairness in application cases cannot be explained on the basis that decision-making in application cases encroaches on anterior legal interests. It rests instead on the court's recognition that an adverse statutory decision on an application for a statutory right has an effect on the applicant's interests that satisfies the threshold principle for procedural fairness.[15]

2. Procedural Non-compellability is not Characteristic of Statutory Discretions

This article concerns a relatively unusual form of legislative provision in relation to statutory powers to confer individual rights: Namely, an express provision that an official invested with a statutory power to confer rights is not bound *to consider* exercising the power. A "no compellable consideration clause" of this kind introduces a radical *procedural* non-compellability to application cases. This is distinct from *substantive* non-compellability whereby no single particular circumstance or factor compels the exercise of the power.[16] The *procedural* non-compellability means that the statutory decision-maker is free to ignore requests for the exercise of the power, or to institute administrative action to screen out requests without making any statutory decision in relation to them.

This procedural non-compellability is not a characteristic of statutory discretionary powers to confer rights. In the absence of an express statutory provision, Australian law presumes those invested with statutory discretion to confer new rights on individuals are bound to consider the exercise of the powers on request or application. This is so even if the power is conferred as an "unfettered discretion" and the enabling legislation does not specifically mandate consideration: The "existence of the discretion

[9] See, eg, *Apache Northwest Pty Ltd v Agostini (No 2)* [2009] WASCA 231, [12] (Wheeler and Newnes JJ).

[10] See, eg, Aronson, Groves and Weeks, n 1; M Groves, "Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism" in M Groves and G Weeks (eds), *Legitimate Expectations in the Common Law World* (Bloomsbury, 2017) 319, 326.

[11] These adjectives are intended to highlight that the reference covers individual interests that are protected by general law doctrines that operate in contexts other than judicial review of the administration of statutory powers.

[12] Authorities that reputation is an interest attracting the protection of procedural fairness include: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576–578 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Annetts v McCann* (1990) 170 CLR 596, 608 (Brennan J); *Apache Northwest Pty Ltd v Agostini (No 2)* [2009] WASCA 231, [144]; *Cornwall v Rowan* (2004) 90 SASR 269, 332 [250]; [2004] SASC 384; *Victoria v Master Builders' Association (Vic)* [1995] 2 VR 121, 151.

[13] See, eg, *Johns v Australian Securities Commission* (1993) 178 CLR 408.

[14] See, eg, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 353–354 [76]–[78]; [2010] HCA 41; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [76]; [2016] HCA 29.

[15] The reasoning behind this recognition is discussed further in Part IIIB.

[16] Substantive non-compellability is described in the authorities in terms of the decision-makers' freedom to choose whether to exercise the power according to "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'": *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

implies the existence of a duty to determine any application that is made".[17] The implied duty to determine applications is justified by reference to a general law presumption that statutory powers are to be exercised reasonably.[18]

Australian policy-makers are well aware that a duty to determine applications for the exercise of a public law power to benefit individuals is an important safeguard against arbitrary or corrupt administration of the power.[19] There is no current indication that Australian parliaments will enact procedural non-compellability across the broad swathe of statutory schemes that regulate social interests by conferring statutory rights.[20] Yet, as experience in the migration context shows, radical procedural non-compellability may hold some attraction for governments minded to restrict the application of judicial review's principles in particular areas of administration.

Experience in the migration context has clarified that procedural non-compellability does not exclude judicial review of administrative action in fact taken on requests for statutory rights,[21] nor does it entirely exclude the application of judicial review's principles.[22] Non-compellability does introduce some limits on the remedies available in judicial review proceedings. Mandamus is not available,[23] and this establishes a discretionary reason to refuse certiorari.[24] However, a declaration can issue where administrative action on requests involves reviewable procedural unfairness or errors of law,[25] and injunctive relief is also available (subject to discretionary considerations).[26] Where others have critiqued the scope of judicial review's *jurisdiction* and *remedies* in relation to non-compellable administrative action,[27] my focus here

[17] *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 17–18 (Mason J), applying *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 197–199 (Taylor and Owen JJ); *Sharpe v Wakefield* [1891] AC 173, 179.

[18] *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 17–18 (Mason J).

[19] See, eg, Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000); Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, Parliament of Australia (March 2004).

[20] It is also possible that if parliaments do provide for powers to confer rights that are procedurally non-compellable, they will include express provision to ensure that deemed statutory decisions are made in relation to all requests in fact received: eg, *National Health Act 1953* (Cth) s 90B(4), (5); see also n 4.

[21] See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 347 [58]–[59]; [2010] HCA 41, explaining that a "no compellable consideration clause" does not prevent any exercise of judicial review jurisdiction in relation to any exercise of the non-compellable statutory power in fact undertaken, and the Court's exercise of its review jurisdiction in that case and others involving an exercise of the non-compellable statutory powers, in particular *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; [2013] HCA 53; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180; [2016] HCA 29. The Court has not squarely confronted the question whether non-compellable administrative action on requests is amenable to judicial review when it does not constitute or evidence an exercise of statutory power or step in a statutory process, see, eg, Amanda Sapienza, "Justiciability of Non-statutory Executive Action: A Message for Immigration Policy Makers" (2015) 79 *AIAL Forum* 70.

[22] See, eg, judicial determination of claims of procedural unfairness and error of law in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 (procedural unfairness and error of law established); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; [2013] HCA 53 (error of law established); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180; [2016] HCA 29 (procedural unfairness not established).

[23] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 [99]; [2010] HCA 41; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 461 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ), 474 (Gaudron and Kirby JJ); [2003] HCA 1.

[24] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 [100]; [2010] HCA 41.

[25] Declarations were awarded in relation to administrative decisions to "screen out" requests without referral to the Minister in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 and *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; [2013] HCA 53.

[26] The availability of equitable remedies in this context is discussed in Christopher Tran, "The 'Fatal Conundrum' of 'No-Consideration' Clauses after Plaintiff M61" (2011) 39 *Federal Law Review* 303.

[27] See, eg, Anlee Khuu, "Non-Statutory Filters in Government Decision-Making: Compatible with Administrative Justice?" (2016) 6 *Victoria University Law and Justice Journal* 10.

is on the engagement of judicial review's *principles* – in particular procedural fairness – in relation to non-compellable administrative action.

3. Procedural Non-compellability in the Migration Act 1958 (Cth)

A notable example of procedurally non-compellable administrative action on requests for statutory rights is found in the provision in the *Migration Act 1958* (Cth) (the Act) for ministerial discretionary powers to confer visas outside the visa application system.

The Act establishes two regimes for granting visas to non-citizens. One is a regime of "tightly controlled official powers" to grant visas upon a valid application and according to statutory criteria.[28] The official powers in relation to applications for visas are "tightly controlled" in two ways – a valid application for a visa must be considered,[29] and the application must be dealt with according to the statutory criteria.[30] The Act also includes a suite of non-compellable ministerial discretionary powers to grant a visa, or a right to apply for a visa, which is otherwise denied by the Act. These powers serve three ends:

- *"End–stage" intervention in visa application system*: The Act enables the Minister to substitute more favourable decisions for decisions reached in the visa application system, including powers to grant visas to individuals whose application for a visa has been refused.[31]
- *"Lifting the bar" to the visa application system*: The Act also enables the Minister to override statutory provisions that deny various cohorts of non-citizens access to the visa application system. These statutory bars to the visa application system apply principally to non-citizens who have entered Australian territory by sea without a valid visa,[32] or are brought to Australia after they have been removed by Australia to another country under any of the iterations of Australia's arrangements with other countries for the removal of asylum seekers from Australia's migration zone.[33]
- *Releasing individuals from mandatory immigration detention*: The Act also empowers the Minister to grant a visa to a person in immigration detention.[34]

These ministerial dispensing powers have become established as an integral component in the statutory scheme for regulating the reception of non-citizens in Australia, including with the aim to meet Australia's international law *non-refoulement* obligations to various cohorts outside the formal visa application system.[35] While it is said that the powers "stand apart"[36] from the "tightly controlled" powers, there are substantive similarities in the operational implementation of the powers. Broadly speaking, the administration of the dispensing powers is underpinned by government policies that enable officials[37] to

[28] See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 648 [30]; [2012] HCA 31.

[29] *Migration Act 1958* (Cth) s 47(1), subject to the cap on visas in s 39(2).

[30] *Migration Act 1958* (Cth) s 65.

[31] *Migration Act 1958* (Cth) ss 351, 417, 501J; see also ss 137N, 495B.

[32] *Migration Act 1958* (Cth) ss 46A, 48B, 91K, 91F, 91Q.

[33] *Migration Act 1958* (Cth) s 46B.

[34] *Migration Act 1958* (Cth) s 195A. See Kevin Boreham, "Comment – 'Wide and Unmanageable Discretions': The Migration Amendment (Detention Arrangements) Act 2005" (2006) 17 *Public Law Review* 5, 16–21.

[35] For example, governments have looked to the ministerial powers to deliver key policy objectives including: to fulfil Australia's international law obligations to provide complementary protection (until March 2012), as one measure to reconcile Australia's excision policy with its international protection obligations to irregular maritime arrivals (in particular during the suspension of offshore processing from February 2008 to July 2012), and to mitigate human rights issues in the system of mandatory detention for unlawful non-citizens. The deficiencies of ministerial discretionary powers as a means to meet Australia's international protection obligations are set out (with reference to complementary protection obligations) in Jane McAdam, "From Humanitarian Discretion to Complementary Protection – Reflections on the Emergence of Human Rights-based Refugee Protection in Australia" (2011) 18 *Australian International Law Journal* 53.

[36] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 350–354 [32]–[42] (French CJ, Crennan and Bell JJ), [111]–[126] (Gageler J); [2013] HCA 24; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 648 [30] (French CJ and Kiefel J), 670–672 [108]–[118] (Heydon J); [2012] HCA 31.

[37] Or others, such as the contractors engaged to provide merits review in the international treaty obligation assessment process considered in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41.

identify individual cases for referral to the Minister, through application of regulatory criteria similar to those applied in visa application cases.[38]

II. Insights into the Effect of Non-compellability on Procedural Fairness in Application Cases from the Migration Context

In this section, I show that current authorities imply that governments may be able to avoid presumptive legal accountability for procedural unfairness in application cases, by securing the enactment of non-compellability provisions. I first highlight the distinctive feature of non-compellable administrative action on requests for new statutory rights, as revealed by experience in Australia's migration context (Part IIA), before describing how this feature complicates application of the threshold principle for engaging procedural fairness obligations (Part IIB). The feature in question is the indeterminacy of the legal character of an adverse outcome in administrative action on requests for statutory rights under a non-statutory process that results in a request being "screened out" without referral to the statutory decision-maker.

A. Indeterminacy of Adverse Outcomes in Non-compellable Administrative Action on Requests for Visas

When Parliaments introduce procedural non-compellability in application cases, this does not obviate the need for an administrative response to requests in fact received. Experience in the migration context demonstrates that a statutory decision-maker who is not bound to consider the exercise of the power on request may adopt an operational policy that requires systematic administrative action in response to requests in fact received, involving assessment of individual circumstances against regulatory criteria. One important feature of procedurally non-compellable action in these cases is the *indeterminacy* of adverse assessments that "screen out" requests without referral to the statutory decision-maker. It is convenient to describe this indeterminacy, before turning to the way it complicates the implication of procedural fairness obligations. The indeterminacy arises because "screening out" requests without referral to the statutory decision-maker *may* constitute a statutory decision, but whether it does so or not is contingent on what the statutory decision-maker has in fact said and done in relation to the non-statutory "screening out" process.

1. "Filtering Out" by Administrative Assessment Need Not Constitute an Adverse Statutory Decision

By enacting procedural non-compellability, parliament multiplies the forms of adverse outcome that can result from administrative action on requests. Where the statutory decision-maker is required to determine an application, an adverse outcome necessarily takes the form of an adverse statutory decision by the statutory decision-maker. In cases where there is no duty to consider an application, there are additional forms that an adverse outcome can take. The Court has explained that any exercise of a non-compellable ministerial power to grant a visa requires two decisions – a procedural decision to consider the exercise of the power, and a substantive decision to exercise the power.[39] The Court has further explained that decision-making at both stages is both substantively and procedurally non-compellable.[40] In the result

[38] The Minister's Guidelines for referral of cases for possible consideration of the exercise of various public interest powers are set out in the Department of Immigration and Border Protection (Cth), *Procedures Advice Manual 3: Refugee and Humanitarian Instructions*, subscription access through LEGENDcom <https://www.homeaffairs.gov.au/trav/visa/lege>.

[39] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 197 [43], 200 [53]; [2016] HCA 29; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 350 [70]; [2010] HCA 41.

[40] Some of the Court's observations do not clearly distinguish between procedural and substantive non-compellability, and it might be arguable that they mean only that the decisions are *substantively* non-compellable (no single circumstances or criteria can dictate a decision to exercise the power) see, eg, *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 200 [53]; [2016] HCA 29 ("the Minister has no obligation to make either decision"). However, *procedural* non-compellability is clearly implied by the Court's decisions that mandamus cannot issue to require the Minister to make a decision on a request for the exercise of the power, even in circumstances where the Minister has in fact commenced a decision-making process: see n 23.

the authorities contemplate that a person who requests that the Minister exercise discretionary power to grant a visa (or a right to apply for a visa) may fail to secure the favourable exercise of the power because:

(1) the Minister makes a statutory decision not to consider the exercise of the power; *or*
(2) the Minister makes a statutory decision not to exercise the power; *or*
(3) the request is "screened out" through a non-statutory process without any statutory decision whether to consider exercising the power; *or*
(4) after a statutory decision to consider, the request is "screened out" through a non-statutory process without any statutory decision whether to exercise the power.

The scope for requests to be "screened out" without an adverse statutory procedural decision (to consider) is clearly implied by the express statutory provision that "the Minister does not have a duty to consider whether to exercise the power".[41] It is the premise for the longstanding ministerial guidelines that enable requests to be "screened out" at the procedural decision-making stage without thereby constituting or evidencing an adverse procedural decision.[42] In contrast, a provision that excludes a duty *to consider* arguably does not dictate procedural non-compellability at the substantive decision-making stage. It could be argued that the statutory language does not rule out all possibility that a general law principle might operate to require the Minster to complete a statutory process of consideration he has commenced.[43] However, the authorities to date tend against this.[44] There has been no authoritative decision recognising that a general principle of law operates on the fact of a procedural decision to require the Minister to make a substantive decision.[45] It would seem that the Minister is free to stop consideration at any time, without making a decision.

In summary, it appears on current authorities that procedural non-compellability makes it possible for a statutory decision-maker to establish a non-statutory filtering process for requests in fact received, under which requests may be "screened out" without any statutory decision being made; and that this is a possibility at both the procedural and substantive decision-making stages. However, to acknowledge this possibility is not to concede that it is an apt characterisation of every instance of "screening out" through a non-statutory process. This brings us to another important feature of procedurally non-compellable application processes – the indeterminacy of the legal status of administrative "screening out" of requests.

2. Indeterminacy of the Legal Status of "Screening Out" under a Non-statutory Process

The legal character of an administrative assessment that a request is to be "screened out" without referral to the Minister is not clear cut. The Court's limited and oblique comments appear to confirm that "screening out" following individualised administrative assessment under guidelines issued by the statutory decision-maker *may* constitute or evidence an adverse statutory decision, but whether it does so or not will depend on what the Minister has in fact said and done in relation to the administrative action in fact taken.

The difficult question here is not whether administrative "screening out" of a request without referral to the Minister *can in some circumstances* constitute an adverse decision by the Minister: The Court has clearly (albeit indirectly) acknowledged that in certain circumstances, administrative screening out

[41] It also accords with the legislative history for the first generation of ministerial dispensing powers, see, eg, Tran, n 26, 304–305.

[42] See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 653 [47] (French CJ and Kiefel J); [2012] HCA 31.

[43] See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 339–340 [24] (French CJ), 345 [94] (Hayne J); [2013] HCA 53.

[44] The Court's decision that mandamus is not available in relation to *substantive* decision-making necessarily implies that even that second stage of decision-making is procedurally non-compellable, see n 23.

[45] See, eg, *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505, [270]–[271] (Lander and Gordon JJ), [330]–[331] (Besanko and Jagot JJ), [342] (Flick J); [2013] FCAFC 33. For comment on judicial attempts to imply compellability at the substantive decision-making stage, see Khuu, n 27, 22–23; Emily Hammond and Rayner Thwaites, "Before the High Court: Minister for Immigration and Border Protection v SZSSJ: Consideration of Asylum Claims Outside the Visa Application System" (2016) 38 *Sydney Law Review* 243.

does *in fact* constitute a personal decision by the Minister.[46] The more difficult question is, *in what circumstances and on what basis* does an adverse official assessment that "screens out" a request without referral to the minister constitute an adverse ministerial decision? One potential basis for such a characterisation would be that the Minister is taken to have exercised an implied authority to act through the agency of others.[47] In the case of the Minister's personal migration powers, however, the Court has avoided ruling whether the Minister is authorised to make adverse decisions through the agency of others.[48] It would appear that characterisation of screening out as a constructive personal ministerial decision is open when the totality of the evidence supports a conclusion that a minister has taken an adverse decision by issuing guidelines as to the cases which are not to be referred for decision. In that context, a constructive ministerial decision can arise through the operation of the ministerial guidelines on the fact of a subjective judgment reached in good faith by an official under the guidelines.[49]

In summary, on current authorities the legal character of administrative "screening out" under guidelines is indeterminate. On the one hand, the Court has acknowledged that adverse assessments that screen out a request without referral to the Minister can constitute a personal adverse decision by the Minister. On the other hand, the authorities do not suggest that characterisation will be apt in every case where the assessment is made under guidelines that require individualised consideration of requests to identify those that are to be referred to the Minister. The Court's oblique remarks do not offer detailed guidance for identifying when "screening out" under guidelines constitutes an adverse statutory decision, except to confirm that this will be contingent on the totality of evidence including what the Minister has in fact said and done in relation to the non-statutory assessment process. In the next section we will see how the character of administrative "screening out" effects the presumptive operation of procedural fairness as a constraint on administrative action in application cases.

B. How Non-compellability Threatens the Presumptive Implication of Procedural Fairness in Application Cases

Precisely how does procedural non-compellability disrupt the presumptive application of procedural fairness in application cases? The Court's decisions in the migration context establish that non-compellable statutory decisions attract procedural fairness on the same basis as compellable statutory decisions, but that this is not the case for administrative assessments that "screen out" requests for visas without any statutory decision. The underlying reason appears to be that an administrative assessment that "screens out" a request without a statutory decision does not have an effect recognised in law on the individual interests that are affected by an adverse statutory decision.

1. Procedural Fairness and Non-compellable Statutory Decisions to Confer Rights

While some equivocation by some judges on this point is evident, the Court's decisions establish that any statutory decision not to consider exercising, or not to exercise, the discretionary powers to grant visas will satisfy the threshold principle for implying procedural fairness obligations, irrespective whether the decision-making encroaches on individual liberty by prolonging administrative detention. The Court did not determine this point in the *Offshore Processing Case*.[50] However, a significant shift occurred in

[46] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 204 [72]; [2016] HCA 29 where the Court endorses the analysis in *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510, 522 [62]–[64]; [2007] FCA 370; see also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 665 [91], [93] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31.

[47] The "alter ego" principle recognised in, eg, *O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1.

[48] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 350 [69]; [2010] HCA 41. The Court's reasoning on statutory provisions affecting "statutory decisions" contradict any broad implied authority basis for statutory decisions by officials, see Part IIIA1, text accompanying nn 73–75.

[49] See n 46.

[50] In *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352–353 [75]; [2010] HCA 41 the Court pointed out that the obligation to afford procedural fairness *is not limited* to deprivation cases, but went on to hold that the obligation was engaged on the basis that the exercise of statutory power involved in the offshore processing cases directly affected individual liberty interests: 353–354 [76]–[78].

Plaintiff S10/2011, where four members of the Court in joint reasons upheld the presumptive operation of procedural fairness in relation to non-compellable statutory decisions to confer visas (or rights to apply for visas). Their Honours outlined the basis on which the adverse statutory decision directly affects individual interests as follows:[51]

> A non-citizen who is in the position of the plaintiffs and seeks the engagement and favourable exercise of the dispensing powers under the federal statute with which these cases are concerned does so to obtain a measure of relaxation of what otherwise would be the operation upon non-citizens of the visa system; it is the requirements of that system which must be met to lift what otherwise are prohibitions upon entry and continued presence in Australia. This is sufficient to satisfy the [principles for implication of a duty of fairness].

Their Honours went on to hold that the Act impliedly excluded procedural fairness in relation to the Minister's personal statutory decisions.[52] The *Data Breach Case* endorses this analysis,[53] and reiterates that the threshold principle is satisfied because "the exercise of the power is apt to affect the interest of an applicant in the actual or potential relaxation of a legal prohibition on his or her continued presence in Australia".[54] In the result, the authorities establish that procedural fairness does not constrain *statutory decisions* under the dispensing powers *only because* the Act evinces a clear intention to exclude the presumptive application of procedural fairness obligations.[55] The authorities establish that any statutory decision not to confer a visa has an effect on the individual's interests in the rights conveyed by the visa.

The Court's decisions also imply that statutory enactment of procedural non-compellability will not in itself be sufficient to exclude procedural fairness obligations. In *Plaintiff S10/2011*, Gummow, Hayne, Crennan and Bell JJ attributed a necessary intendment to exclude procedural fairness to the cumulative significance of nine features of the enabling legislation.[56] These factors concerned the "distinctive nature of the powers conferred upon the Minister (as personal, non-compellable, public interest powers)" and "the availability of access to the exercise of those powers only to persons who have sought or could have sought, but have not established their right to, a visa". The *Plaintiff S10/2011* plurality's reasons on statutory exclusion place weight on a range of features of the migration powers, including that they are dispensing powers of last resort, exercisable by the Minister who stands at the peak of administration of the statutory regime and must give account to Parliament for any decision to exercise the powers. *Plaintiff S10/2011* does not, on balance, imply that legislation for procedural non-compellability will in itself be sufficient to exclude procedural fairness.[57]

In summary, procedural non-compellability does not in itself threaten legal accountability for procedural unfairness *when non-compellable statutory decisions are in fact made on requests for new rights.* On the contrary, the authorities establish two important points. First, non-compellable statutory decisions attract procedural fairness on the same basis as compellable statutory decisions. Second, enactment of a "no compellable consideration" clause does not itself suffice to convey a necessary intendment to exclude a

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[51] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 659 [69] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31.

[52] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 667–668 [99]–[100] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31.

[53] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [76]–[77]; [2016] HCA 29.

[54] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [76]; [2016] HCA 29.

[55] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [76]; [2016] HCA 29.

[56] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 667–668 [99]–[100]; [2012] HCA 31, drawing an analogy with the situation identified by Brennan J in *South Australia v O'Shea* (1987) 163 CLR 378, 410.

[57] It might be more plausible to conclude that the exclusion is necessarily implied from the features of the statutory provisions which made them dispensing powers, and then only in relation to individuals who were parties to the application process: see *Kong v Minister for Health* (2014) 227 FCR 215, [91]–[92] (Jacobson J); [2014] FCAFC 149. See also Margaret Allars, "Executive versus Judiciary Revisited in AJ Connolly and D Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 49, 72; Matthew Groves, "Exclusion of the Rules of Natural Justice" (2013) 39 *Monash University Law Review* 285, 306–307.

duty to accord procedural fairness in making a statutory decision. These points apply to procedural and substantive decisions in fact made by the Minister.

This brings us closer to a more precise statement of the way that procedural non-compellability disrupts the implication of procedural fairness in application cases. To bring this into focus, we need to consider what the Court has said about the implication of procedural fairness obligations where requests for statutory rights are "screened out" under non-statutory guidelines *without any statutory decision being made*.

2. Procedural Fairness and Administrative Assessments That "Screen Out" Requests without Any Statutory Decision Being Made

The *Offshore Processing Case* and *Data Breach Case* are perhaps best known for establishing that the common law presumes procedural fairness applies to non-compellable administrative processes that prolong administrative detention, and thereby directly affect individual interest in liberty.[58] This significant ruling by the Court provides an important safeguard in the context of the Act's inflexible mandatory provisions for detention of unlawful non-citizens.[59]

It is important to notice what the Court has said regarding procedural fairness and non-compellable administrative action that does *not* prolong detention. It would appear to be the Court's view that the common law threshold principle for implying a duty of fairness is satisfied *only* where the administrative action on requests constitutes a statutory decision *or* prolongs administrative detention. In the *Data Breach Case*, the Court emphasises that non-compellable administrative action has the potential to attract procedural fairness "in two distinct ways":[60] The first is making a statutory decision, which is "apt to affect the interest of an applicant in the actual or potential relaxation of a legal prohibition on his or her continued presence in Australia". The second is engaging in a process of assessment to assist the minister's decision-making attracts procedural fairness "where it has the effect of prolonging immigration detention". The Court's comments imply that these are the *only* two bases for attracting the presumption that procedural fairness applies to non-compellable administrative action on requests for the exercise of the powers. That is, an administrative assessment that screens out a request but does not constitute a statutory decision *does not* affect the individual interests that are acknowledged to be affected by an adverse statutory decision. This would be consistent with the approach taken by French CJ and Kiefel J in *Plaintiff S10/2011* in relation to administrative assessments which "screen out" requests but do not constitute or evidence a statutory decision: Their Honours explained that there is nothing about the character of the guideline processes that attracts a requirement to observe procedural fairness *unless* they are an exercise of the statutory dispensing powers or prolong administrative detention.[61]

Strictly the Court's decisions are not direct authority that administrative assessments which "screen out" requests without constituting a statutory decision lack any effect on the individual interests that are affected by an adverse statutory decision.[62] However, this is strongly implied. At the very least we can say that the Court has conspicuously avoided acknowledging that the individual interests that are

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[58] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 353–354 [76]–[78]; [2010] HCA 41; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [76]; [2016] HCA 29.

[59] See Mary Crock and Daniel Ghezelbash, "Due Process and the Rule of Law as Human Rights: The High Court and the 'Offshore' Processing of Asylum Seekers" (2011) 18 AJAL 101, especially 108–109.

[60] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 200 [54], 205 [76]; [2016] HCA 29.

[61] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 642 [3], 653–655 [47]–[52] (French CJ and Kiefel J); [2012] HCA 31.

[62] The point did not arise in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 and *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180; [2016] HCA 29, which concerned administrative action that prolonged detention. In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31, only two members of the Court (French CJ and Kiefel J) expressly stated that the cases brought to the Court involved "screening out" or "conduct anterior to an adverse decision" (see n 42). The plurality appear instead to have regarded all the cases before the Court as ones in which the Minister had made an adverse decision (see n 46).

affected by adverse statutory decisions are also affected by decisions that "filter out" requests without any statutory decision.

This outcome suggests that governments may be empowered, through enactment of a "no compellable consideration" clause, to largely avoid procedural fairness obligations in application cases by opting to "screen out" requests without making an adverse statutory decision. The position would seem to be that where the final administrative action on a request for a new right is "screening out" (without a statutory decision), procedural fairness would be owed only in those exceptional cases where the administrative action encroaches on an individual right or interest recognised and protected by the general law, that is independently of the statutory scheme.[63]

In the migration context, the Court's decision that the Act excludes procedural fairness in ministerial statutory decisions means there is little to be gained by pushing for clarification whether an assessment that "screens out" a request without a statutory decision attracts procedural fairness on the same basis as a statutory decision. If the Act excludes the implication of procedural fairness for ministerial statutory decisions, logically that exclusion would extend also to anterior administrative actions that engage the common law presumption *on the same basis* as statutory decisions.[64] Nevertheless, the point is an important one that may require an answer in another context. The features of the Act which, in combination, evinced an intention to exclude procedural fairness in relation to the ministerial powers under the Act will not necessarily be present in any other statutory schemes for the provision of individual statutory rights. It is possible that in a different statutory context the presumption against legislative abrogation would hold. It may then prove necessary to confront the point left open by the Court in the *Data Breach Case*.

3. Why This Matters

If, as the *Data Breach Case* appears to imply, "no compellable consideration clauses" do empower governments to finalise requests for statutory rights without engaging procedural fairness obligations, policy-makers may be encouraged to see them as an effective way to avoid judicial review for procedural unfairness in application cases. There are two reasons to be concerned about this.

One is that procedural non-compellability represents a way for parliaments to legislate to avoid judicial review for procedural unfairness that is at odds with the role reserved for parliaments by the principle of legality.[65] Rather than direct and unequivocal legislation to exclude procedural fairness, procedural non-compellability gives statutory decision-makers the option to design administrative processes to receive and deal with requests for new statutory rights in such a way that requests are "screened out" under non-statutory guidelines without any statutory decision being made. When it comes to a non-compellable process to administer requests for new statutory rights, the critical factors that determine whether procedural fairness obligations are engaged are matters of operational choice. If this is the case, the enactment of a "no compellable consideration" clause marks a significant devolution, from the courts to the executive, of power to determine when administrative law obligations supplied by the common law are engaged in an application scenario.

There may also be important implications for administrative justice in application cases.[66] As experience in the migration context shows, there may be little of substance to distinguish "screening out" of requests for statutory rights from adverse statutory decisions. In the migration context, screening out of a request that the Minister confer a visa (or right to apply for a visa) is a final determination on the request – no

[63] See nn 12–14.

[64] Compare *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 672–673 [118]–[119] (Heydon J); [2012] HCA 31.

[65] That is, that it is for parliament to "squarely confront what it is doing" when it legislates to override fundamental common law principles: *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115, 131 (Hoffman LJ). Australian authorities that attribute this role to parliament as a justification for the clear statement rule are discussed in, eg, Brendan Lim, "The Normativity of the Principle of Legality" (2013) 37 *Melbourne University Law Review* 372.

[66] See Khuu, n 27, arguing that non-statutory filters need to be brought within the scope of the *Administrative Decisions (Judicial Review) Act 1974* (Cth) and made amenable to certiorari.

further consideration is given once the request is "filtered out". The "screening out" is the result of official assessment under government policies which require individual circumstances be assessed against regulatory criteria. No one could deny that in these scenarios we see a coercive regulatory function being performed by governmental actors with important consequences for individuals.[67] Yet it would appear that even where the substantive similarity between "screening out" and an adverse statutory decision is overwhelming, legal accountability for procedural unfairness in "screening out" may be radically restricted in comparison with the accountability that would be available if the administrative process resulted in a statutory decision. This is a departure from the standards of administrative justice that we have come to assume will be available to applicants for statutory rights under Australian law. It is contemplated on the basis that administrative action to "screen out" requests for statutory rights in a non-compellable process does not have an effect on the individual interests that are affected by an adverse statutory decision. In the case of administrative action under government policies that consider individual circumstances, this conclusion privileges form over substance. This raises the question: How can the law develop to ensure that the presumptive application of procedural fairness in this and similar cases is not made hostage to a formal distinction between "screening out" and a statutory decision?

III. Avenues for Doctrinal Development

In this section, I explore the scope that the authorities provide for extending legal accountability for procedural unfairness to *non-compellable* administrative assessments that "filter out" requests for statutory rights but do not constitute a statutory decision.[68] I begin by evaluating the scope afforded by the Court's decisions to do this by characterising "screening out" under non-statutory guidelines as a *statutory decision* or as a *step in the process* towards the statutory decision (Part IIIA). I propose that while the authorities establish a flexible framework that *could* be used to extend legal accountability for procedural unfairness to non-compellable administrative action that "screens out" requests for statutory rights, on balance it seems unlikely this could provide a principled foundation for requiring procedural fairness in this type of administrative action. This leads to my concluding proposal, that the disruptive effect of procedural non-compellability in the migration context may serve as a prompt to revive consideration of the common law basis for procedural fairness in application cases (Part IIIB).

A. Flexibility within the Framework of the Court's Decisions

The *Data Breach Case* establishes a framework that could be used to extend the presumptive implication of procedural fairness to non-compellable administrative assessments that screen out requests for new statutory rights. The foundation for this extension would be the Court's acknowledgment that non-compellable statutory decisions in application scenarios have the same effect on individual interests as compellable decisions in application cases (and that this effect attracts the presumptive implication of procedural fairness obligations).[69] There are two ways that decisions which "screen out" requests under ministerial guidelines could be aligned with non-compellable *statutory decisions* (and so satisfy the threshold principle for implying procedural fairness). One is by characterising all decisions under guidelines that "filter out" requests as constructive adverse statutory decisions.[70] Another is to hold that those decisions have a statutory effect on the interests that are affected by a final and operative decision, for example on the basis that they are "steps in a process" towards the statutory decision.[71] I would argue

[67] See the detailed analysis of the justiciability of non-statutory assessment of protection obligations in Amanda Sapienza, "Justiciability of Non-statutory Executive Action: A Message for Immigration Policy-Makers" (2015) 79 *AIAL Forum* 70, 74–82.

[68] This necessarily assumes that parliament does not legislate to ensure there is a statutory decision on all requests in fact received. For an example of legislation that ensures a statutory decision on all requests in fact received in a non-compellable application process see *National Health Act* (Cth) ss 90A, 90B, esp s 90B(4), (5): see also n 4.

[69] See text accompanying nn 50–54.

[70] See text accompanying n 46.

[71] Compare authorities on the availability of certiorari in relation to reports or recommendations, discussed in, eg, *Apache Northwest Pty Ltd v Agostini (No 2)* [2009] WASCA 231, [12] (Wheeler and Newnes JJ); *City of Port Adelaide Enfield v Bingham* (2014) 119 SASR 1, 5–8 [11]–[18] (Stanley J); [2014] SASC 36.

that while both of these avenues remain open on the authorities, they are unlikely to provide a coherent principled foundation for procedural fairness in non-compellable administrative action on requests for statutory rights.

1. "Screening Out" as a Constructive Statutory Decision?

As noted above, the Court has explained that "screening out" under the decision-maker's guidelines may in some circumstances constitute a statutory decision through the operation of the guidelines on the fact of the administrator's assessment.[72] The Court's observations acknowledging this possibility are oblique, but do raise the question: Could the concept of a "constructive decision in fact" be used to establish a general foundation for procedural fairness in administrative assessments that "screen out" requests for rights in a non-compellable administrative process?

Such a move would be difficult to reconcile with the many instances in which courts have held or assumed that completed adverse administrative assessments under the ministerial guidelines resulting in "screening out" without referral are not "statutory decisions". These include decisions that completed adverse assessments are not "statutory decisions" within the meaning of provisions that deny the Federal Circuit Court's jurisdiction[73] or impose time limits on applications to the courts;[74] as well as judicial reservations as to whether an adverse assessment under the non-statutory guidelines that require individualised assessment is amenable to certiorari.[75]

Further, a constructive statutory decision can only arise *in fact* if the actions taken by the statutory decision-maker and officials in relation to the non-statutory assessment process support that characterisation. It is improbable that the courts would make this finding of fact if it is contradicted by the language used by the statutory decision-maker and officials in establishing and implementing the non-statutory assessment process. As a practical matter, this is not a promising avenue for extending procedural fairness to non-compellable administrative action.

2. Administrative Resolution of Requests under Guidelines as a Step in a Statutory Process?

The Court has made a number of observations in the migration context that arguably lay a foundation for future judicial recognition that "screening out" decisions by officials under non-statutory guidelines in a non-compellable process have a statutory effect on those individual interests that are implicated in a statutory decision. In the *Offshore Processing Case* the Court observed that administrative assessments under non-statutory guidelines were steps towards the exercise of the statutory powers,[76] and declined to rule out the possibility that such preliminary assessments might attract certiorari.[77] The Court explained that the characterisation of the assessment process as a "step towards" the exercise of the statutory power was apt even though it is possible that an adverse assessment will screen out the request without referral to the statutory decision-maker.[78] The *Data Breach Case* confirms that administrative assessments in fact undertaken at the statutory decision-maker's direction to inform a potential statutory decision can "have

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[72] See text accompanying n 46.

[73] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 204–205 [71]–[73]; [2016] HCA 29. The ITOA assessment in relation to SZTZI had been completed at the time the application was made to the Federal Circuit Court. The Minister's appeal to the High Court expressly put in issue whether the finalised assessment in relation to SZTZI constituted a constructive adverse ministerial decision, so it cannot be said that the Court was unaware of this fact when it ruled that SZTZI's challenge was *not* caught by the statutory provisions that deny the Federal Circuit Court's jurisdiction in relation to ministerial decisions.

[74] See, eg, *SZQDZ v Minister for Immigration and Citizenship* (2012) 200 FCR 207; [2012] FCAFC 26, holding that an adverse assessment that "screened out" a request without referral to the Minister in the substantive decision-making stage did not engage a statutory time limit on applications to the courts in relation to statutory decisions.

[75] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 [100]; [2010] HCA 41.

[76] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 353–354 [78]; [2010] HCA 41.

[77] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 [100]; [2010] HCA 41.

[78] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 353–354 [78]; [2010] HCA 41.

a statutory basis"[79] and be "conduct under the Act" preparatory to the making of a substantive decision.[80] Would it be a short step for the Court to further recognise that a preliminary assessment which has a statutory basis has a statutory effect on the interests affected by a final and operative statutory decision?

The impediment to this step in the law takes the form of the analytical distinction that the Australian authorities make between actions that are authorised by statute and those that derive legal force and effect from the statute.[81] If the question is whether a preliminary decision affects the interests affected by the final statutory decision, the analysis is inevitably grounded in the effect that the preliminary decision has within the statutory decision-making process. It is not surprising that when it is framed this way, the analysis tends to fix on the legal force and effect that the preliminary decision derives from the statute. As such, this route to extending procedural fairness obligations to preliminary decisions is likely to remain limited to those preliminary decisions that are designated by the statute as an essential precondition or a bar to a final decision, or a matter to which a decision-maker *must* have regard.[82] This implicitly aligns with a categorical distinction (between actions that are authorised by statute and actions that derive legal force and effect from statute) that the Court uses for other analytical purposes in judicial review; notably its construction of statutory grants of jurisdiction to judicially review decisions "made under" legislation,[83] and in judging whether a decision has a statutory effect that attracts certiorari.[84] Given the utility of the categorical distinction for various analytical purposes in judicial review, it is unlikely that Australian courts will hold that all preliminary decisions that are *authorised* by statute thereby have a *statutory effect* on the individual interests that are affected by the final and operative decision.

A further difficulty with this avenue is that it is in any event contingent on the courts implying a statutory basis for assessments in fact undertaken to inform statutory decisions.[85] In the *Offshore Processing Case* and *Data Breach Case* the Court was pushed towards implying a statutory basis for the assessment process as a means to reconcile consideration of the exercise of the dispensing powers with the Act's express provisions for the removal of unlawful non-citizens from Australia, and to provide a valid lawful foundation for detention during the assessment process.[86] The apparent tension in the Act between the provision for the dispensing powers on the one hand and the mandatory removal provisions and limited statutory authority to detain on the other provided a catalyst for implying a statutory foundation for administrative assessments undertaken to inform a potential exercise of the dispensing powers.[87] The Court's decision to imply a statutory basis for official assessments not expressly required by the statute in *Offshore Processing Case* and *Data Breach Case* was justified in this exceptional context. Even in that context, the Court did not imply a statutory basis for administrative assessments that "screen out" requests at the procedural decision-making stage.[88]

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[79] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 200 [54]; [2016] HCA 29.

[80] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [66]; [2016] HCA 29.

[81] This distinction has proven to be an impediment to imposing a reasonableness requirement on decisions that "screen out" requests without referral to the Minister which have a statutory foundation, see discussion of *Minister for Immigration and Border Protection v SZSNW* (2014) 229 FCR 197; [2014] FCAFC 145 in Khuu, n 27, 13–14.

[82] See n 71. As noted above, preliminary action may attract procedural fairness if it adversely affects extrinsic or anterior legal interests eg reputation or liberty.

[83] See, eg, *Griffith University v Tang* (2005) 221 CLR 99, 107–110 [10]–[18] (Gleeson CJ), 128–131 [79]–[89] (Gummow, Callinan and Heydon JJ); [2005] HCA 7.

[84] See, eg, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580–581; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 164–165. Compare *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358 [100]; [2010] HCA 41.

[85] Precedents for implying statutory power to make a determination are discussed, eg, in *Griffith University v Tang* (2005) 221 CLR 99, 126–128 [74]–[75], [87] (Gummow, Callinan and Heydon JJ).

[86] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 337–342 [19]–[36]; [2010] HCA 41.

[87] For more detailed analysis of the Court's reasons for implying a statutory foundation for the assessment of protection obligations in the *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 See, eg, Sapienza, n 67, 72–74.

[88] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 348–349 [63]–[66]; [2010] HCA 41. In practice this is unlikely to cut back on the incidence of procedural fairness in non-compellable action in the migration context, where the government is likely to want to establish a statutory basis for detaining individuals whose requests are being assessed. Absent that exceptional

In summary, the *Offshore Processing Case* and *Data Breach Case* show that the courts can be persuaded to imply a statutory foundation for assessments that are in fact undertaken to inform a potential non-compellable statutory decision, but are likely to take a cautious approach to making the implication. The assessment processes undertaken in these cases were exceptional in that individuals were held in detention while their cases were assessed; the government required statutory authority for the detention; and this statutory authority could only be extended if the assessments were being undertaken for the purpose of informing the Minister's consideration of the dispensing powers. The detention context is unlikely to be replicated in other statutory schemes for non-compellable administrative action on requests for statutory rights. And even in this exceptional context, the Court has not acknowledged that decisions that "filter out" requests under guidelines have a statutory effect on the individual interests that are affected by an adverse statutory decision. On balance, the better view is that in order to advance a coherent justification for procedural fairness in these cases, the courts would need to turn to autonomous common law doctrine to articulate when non-statutory "filtering out" of requests attracts procedural fairness.

B. Re-engaging with the Common Law as a Foundation for Procedural Fairness in Application Cases

In this final section, I propose that we can see the courts' response to procedural non-compellability in the migration context as a reminder of the continuing need to engage with the common law as a foundation for procedural fairness in application cases.

As shown above, the *Data Breach Case* implies that administrative assessments that "screen out" requests for statutory rights but do not constitute a statutory decision would not, in the ordinary course, have an effect on the individual that attracts procedural fairness. This conclusion would be compelling if we were to assume that the only relevant measure is whether the adverse assessment has an effect, derived from the statute, on the individual's entitlement to a new right. However, the authorities do not support that assumption, so it is possible to take a wider view of the matter. We would start by acknowledging that the common law is a juristic basis for procedural fairness in application cases. As such, it would be open for the courts to articulate that an adverse assessment that "screens out" requests for a statutory right does, in certain circumstances have characteristics that justify legal accountability for procedural unfairness (whether or not the assessment has a legal effect derived from the statute), subject only to contrary legislation. Australian common law does not currently recognise a doctrine that is suitable for this task, so this will require re-engaging in an iterative common law process of doctrinal development.

1. The Common Law as a Source for Procedural Fairness

As others have pointed out,[89] Australian authorities have not ruled out recognition of the common law as a source for procedural fairness in the exercise of public powers. It is true that the Court in recent years has pulled back[90] from acknowledging the common law as an autonomous foundation for judicial review of statutory powers, and the prevailing judicial terminology describes the basis for procedural fairness in the exercise of statutory powers as an implied statutory requirement.[91] As it

competing policy incentive, there would be little reason for the statutory decision-maker to make a procedural decision in advance of non-compellable administrative assessments under non-statutory. The Court's decisions do not foreshadow implying a statutory basis for assessments undertaken to inform a potential non-compellable *procedural* decision (to consider).

[89] See, eg, Aronson, Groves and Weeks, n 1, 414–416; Groves, n 57, 286–293.

[90] Contrast the strong judicial support for the view that the common law is the source of procedural fairness during Sir Anthony Mason's time on the Court, essayed, eg, in Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, 2002) 261–266. Key judicial statements identifying the common law as preferred source of procedural fairness include: *Kioa v West* (1985) 159 CLR 550, 584 (Mason J; Wilson J agreeing); *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653, 655 (Deane J), 680 (McHugh J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 575 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Annetts v McCann* (1990) 170 CLR 596, 599 (Mason CJ, Deane and McHugh JJ).

[91] The judicial observations in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258–259 [11]–[12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2010] HCA 23 and *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31 are cited as evidence that the tide had turned against the view that procedural fairness is an autonomous common law duty: See Aronson, Groves and Weeks,

happens, one of the most trenchant judicial advocates for this way of describing procedural fairness in relation to statutory powers, Sir Gerard Brennan, also advocated that constitutional principle dictates that all limits on statutory powers be derived from statute.[92] However, judges who now describe procedural fairness in the exercise of statutory powers as a statutory implication profess agnosticism on the constitutional imperative.[93] They have been able to do this because it is clear that procedural fairness may be supplied *from the common law* as an implied statutory limit on statutory powers.[94] More specifically, there is no doubt that the common law is a source of principles that can legitimately be used to articulate circumstances that attract procedural fairness to an exercise of statutory power (subject to contrary legislation).[95] Despite the trend to describe procedural fairness as a "statutory" requirement, there can be no doubt that common law principles can be used to articulate that circumstances attending an exercise of a statutory power trigger a duty of procedural fairness, subject to contrary legislation.[96]

2. Common Law as a Source for Procedural Fairness in Application Cases?

Notwithstanding that the common law is an acknowledged source of procedural fairness obligations, Australian common law has not been required to develop an autonomous doctrinal basis for procedural fairness in application cases. To understand why this is the case, we need to return briefly to two contrasting views of the basis for procedural fairness in application cases advocated in Australia by Sir Anthony Mason and Sir Gerard Brennan. Both views start from the premise (we can describe this as a "common law" principle) that procedural fairness is attracted if an exercise of public power is apt to adversely affect an individual.[97] Further, both views recognise that courts may draw on common law principles to articulate that an exercise of public power has an adverse effect for the individual that triggers procedural fairness.[98] Despite these substantial similarities, there is an important difference in the accounts of procedural fairness in application cases. The difference is discernible when we consider the way of articulating as a matter of law that an individual is adversely affected when her request for a right is refused.

On one view, advocated by Sir Anthony Mason, it is a matter for the common law to articulate that an applicant for a statutory right has an interest recognised in law which is adversely affected if the right is not conferred. Australian common law made some headway towards this through the legitimate expectations doctrine, but this doctrine was never developed by Australian courts as a general basis for procedural fairness in application cases.[99]

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n 1, 414–415; Naomi Sharp, "Procedural Fairness: The Age of Legitimate Expectation Is Over" (2016) 90 ALJ 797, 798–800. This arguably vindicates earlier commentary drawing attention to the decline in judicial support for the common law paradigm among sitting jurists, see, eg, Sir Anthony Mason, "Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation" (2005) 12 AJ Admin L 103, 105 and Stephen Gageler SC, "Legitimate Expectation: Comment on the Article by the Hon Sir Anthony Mason AC KBE" (2005) 12 AJ Admin L 111, 112–113.

[92] See, eg, *Kioa v West* (1985) 159 CLR 550, 611 (Brennan J); *Annetts v McCann* (1990) 170 CLR 596, 604 (Brennan J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 584–585 (Brennan J). Sir Gerard Brennan's account of the constitutional imperative for a statutory basis for procedural fairness is overviewed in, for example: Holloway, n 90, 254–261.

[93] Aronson, Groves and Weeks, n 1, 415. See in particular *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352 [74]; [2010] HCA 41; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31.

[94] This was expressly acknowledged by Sir Gerard Brennan, see, eg, *Annetts v McCann* (1990) 170 CLR 596, 606, 609 (Brennan J); *J v Lieschke* (1987) 162 CLR 447, 456 (Brennan J).

[95] For example, when the exercise of a statutory function that has no statutory effect on rights or obligations encroaches on an anterior or extrinsic legal interests such as reputation, confidentiality or liberty: see nn 12–14.

[96] Compare Aronson, Groves and Weeks, n 1, 413.

[97] Compare *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 622 [367] (Gageler J); [2015] HCA 1, noted in Aronson, Groves and Weeks, n 1, 416.

[98] Compare Aronson, Groves and Weeks, n 1, 413.

[99] See n 3.

A contrasting view, advocated by Sir Gerard Brennan, rejected resort to an "uncertain"[100] doctrine of legitimate expectations to articulate the basis for procedural fairness, and looks instead to the manner in which an individual is affected by the exercise of a statutory power. According to Brennan J, the critical consideration in determining whether the threshold principle is satisfied is whether the exercise of a statutory power is "apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large".[101] In proposing this approach, Brennan J made it clear that regulatory legislation itself provides a complete foundation for recognition that individual interests are affected by an exercise of statutory power in a manner that attracts procedural fairness, making resort to common law doctrine to articulate the interests affected by the exercise of statutory power superfluous. In *Kioa*, Brennan J referred to the "large and increasing variety of interests" that attract the protection of procedural fairness and proposed that it would be wrong for the courts to try and superimpose some restrictions on the kinds of individual interests that justify the protection of procedural fairness.[102] His Honour wrote:[103]

> There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests – licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials – intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights.

Relevantly to the present discussion, Brennan J's view provides a general foundation for procedural fairness in application cases without resort to common law doctrine. On the Brennan view, the fact of Parliament's decision to enact powers to regulate social interests by conferring powers to grant individual rights simultaneously provides legal recognition that individual interests are affected by administration of the statutory powers to confer rights.[104] The Brennan view renders it superfluous to resort to common law doctrine to articulate that an adverse statutory decision has an adverse effect on the individual. Parliament's intervention to regulate social interests by administration of a statutory scheme for discretionary conferral of individual rights necessarily extends legal recognition that individual interests are implicated in the statutory decision-making process.[105]

3. Procedural Non-compellability Prompts Re-engaging with a Common Law Foundation for Procedural Fairness in Application Cases

The Brennan account provides a powerfully simple justification for presuming that procedural fairness applies in application cases where a statutory decision is made. In the typical application scenario, where a statutory decision is required, there is no need to articulate an autonomous common law doctrinal account to recognise that individual interests are relevantly affected by an adverse statutory decision on an application. Indeed, experience in the migration context shows that the Brennan account can justify applying procedural fairness to non-compellable statutory decisions. However, where the Brennan account founders is when non-compellable administrative action "filters out" requests *without* a statutory decision. In this particular context, it will be difficult for judges to justify implying procedural fairness without acknowledging the constitutive power of the common law to articulate that individual interests are affected by government action on requests for statutory rights.

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[100] *Kioa v West* (1985) 159 CLR 550, 617.

[101] *Kioa v West* (1985) 159 CLR 550, 619 (Brennan J).

[102] *Kioa v West* (1985) 159 CLR 550, 619 (Brennan J).

[103] *Kioa v West* (1985) 159 CLR 550, 616–617 (Brennan J), quoted in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [66] (Gummow, Hayne and Crennan JJ); [2012] HCA 31.

[104] Compare Allars, n 3, 316–319, noting that Brennan J's proposal to use standing rules as a criterion to filter out cases to which procedural fairness should not apply breaks down the historical distinction between expectation and application categories without requiring continued recourse to the concept of a legitimate expectation.

[105] *Kioa v West* (1985) 159 CLR 550, 616–617.

The Court's account of the basis for procedural fairness in application cases is a work in progress, and the fact that the Court has used the Brennan account to justify applying procedural fairness to statutory decisions does not necessarily preclude future judicial recognition of a distinct common law doctrine that covers application cases. At the same time, the ascendancy of the Brennan view does direct judges to rely on the statutory scheme for legal recognition that individual interests are affected by administrative action in application cases. In the face of procedural non-compellability, a focus on the statutory scheme as the source which extends legal recognition that interests are affected in application cases may have an unduly constrictive effect. In particular, looking to the statutory scheme for evidence that individual interests are affected may encourage a view that it is *only* official actions "knitted into"[106] the statutory scheme that affect an applicant's interests. Judges habituated to the Brennan view are more likely to place weight on the formal distinction between administrative "screening out" of requests for rights under non-statutory guidelines (without any statutory decision) on the one hand and a statutory decision on the other. On the Brennan view, it is the statutory provisions for dealing with applications for statutory rights that serve to establish that individual interests are affected by administrative action in application cases. This might encourage an assumption that administrative action on a request can only be said to have that effect on individual interests if it is "knitted into" the statutory powers to deal with requests.

On this hypothesis, if the courts are to extend procedural fairness to administrative assessments that "screen out" requests for new rights without any statutory decision, they will need to revisit the common law doctrinal basis for procedural fairness in application cases. While the Brennan view has delivered a solid foundation for procedural fairness in *compellable* processes, legislation for procedural non-compellability highlights the continuing need to engage with autonomous common law foundation for procedural fairness. In this regard, it is important to bear in mind that the authorities do not rule out using common law principles to articulate that an exercise of public power has characteristics that trigger procedural fairness. It is open to take a wider perspective on the circumstances of the case than simply asking whether a request for a new right has been determined by an exercise of statutory power. A common law doctrinal response could articulate that "screening out" a request for a right is an exercise of public power in which an individual has a special interest that attracts procedural fairness obligations *whether or not* it is a statutory decision or step in a statutory process. This is arguably the only way for the courts to arrive at a principled foundation for procedural fairness in relation to *non-compellable* administrative action on requests for rights.

4. Future Directions for Common Law Doctrine in Application Cases?

Enunciating a common law doctrinal basis for procedural fairness in application cases is unlikely to be easy. There have from time to time been some judicial suggestions[107] that the law is moving towards a point where procedural fairness is presumptively applicable to decisions made by public officials and tribunals which specially concern individuals.[108] However these observations assume a decision that has an effect on an individual that is *recognised in law*. They do not suggest that procedural fairness should be applied to every governmental decision which disadvantages individuals.[109]

It will be relevant to revisit the contributions made by judges who followed the Mason view of the basis for procedural fairness, but it would be misguided to hope that they provide a "readymade" justification for applying procedural fairness in application cases. Much careful work would be required to disentangle wider points of principle from the specific strictures imposed in those earlier cases by the (now disfavoured[110]) legitimate expectations doctrine. With the High Court having poured cold water on that specific doctrine, the doctrinal project will need to focus on articulating a principled basis for

[106] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 654 [49] (French CJ and Kiefel J); [2012] HCA 31.

[107] For a critical review see, eg, Holloway, n 90, 265–266.

[108] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 311 (McHugh J); *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653 (Deane J).

[109] See *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 306 (Wilcox J).

[110] See, eg, Sharp, n 91.

applying procedural fairness to administrative decisions that "filter out" requests for statutory rights by reference to the general characteristics of those decisions as an exercise of public power.

Of course, any extension of procedural fairness in "screening out" scenarios would need to be consistent with other general principles that determine whether procedural fairness applies, including that the action taken specially concerns the individual claiming a right to be heard and that the action has a "direct" or "immediate" effect on the individual. It will be important to bear in mind that the task is to articulate as a matter of general law that this form of administrative action has a direct effect on the individual, and not to regard the lack of *statutory* effect as dispositive. There are precedents that show the courts' willingness to engage in the kind of doctrinal work that is required to hold exercises of public power to account when their *practical effect* on individuals requires it. This kind of work is not typically required in application cases, but experience in the migration context shows that it may be needed to meet the challenge posed by radical procedural non-compellability to the presumptive operation of procedural fairness.

IV. Conclusion

The Court's decisions in the *Offshore Processing Case* and *Data Breach Case* ensure a measure of administrative justice for individuals who are held in immigration detention while their requests for the exercise of non-compellable discretions to confer visas are considered. In this aspect, it can be said that the cases demonstrate that "Australia's Constitution and common law tradition do provide some guarantees against administrative unfairness and the arbitrary use of power".[111] However, not all cases will be able to invoke detention in this way. In this article, I have highlighted how the Court's decisions imply that non-compellable administrative action that "filters out" requests for statutory rights does not, in the ordinary course, have an effect on individuals that is capable of attracting procedural fairness obligations. My aims in this article have been to describe how procedural non-compellability complicates the application of procedural fairness in application cases; and to identify some of the ways the courts may develop doctrine to maintain the presumptive legal accountability for procedural unfairness in non-compellable administrative action on requests for statutory rights. Based on past legislative practice, it would seem that Australian Parliaments recognise that compellability of consideration of requests for statutory rights supports integrity in public administration. Yet, experience in the migration context might encourage governments to extend the use of radical procedural non-compellability as a means to avoid engaging judicial review's principles. Should that occur, it will be important to understand whether, and how, Australian law can respond to maintain presumptive legal accountability for procedural unfairness in appropriate application cases.

[111] Crock and Ghezelbash, n 59, 101.