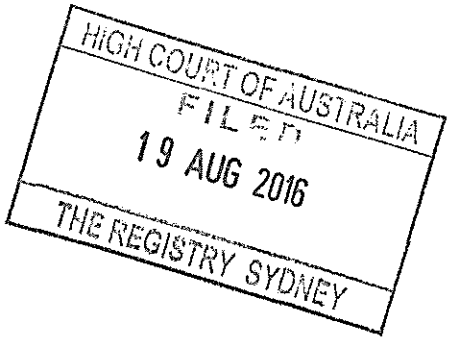
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S61 OF 2016**

BETWEEN: **PLAINTIFF S61/2016**
Plaintiff

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Defendant



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SUBMISSIONS OF THE DEFENDANT

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The issues are identified in the questions stated in the special case filed 13 July 2016 (**SC**). Abbreviations adopted in the special case are adopted in these submissions. The special case book is referred to as "SCB".

PART III SECTION 78B OF THE JUDICIARY *ACT 1903* (CTH)

3. No notice is required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

4. The facts are set out in the special case.

PART V LEGISLATIVE PROVISIONS

5. In addition to the relevant legislative provisions identified in the plaintiff's submissions filed 25 July 2016 (**plaintiff's submissions**), the Minister relies on the legislative provisions in Annexure A.

PART VI ARGUMENT

SUMMARY

6. In summary, the Minister submits as follows:

   A. The words "have regard to the order set out in section 8" in section 7 of Direction 62 are, when read in the context of the Direction as a whole, to be construed as obliging delegates of the Minister to follow the order of priority set out in section 8.

   B. So construed, Direction 62 is not a legislative instrument. It was therefore not required to be registered.

   C. So construed, Direction 62 is not inconsistent with the Migration Act in either of the respects alleged by the plaintiff.

A. CONSTRUCTION OF THE DIRECTION

(a) The issue

7. The question of construction of Direction 62 is the subject of Question 2 in the special case (SC [95]). It is convenient to address this question before the other questions, as the plaintiff accepts that, if the Direction is construed as he contends, the other questions in the special case do not arise (plaintiff's submissions [8]–[11], [29], [78]).

8. The question of construction of Direction 62 centres on section 7 of the Direction (SCB 102). It says that delegates are to "have regard to" the order set out in section 8. It does not say that delegates are to "follow" or "adopt" the order set out in section 8. It may be accepted that the expression "have regard to" is often used to indicate a matter which a decision-maker need only consider, as opposed to a matter which the decision-maker must treat as determinative. The question of construction is whether that is the meaning of the phrase in the context in which it is used in section 7.

(b) Applicable principles

9. As with the construction of all written instruments, Direction 62 is *prima facie* to be given its natural and ordinary meaning, when read as a whole.[1]

10. Whether or not Direction 62 is a legislative instrument, the principles of construction in the *Acts Interpretation Act 1901* (Cth) apply.[2] Thus, the interpretation that would best achieve the purpose or object of Direction 62 is to be preferred to each other interpretation (s 15AA). Further, consideration may properly be given to extrinsic material, at least if the meaning of Direction 62 is ambiguous (s 15AB).

(c) Submissions

11. Contrary to plaintiff's submissions [26], the expression "have regard to" may be used to identify *exhaustively* or *exclusively* the matters which may be

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1 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 per Isaacs and Rich JJ; *Re Media, Entertainment & Arts Alliance; Ex parte Hoyts Corp Pty Ltd* (1993) 178 CLR 379 at 386–387 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ; *Adams v Lambert* (2006) 228 CLR 409 at [21] per *curiam*.

2 *Acts Interpretation Act 1901* (Cth), s 46(1); *Legislation Act 2013* (Cth), s 13(1).

considered. Thus, the House of Lords observed in *R (Heffernan) v Rent Service*[3] that "[t]he words 'having regard to', as a matter of language, may or may not be exclusive: whether they are or not inevitably depends on their context." The reference to "context" is consistent with the applicable principles referred to in paragraphs 9 and 10 above. The House of Lords concluded in that case that the words "having regard to" stated, exhaustively, the matters to which regard was permitted. There are Australian authorities taking the same approach.[4]

12. For the following reasons, the Minister submits that the words "have regard to" in section 7 of Direction 62 should be construed as stating exhaustively or exclusively the matters which delegates are permitted to consider, meaning that in determining the order in which applications will be considered delegates are permitted to consider *only* the order set out in section 8 (which is the same as saying that they are required to follow that order).

13. *First*, as plaintiff's submissions [27]–[28] tacitly acknowledge, a construction of this kind is suggested by section 9 (SCB 103). If delegates were free to have regard to matters *other than* the order of priority specified in section 8, and to depart from that order of priority if they considered it appropriate to do so, there would have been no need for section 9(1) to permit them to do so in cases of special circumstances of a compelling or compassionate nature. Reading Direction 62 as a whole, the Court should lean in favour of a construction which gives section 9(1) work to do.[5]

14. It may be accepted that, even on the plaintiff's construction, section 9(1) is not entirely otiose: it *requires* consideration of special circumstances of a compelling nature. However, if delegates were free to depart from the order set out in section 8, it is difficult to see how such circumstances could be permissibly

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[3] [2008] 1 WLR 1702 (HL) at [66] per Lord Neuberger (with whom Lord Hope and Lord Scott agreed).

[4] See, eg, *Andrews v Diprose* (1937) 58 CLR 299 at 313 per Evatt J (dissenting); *Howard Hargrave Pty Ltd v Penrith Municipal Council* (1958) 3 LGRA 260 (LVCNSW); *Coulson v Shoalhaven Shire Council* (1974) 29 LGRA 166 at 170 (NSWSC) per Helsham J; *Re Bundy & Department of Housing & Construction* (1980) 2 ALD 735 (AAT) at 744–749 per Member Hall; *Re BHP Petroleum Pty Ltd & Minister for Resources* (1993) 30 ALD 173 (AAT) at 180 per *curiam*.

[5] See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ. While this passage was stated in the context of the construction of legislation, the presumption against surplusage has long been stated in the context of written instruments generally: see, eg, *Hayne v Cummings* (1864) 16 CB (NS) 421 at 427 per Byles J [143 ER 1191]; *Re Strand Music Hall Co Ltd* (1865) 35 Beav 153 at 159 per Romilly MR [55 ER 853].

ignored if asserted. That being so, the plaintiff's construction does, in substance, render section 9(1) otiose.

15. *Secondly*, and related to the first point, if delegates were free to depart from the order of priority specified in section 8, the disapplication of section 9(1) by section 9(2) in cases of, *inter alia*, applications sponsored by UMAs would do little work. Notwithstanding that section 9(1) is specifically dis-applied in such cases, delegates would nonetheless be free to take into account special circumstances of a compelling or compassionate nature even in such cases.

16. Again, it may be accepted that, on its face, section 9(2) is not rendered entirely otiose: its effect would be that delegates would be permitted, but not required, to consider special circumstances of a compelling nature in cases of applications sponsored by UMAs. However, as noted above, it is difficult to see how special circumstances of a compelling nature could permissibly be ignored if asserted. That being so, the plaintiff's construction does, in substance, render section 9(2) otiose. Further, it does not involve a natural reading of section 9(2), which is fairly obviously intended to specify cases in which the order of priority set out in section 8 must be followed strictly.

17. *Thirdly*, it may be noted that section 9(1) provides that delegates are to "take into account" special circumstances of a compelling or compassionate nature. Plainly, that means that such circumstances are to be considered by delegates, not that they are to be determinative: if it were otherwise, such circumstances, when established, would in all cases displace the order set out in section 8. It is significant that the words used in section 9(1) ("take into account") are different from the words used in section 7 ("have regard to"). The use of different words suggests that they have a different meaning.[6]

18. *Fourthly*, construing section 7 as specifying the order of priority in section 8 as the *only* matter which may be considered best gives effect to the purpose of Direction 62, in accordance with s 15AA of the *Acts Interpretation Act*. That purpose, as revealed by the Preamble in section 5 (SCB 99), was to align the order in which delegates consider and dispose of Family Stream visa

[6] See, eg, *Commr of Taxes (Vic) v Lennon* (1921) 29 CLR 579 at 590 per Higgins J; *King v Jones* (1972) 128 CLR at 266 per Gibbs J. Again, while these passages were stated in the context of the construction of legislation, the proposition has long been stated as applying to written instruments generally: see, eg, *Hadley v Perks* (1866) LR 1 QB 444 at 457 per Blackburn J.

applications with the order of priority determined by the Government, consistently with its policy intentions, as set out in section 8. That purpose would not be as well achieved if in every case it was open to delegates to depart from the order of priority set out in section 8.

19. *Fifthly*, in light of the matters above, the words "having regard to" in section 7 of Direction 62 are, at the least, ambiguous. That being so, s 15AB of the *Acts Interpretation Act* authorises consideration of the submission to the Minister which preceded the making of the Direction (SCB 93). The submission reveals clearly that the purpose of the Direction was to give the lowest processing priority to visa applications where the sponsor is a UMA who holds a permanent visa (see at [2], [5] (SCB 94–95)). Again, that purpose is best given effect if the Direction is construed as the Minister contends.

20. *Sixthly*, a construction of Direction 62 that permitted delegates to depart from the order set out section 8 in every case would not serve the public interest in consistency of administrative decision-making. As this Court acknowledged in *Plaintiff M64 v Minister for Immigration and Border Protection*:[7]

> Policy guidelines like the priorities policy promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike. In particular, policies or guidelines may help to promote consistency in "high volume decision making", such as the determination of applications for Subclass 202 visas.

21. For the reasons below, the construction of Direction 62 for which the Minister contends does not render that Direction invalid. Accordingly, contrary to plaintiff's submissions [28], there is no occasion for recourse to the presumption in favour of a construction of an instrument which would render it valid, rather than invalid.

(d) Conclusion as to Question 2

22. It follows that Direction 62 should be construed as the Minister contends. The order set out in section 8 is, pursuant to section 7, the only matter to which delegates may permissibly have regard. They must follow it. Question 2 should therefore be answered "Yes", and the other questions must be addressed.

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[7] (2015) 90 ALJR 197 at [54] per French CJ, Bell, Keane and Gordon JJ; (2015) 327 ALR 8.

B. LEGISLATIVE INSTRUMENT

(a) The issue

23. Question 1 in the special case is whether Direction 62 is a "legislative instrument" under the legislation now titled the *Legislation Act 2003* (Cth). At the time Direction 62 was made, the Act was called the *Legislative Instruments Act*. The name of the Act was changed, and other amendments made to the Act, commencing 5 March 2016.[8]

24. The relevance of Question 1 is that s 31(1) of the *Legislative Instruments Act* provided:

> A legislative instrument that is required to be registered under Division 2 is not enforceable by or against the Commonwealth, or by or against any other person or body, unless the instrument is registered.

The reference to the instrument being "registered" was to the instrument being registered on the Federal Register of Legislative Instruments (s 4(1)).

25. In place of the above provision, s 15K(1) of the *Legislation Act* now provides:

> A legislative instrument is not enforceable by or against any person (including the Commonwealth) unless the instrument is registered as a legislative instrument.

The reference to the instrument being "registered" is to the instrument being registered on the Federal Register of Legislation, which is the successor to the Federal Register of Legislative Instruments.

26. Direction 62 was not registered on the Federal Register of Legislative Instruments and has not been registered on the Federal Register of Legislation.

27. For the following reasons, Direction 62 was not (under the *Legislative Instruments Act*) and is not (under the *Legislation Act*) a legislative instrument. It follows that it was not required to be registered pursuant to the former Act, and is not required to be registered pursuant to the current Act.

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[8] *Acts and Instruments (Framework Reform) Act 2015* (Cth).

(b) Legislative Instruments Act

28. The expression "legislative instrument" in the *Legislative Instruments Act* was defined in s 4(1) to have the meaning given by s 5 but, relevantly, to exclude instruments declared not to be legislative instruments under s 7.

29. Section 5(1) provided that, to be a legislative instrument, an instrument must be of a "legislative character" and s 5(2) provided that an instrument was taken to be of a legislative character if:

> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
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> (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

30. The kinds of matters relevant to whether an instrument is of a "legislative character" have been considered in previous cases in the Federal Court.[9] Suffice to say that, in the case of Direction 62, they point in different directions.

31. The plaintiff does not rely on any analysis of these factors. Rather, he submits that Direction 62 fell within s 5(2) (plaintiff's submissions [79], [81]–[83]). That submission is open to doubt. If a direction of the kind found in Direction 62 was given in the instrument of delegation to an individual delegate (as is permitted by s 496(1A) of the Migration Act) it would clearly involve an application of the law in a particular case. It plainly would not "determine the law", or "alter the content of the law". It is not apparent why such a direction, if given to delegates generally, would be of a different character.

32. It is not necessary for the Court to decide this issue, because s 7 provided that an instrument was *not* a legislative instrument for the purposes of the *Legislative Instruments Act* if it was included in the table contained in s 7. Item 21 of the table was: "Instruments that comprise, in their entirety, directions to delegates".

33. On its terms, item 21 applies to Direction 62. Direction 62 can accurately be described as an instrument which, in its entirety, comprises a direction only to delegates of the Minister. In that regard, it is noteworthy that section 4(3) of

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[9] See, eg, *Visa International Service Association v Reserve Bank of Australia* (2007) 131 FCR 300 at [592]–[593], summarising the analysis in *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185 (FC).

Direction 62 expressly provides (SCB 99) that Direction 62 does not apply to the Migration Review Tribunal or the Administrative Appeals Tribunal, which are not "delegates".[10]

34. Accordingly, irrespective of whether Direction 62 was of a "legislative character" within the meaning of s 5(1), or was deemed to be so by s 5(2), by force of item 21 of the table in s 7, it was not a "legislative instrument" for the purposes of the *Legislative Instruments Act*.

(c) Legislation Act

35. The provisions of the *Legislation Act* are somewhat different from those of the *Legislative Instruments Act*. Section 8 defines what instruments are "legislative instruments". The reference to instruments of a "legislative character" has been omitted. Instead, s 8(4)(b) relevantly provides that an instrument is a "legislative instrument" if any provision of the instrument:

> (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
>
> (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

36. The plaintiff relies on this provision (plaintiff's submissions [79], [81]–[83]), which is closely analogous to s 5(2) of the *Legislative Instruments Act*. For the reasons addressed above in relation to s 5(2), it is doubtful that the provision applies.

37. However, it is again not necessary to pursue this issue, because s 8(6)(b) of the *Legislation Act* provides that an instrument is not a legislative instrument if it is "prescribed by regulation for the purposes of this paragraph".

38. The exemption previously provided by item 21 of the table contained in s 7 of the *Legislative Instruments Act* is now prescribed, pursuant to s 8(6)(b) of the *Legislation Act*, by item 2 of the table in reg 6(1) of the *Legislation (Exemption and Other Matters) Regulation 2015* (Cth). It excludes from the definition of legislative instrument: "An instrument that is a direction to a delegate".

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[10] cf *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348 at [58].

39. While the wording is a little different from its predecessor, the relevant Explanatory Statement[11] makes clear that it was to replace the previous item 21:

> Item 2 is an instrument that is a direction to a delegate. This item preserves the exemptions in item 21 of the table in subsection 7(1) of the *Legislative Instruments Act*. The phrase "comprise, in their entirety" has been omitted from the text, as it is no longer needed due to the general clarification in subsection 6(2), which states that instruments do not fall within the classes of exempt instruments where they have effect other than as provided in the item or any other item of the table. Similar to item 1, this type of instrument is also administrative in character. This exemption is a companion measure to item 1.

40. Having regard to the purpose of this exemption to replace the previous item 21, nothing turns on the fact that the previous item 21 was expressed in the plural ("directions") and the new item 2 is expressed in the singular ("direction"). In any event, that difference is explained by the focus in s 8(4)(b) of the *Legislation Act* upon the effect of any "provision" of an instrument (as opposed to the previous focus on the instrument as a whole) and, consistently with this, the general approach in reg 6 to state exceptions in the singular. The general rule that the singular is to be read as including the plural applies.[12] (It may be noted that, as explained in the Explanatory Statement, items 1 and 2 of the table in reg 6(1) then work harmoniously together: the first covers directions to delegates *within instruments of delegation* and the second covers all other directions to delegates.)

41. Accordingly, just as the previous item 21 applied to Direction 62, the new item 2 likewise applies to that Direction. In this light, as was the case under the *Legislative Instruments Act*, Direction 62 is exempted from the definition of "legislative instrument" under the *Legislation Act*, and is not required to be registered.

(d) Conclusion as to Question 1

42. It follows that Direction 62 is not a legislative instrument. Question 1 should therefore be answered "No".

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[11] Explanatory Statement to the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth), Select Legislative Instrument No 158, 2015.

[12] *Legislation Act 2013* (Cth), s 13(1); *Acts Interpretation Act 1901* (Cth), s 23.

(e) Section 499(2A) of the Migration Act

43. If, contrary to the submissions above, the Court concludes that Direction 62 was, or is, a legislative instrument, a separate question arises as to how s 31(1) of the *Legislative Instruments Act*, and now s 15K(1) of the *Legislation Act*, interact with s 499(2A) of the Migration Act. Section 499 relevantly provides:

> (1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:
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> (a) the performance of those functions; or
>
> (b) the exercise of those powers.
>
> ...
>
> (2A) A person or body must comply with a direction under subsection (1).

44. The Minister submits that the effect of this provision is that delegates are required to follow Direction 62 even if, on their terms, s 31(1) of the *Legislative Instruments Act*, and now s 15K(1) of the *Legislation Act*, provide that it is "not enforceable".

45. Section 499(2A) predated both the *Legislative Instruments Act* and the *Legislation Act*. However, the latter Acts should not be regarded as impliedly repealing s 499(2A) merely because they are later in time. To the contrary, there is a strong presumption against that result.[13] Implied repeal "requires that actual contrariety be clearly apparent and that the later of the two provisions be not capable of sensible operation if the earlier provision still stands".[14] That is not the position here, as the provisions are to be reconciled by construing the general terms of the *Legislative Instruments Act* and the *Legislation Act* as subject to the very specific and targeted terms of s 499(2A) of the Migration Act.

46. It follows that, even if Question 1 were answered favourably to the plaintiff, it would not lead to the grant of any relief to the plaintiff. Direction 62 would remain

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[13] See, eg, *South Australia v Tanner* (1989) 166 CLR 161 at 171 per Wilson, Dawson, Toohey and Gaudron JJ; *Shergold v Tanner* (2002) 209 CLR 126 at [34] per *curiam*; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [4] per Gleeson CJ, [18] per Gummow and Hayne JJ, [110] per Kirby J.

[14] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [48] per Gummow and Hayne JJ.

binding on delegates by reason of s 499(2A). Accordingly, regardless of the answer to Question 1, so far as Question 4 concerns the enforceability (as opposed to validity) of Direction 62, Question 4 should be answered adversely to the plaintiff (cf plaintiff's submissions [87]).

C. VALIDITY

47. The plaintiff impugns the validity of Direction 62 on the basis that it is inconsistent with the Migration Act in two respects: *first*, it is said to be inconsistent with the Minister's obligation under the Migration Act to consider and determine each Family Stream visa application within a reasonable time from the making of the application; *secondly*, it is said to be inconsistent with s 51(1) of the Migration Act. Neither submission should be accepted.

(a) Reasonable time

48. This part of the plaintiff's case depends on three arguments:

(1) It is implicit in the obligation to determine visa applications within a reasonable time that delegates can have regard to the circumstances of the case, as that is necessary to identify what is a reasonable time. Direction 62 precludes delegates from having regard to such circumstances (plaintiff's submissions [54]–[56]).

(2) The right to insist upon performance of the duty to determine a visa application is contingent only upon the effluxion of time. However, Direction 62 makes processing of a Family Stream visa application sponsored by a UMA contingent upon the UMA attaining Australian citizenship (plaintiff's submissions [57]–[60]).

(3) In some cases, the effect of Direction 62 is likely to be to cause unreasonable delay in the processing of Family Stream visa applications (plaintiff's submissions [61]–[73]).

49. Before considering these arguments, it is necessary to address the operation of Direction 62 and the way it relates to the obligation cast upon the Minister by the Migration Act to consider and dispose of all visa applications within a reasonable time.

The Minister's position

50. The obligation to determine visa applications within a reasonable time was identified by this Court in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*[15] in the following terms:

> The duties of the Minister to consider a valid application for a visa of a class other than a protection visa and to make a decision granting or refusing such a visa are, by implication, to be performed within a reasonable time. Section 51(2) acknowledges that implication in providing that the fact that an application has not been considered or disposed of, when a later application has, "does not mean that the consideration or disposal of the earlier application is unreasonably delayed". What amounts to a reasonable time is ultimately for determination by a court, on an application for mandamus against the minister under s 75(v) of the Constitution or equivalent statutory jurisdiction, having regard to the circumstances of the particular case within the context of the decision-making framework established by the Act.

51. Reading s 51(1) of the Migration Act together with the rest of the Act, the Minister accepts that his power to determine applications in the order in which he or she considers appropriate is subject to the overriding requirement that all applications are considered and disposed of within a reasonable time (plaintiff's submissions [50]–[53]). Likewise, where the power to determine the order in which applications are considered and disposed of is delegated, delegates are subjected by the Act to the overriding requirement that all applications are considered and disposed of within a reasonable time. It follows that the Minister accepts that a direction pursuant to s 499(1) (or indeed s 496(1A)) cannot validly require a delegate to delay consideration and disposition of a particular application beyond a reasonable time.

52. Accordingly, the Minister accepts that Direction 62 cannot validly operate so as to cause the consideration and disposition of any application to be delayed beyond a reasonable time. If the Direction had that effect in the case of a *particular* application, it could not validly apply to that application once the point of unreasonable delay was reached.

53. It may be accepted that Direction 62 is *capable* of having that operation. However, it does not follow that it will *always* have that operation, or that it can

[15] (2014) 255 CLR 179 at [37] per Crennan, Bell, Gageler and Keane JJ.

be determined, in advance, that it will have that operation in the case of any particular application. The time taken to consider and dispose of visa applications varies dramatically and is highly dependent on the circumstances (SC [52]–[55]). Relevant circumstances that affect the time that will be a reasonable time to determine an application include: the Government's plan as to the total number and mix of visas that will be granted each year in the non-humanitarian program (noting that "[d]emand for places in the Family Stream each financial year is consistently higher than the number of places" (SC [20]) and noting also that the financial cost of adding more Family Stream places is considerable[16]) (SC [18]–[20], [27]); the number of staff allocated to process visas of different kinds and the geographic location of those staff (SC [31]); the time taken for checks to be undertaken by external agencies, to address concerns about identity or authenticity of documents and to conduct interviews (the timing of which can be affected by safety considerations) (SC [32], [54]); and the "particularly high level of complexity and delay associated with Family Stream applications from the families of UMAs" (SC [33]). There are also wide variations in the time taken for conferral of Australian citizenship that may impact on the operation of processing priorities (see SC [40]–[45]), although most applicants who are eligible are approved (SC [38]).

54. Given all these factors, even putting aside Direction 62, the processing of Family Stream visa applications sponsored by UMAs can take a considerable period of time. For instance, in the 2013–2014 and 2014–2015 financial years, at the Department's Dubai post (which is the relevant post for the visa applications sponsored by the plaintiff), a substantial number of finalised Partner (Provisional) (Class UF) visas took three years or more to process (SC [55]). In light of the complex of policy and operational factors bearing upon these processing times, the Court should be wary of an overbroad and abstract approach to the meaning of "reasonable time", divorced from the facts of any particular case. The case by case approach that was contemplated in the passage quoted above from *Plaintiff S297/2013* is more appropriate.

55. The result is that, contrary to the plaintiff's position, the Court should not find that Direction 62 is wholly invalid. Rather, that Direction should be permitted to

[16] In FY 2013-2014, the Government budgeted for the provision of $54.6 million over four years to address a planned increase of 4,000 family stream places: SC [25].

operate where it validly can. Its valid operation would be severed from its invalid operation. If its operation in any given case would lead to the processing of a visa application taking longer than a reasonable time, Direction 62 would not operate.

56. There is no difficulty approaching the validity of Direction 62 in this way. To the contrary, it is required by s 46 of the *Acts Interpretation Act 1901* (Cth).[17] The general reference to the "applications for Family Stream visas" to which the Direction purports to apply (see sections 4(1) (SCB 99) and 7 (SCB 102) must be read distributively as applying to all such applications where a reasonable time has not yet passed. Given that the Direction concerns the order in which applications are to be considered and disposed of, and in light of the implied requirement of the Migration Act to consider and dispose of all applications within a reasonable time, the reading down is suggested by the subject matter and context.[18] There is no positive indication from the Direction that it is to have either a full and complete operation or none at all,[19] and indeed there is no other reason to think such a result was intended. The mere fact that the reading down would require an inquiry of fact to determine whether the reading down would be engaged in any particular case is no impediment to such a reading down.[20]

57. It follows that, in a case where the application of Direction 62 would lead to the processing of a visa application taking longer than a reasonable time, the Direction has no application and decision-makers could, if necessary, be compelled by mandamus to decide a particular application notwithstanding that Direction. Because, however, whether the Direction will cause processing of a particular application to take an unreasonable time depends heavily on the particular features of that application, the question is not suited to a global answer of the kind sought by the plaintiff.

58. It follows that Direction 62 can properly be applied by delegates unless and until an applicant submits that a reasonable time has elapsed. At that point, the

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[17] To the extent that Direction 62 is, contrary to the submissions above, a legislative instrument, the same approach is required by s 13 of the *Legislation Act*.

[18] *Pidoto v Victoria* (1943) 68 CLR 87 at 111 per Latham CJ; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *Tajjour v New South Wales* (2014) 254 CLR 508 at [52] per French CJ.

[19] *Cam & Sons Pty Ltd v Chief Secretary (NSW)* (1951) 84 CLR 442 at 454 per Dixon, Williams, Webb, Fullagar and Kitto JJ; *Tajjour v New South Wales* (2014) 254 CLR 508 at [169] per Gageler J.

[20] *Tajjour v New South Wales* (2014) 254 CLR 508 at [171]–[172] per Gageler J.

delegate would be required to consider that submission. If the delegate accepts the submission, and on that basis concludes that Direction 62 cannot validly apply to the application in question, then the delegate would proceed to make a decision on the application. On the other hand, if the delegate decides that a reasonable time has not yet passed, the delegate would continue to apply Direction 62, and, if the applicant is not content with that decision, mandamus could be sought. But whatever decision is made, Direction 62 does not require an unreasonable time to be taken in processing any particular visa application, because to the extent it purported to do so it would be invalid. In those circumstances, the Direction should not be held invalid in its entirety, but should be permitted to operate to set priorities within the outer boundary of the requirement to decide applications within a reasonable time.

59. Against this background, the plaintiff's submissions concerning the validity of Direction 62 largely fall away.

The plaintiff's first argument: Asserted requirement to have regard to the circumstances of the case

60. It does not follow from the fact that all visa applications must be considered and disposed of within a reasonable time that *delegates* must be able to consider for themselves the order in which applications should be considered so that they can personally decide whether or not a reasonable time has elapsed. Section 51(1) of the Migration Act expressly contemplates that "the Minister may consider and dispose of applications for visas in such order as he or she considers appropriate", and there is nothing in the Act that requires the Minister to delegate that power, let alone to delegate it to all of the same persons who hold delegations to decide applications for visas. As this Court said in *Plaintiff S297*, the question whether a reasonable time has been taken in respect of any given application is ultimately a matter to be judged by a court, in the event that it is alleged in proceedings that an unreasonable time has been taken. This is not a matter that needs to be assessed in every case by each individual delegate. Consistently with s 51(1), delegates must consider visa applications in such order as is determined in any directed by the Minister pursuant to s 499(1), provided only that compliance with that direction will not cause a particular application not to be decided within the outer boundary set by the need to decide applications within a reasonable time.

61. The point may be illustrated by references to paragraphs of section 8(1)(a) to (f) of Direction 62 (SCB 102), being paragraphs that *do not* concern UMAs. On the plaintiff's first argument, those paragraphs would be invalid, because they direct delegates as to the order of priority in considering visa applications, and thereby prevent those delegates from deciding the order in which applications would be considered by reference to all the circumstances of the case. That would follow even if all of the lowest priority cases would nevertheless be decided within a reasonable time. There is no reason to construe the Migration Act in that way. To do so would prevent the Minister from issuing directions under s 499(1) in relation to a topic that obviously calls for such a direction, in the interests of promoting "values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike".[21]

62. In any event, having regard to the Minister's position as to the operation of Direction 62 (as summarised in paragraph 58 above), if it is asserted by an applicant that application of the order of priority for which the Direction provides would result in an unreasonable delay in the consideration and disposition of their application, the delegate is permitted — indeed obliged — to consider that assertion.

The plaintiff's second argument: Citizenship

63. Having regard to the Minister's approach to Direction 62, its effect is not to make the processing of a Family Stream visa application sponsored by a UMA contingent on the sponsor obtaining Australian citizenship. Even if a UMA who sponsors a Family Stream visa application has not yet become an Australian citizen, or chooses never to seek to become an Australian citizenship, the application must be processed within a reasonable time. The Direction could not validly, and therefore does not, provide otherwise. The result is that "the right to insist upon the performance of the duty created by s 47(1) [remains] contingent only on one thing: the effluxion of time" (plaintiff's submissions [57]).

64. Within the period which is reasonable, the Minister has power to consider and determine visa applications in the order in which he or she considers

[21] *Plaintiff M64 v Minister for Immigration and Border Protection* (2015) 90 ALJR 197 at [54] per French CJ, Bell, Keane and Gordon JJ; (2015) 327 ALR 8. See also Direction 62 at [5](1) & (2): SCB 99.

appropriate. Within the period which is reasonable, it is open to the Minister to consider it appropriate that a visa application sponsored by a UMA should not be processed until the UMA becomes an Australian citizen. As was said by this Court in a different context in *Plaintiff M64/2015 v Minister for Immigration and Border Protection*,[22] the evident rationale is that no one should receive a migration advantage as a result of arriving in Australia as a UMA — that is a permissible consideration for the Minister in determining the order of processing that he or she considers "appropriate" and in directing delegates accordingly.

65. Further, to the extent that the plaintiff's argument relies upon delay that may arise as a consequence of the sponsor's decision to travel outside of Australia (thus delaying satisfaction of the general residence requirements), or decision not to apply for citizenship (plaintiff's submissions [41]), the argument should be immediately rejected. While it is true that the sponsor may be entitled under the Migration Act to act in those ways (SC [36]), there is no reason in principle why a decision to act in a way that the sponsor is lawfully entitled to act cannot delay consideration of a visa. Choices commonly have legal consequences, notwithstanding that the choice is between lawful options, and if a sponsor acts in a way that weakens his or her nexus to Australia, that can permissibly be taken into account.

Plaintiff's third argument: Causing unreasonable delay

66. The plaintiff's third argument is that Direction 62 is, in its terms, capable of causing the consideration and disposition of a Family Stream visa application to be delayed for an unreasonable time. So much may be accepted. However, for the reasons already addressed, that does not lead to the invalidity of the Direction as a whole.

67. The extent of any delay that may be caused by Direction 62 depends on a range of factors (SC [52]). The plaintiff's case illustrates the point, for he became lawfully present in Australia on 11 September 2012, and a permanent resident on 11 December 2012 (SC [11]–[12]), but did not sponsor any visa applications until 25 February 2015 (SC [56]). In those circumstances, the plaintiff will be eligible to become an Australian citizen about 19 months after the visa application that he has sponsored was made (SC [53]). If he applies for

[22] (2015) 90 ALJR 197 at [49] per *curiam*; (2015) 327 ALR 8.

citizenship once he becomes eligible, the most recent data indicates it would take approximately 7 months for citizenship to be granted (SC [45]). That being so, any delay caused by Direction 62 is likely to be in the region of two years. Having regard to the time averages and ranges of processing times referred to in the special case (see esp SC [54]–[55]), it is simply impossible at this stage to find that the visa applications that he has sponsored will not be determined within a reasonable time of those applications being made. Like all other visa applications, that issue needs to be considered case by case.

68. The mere fact that the operation of Direction 62 may be to add to the time taken to process the visa application beyond that which might have been expected if the Direction was inapplicable does not demonstrate unreasonable delay. It is inherent in s 51(1) that applications need not be considered and determined in the shortest time possible. Inevitably, the exercise of the discretion conferred by s 51(1) will result in the time for consideration and disposition of applications given a lower priority by the Minister being longer than would otherwise be the case. In light of s 51(1), one of the matters to be taken into account in assessing whether a delay is unreasonable must be the order of priority selected by the Minister pursuant to the discretion s 51(1) confers. Thus, the fact that a period of delay, even of inactivity (caused by the deployment of resources to process one application rather than another), results from the exercise of that discretion cannot of itself mean that the application is delayed for an unreasonable time. The same is so where the order of priority is specified in a s 499(1) direction.

(b) Section 51(1)

69. Question 3(b) is whether Direction 62 is inconsistent with s 51(1) of the Migration Act. The plaintiff submits that such inconsistency arises because the Direction fetters the exercise by delegates of the discretion conferred by s 51(1) to determine visa applications in the order they think appropriate (plaintiff's submissions [74]–[77]). That submission should be rejected.

70. It may be accepted that s 51(1) confers upon the Minister a discretion as to the order in which to consider and dispose of visa applications. It may also be accepted that, if the Minister delegates the power conferred upon him or her by s 51(1), all other things being equal, the delegate has the same discretion as the Minister as to the order in which to consider and dispose of visa applications.

71. However, the Migration Act makes clear that the exercise of discretions by delegates is able to be fettered to some extent by the Minister, in a way in which the discretions conferred on the Minister personally are not fettered. That is implicit in the power of the Minister to give directions to delegates pursuant to ss 496(1A) and 499(1). It is, however, made express by s 499(1A), which provides:

> For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.

In a circumstance such as that posited in s 499(1A), the Minister would have a choice which of the two identified powers to exercise. But s 499(1A) in terms contemplates that delegates can properly be deprived of that choice.

72. Thus, the mere fact that the exercise of the discretion conferred by s 51(1) when exercised by a *delegate* is fettered by a direction from the Minister in a way that the *Minister's* exercise of that discretion is not does not demonstrate any inconsistency with s 51(1). The apparent purpose of s 499 is to empower the Minister to make directions that have that very effect.

73. Further, the manner in which delegates are to exercise the discretion conferred by s 51(1) is naturally a topic on which the Migration Act implicitly suggests the Minister is able to give directions. As already noted, s 51(1) permits the Minister to consider and determine visa applications in the order in which he or she considers appropriate. If that is so, it seems naturally a topic on which the Minister should be permitted to direct his or her delegates, in accordance with what he or she considers appropriate. That is especially so since both s 51(1), and the reference to the "national interest" in s 4(1), suggest that the order in which visas are to be processed is a matter which may properly be the subject of government policy.

74. The point is somewhat similar to one accepted by this Court in *Plaintiff M64/2015 v Minister for Immigration and Border Protection*,[23] albeit in the context of a different kind of order of priorities determined in accordance with government policy.

[23] (2015) 90 ALJR 197; 327 ALR 8.

75. For these reasons, Direction 62 should not be held invalid on the basis that it is inconsistent with s 51(1) of the Migration Act.

(c) Conclusion as to Question 3

76. It follows that the Court should reject both grounds upon which the plaintiff contends that Direction 62 is invalid.

77. To the extent that, in the case of a particular visa application, it is inconsistent with the obligation to determine that application within a reasonable time, Direction 62 cannot validly, and hence does not, operate. But that must be assessed on a case by case basis, and does not result in the invalidity of Direction 62 as a whole, which validly determines the order of processing of visa applications within the outer boundary set by the need to decide applications within a reasonable time. Question 3(a) should therefore be answered "No".

78. Direction 62 is not inconsistent with s 51(1) of the Migration Act. The order of priority for the consideration and disposition of visa applications is precisely the kind of matter which the Act contemplates may be the subject of directions to delegates, which constrain their exercise of the discretion conferred by s 51(1). Question 3(b) should therefore be answered "No".

PART VII QUESTIONS STATED

79. For the reasons above, the questions stated for the opinion of the Full Court in the special case should be answered as follows: (1) No. (2) Yes. (3)(a) No. (3)(b) No. (4) None. (5) The plaintiff.

PART VIII LENGTH OF ORAL ARGUMENT

80. Approximately 1.5 hours will be required for the presentation of oral argument.

Dated: 19 August 2016

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S 61 OF 2016

BETWEEN: PLAINTIFF S61/2016
Plaintiff

AND: MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Defendant

ANNEXURE A TO SUBMISSIONS OF THE DEFENDANT

Legislative Instruments Act 2003

No. 139, 2003

Compilation No. 31

Compilation date:	18 June 2015
Includes amendments up to:	Act No. 59, 2015
Registered:	22 June 2015

Prepared by the Office of Parliamentary Counsel, Canberra

7 Instruments declared not to be legislative instruments

(1) An instrument is not a legislative instrument for the purposes of this Act if:

(a) it is included in the table below; or

(b) it is made under an Act or a disallowable legislative instrument:

(i) that first authorised the making of the first-mentioned instrument on or after the commencing day; and

(ii) that declared the first-mentioned instrument not to be a legislative instrument for the purposes of this Act.

Instruments that are not legislative instruments for the purposes of the Act

Item	Particulars of instrument
1	Instruments (other than regulations and other instruments that, immediately before the commencing day, are disallowable) made under the *Air Navigation Act 1920*, or under the regulations made under that Act, relating to aviation security
2	Commissioner's orders under section 38 of the *Australian Federal Police Act 1979*
4	Guidelines under section 8A of the *Australian Security Intelligence Organisation Act 1979*
5	Ministerial directions to: (a) a Commonwealth company within the meaning of the *Public Governance, Performance and Accountability Act 2013*; or (b) a corporate Commonwealth entity within the meaning of that Act; other than any such direction: (d) that is required to be laid before the Houses of the Parliament under the legislation that authorises the giving of the directions; or (e) the full text of which is required to be published in the *Gazette* or elsewhere under that legislation

Instruments that are not legislative instruments for the purposes of the Act	
Item	**Particulars of instrument**
6	Instruments (other than regulations and other instruments that, immediately before the commencing day, are disallowable) that are made under the *Corporations Act 2001* and that, in relation to: (a) a specified person (other than a person specified by membership of a class) or to persons associated with that specified person; or (b) a specified facility (other than a facility specified by membership of a class); or (c) a specified financial product (other than a product specified by membership of a class); have the effect of: (d) exempting the person, facility or product from the rules under the Act; or (e) modifying the operation of the rules under the Act in their application to the person, facility or product
7	Determinations made under section 273 of the *Customs Act 1901*
8	Instructions under section 9A of the *Defence Act 1903*
9	Determinations made under section 58B or 58H of the *Defence Act 1903*
10	Legal Services Directions issued under paragraph 55ZF(1)(b) of the *Judiciary Act 1903*
12	Designations, or revocations of designations, made under section 11 of the *Payment Systems (Regulation) Act 1998*
13	Instruments made under section 72 of the *Public Service Act 1999*

Instruments that are not legislative instruments for the purposes of the Act	
Item	**Particulars of instrument**
14	Laws of a self-governing Territory, other than: (a) Ordinances made under subsection 12(1) of the *Seat of Government (Administration) Act 1910* that have not become enactments (as defined in the *Australian Capital Territory (Self-Government) Act 1988*); or (b) Ordinances made under section 27 of the *Norfolk Island Act 1979*; or (c) rules, regulations and by-laws made under Ordinances described in paragraph (a) or (b)
15	Instruments (other than regulations and other instruments that, immediately before the commencing day, are disallowable) that are made under the *Superannuation Industry (Supervision) Act 1993* and that, in relation to: (a) a specified person (other than a person specified by membership of a class) or to persons associated with that specified person; or (b) a specified financial product (other than a product specified by membership of a class); have the effect of: (c) exempting the person or product from the rules under the Act; or (d) modifying the operation of the rules under the Act in their application to the person or product
16	Private rulings given under the *Taxation Administration Act 1953*
17	Public rulings made under the *Taxation Administration Act 1953*
18	Fair work instruments (within the meaning of the *Fair Work Act 2009*)
18A	Transitional instruments and Division 2B State instruments (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*)
19	Decisions and orders of the Fair Work Commission

Instruments that are not legislative instruments for the purposes of the Act	
Item	**Particulars of instrument**
19A	Orders made by the Australian Industrial Relations Commission in proceedings under the *Workplace Relations Act 1996* or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*
19B	Decisions of the Australian Fair Pay Commission
20	Instruments that relate to terms and conditions of employment of persons, or to the terms and conditions of service of persons as members or special members of the Australian Federal Police, other than: (a) regulations; or (b) instruments that are declared to be disallowable instruments under the enabling legislation; or (c) instruments that are made under section 23 or subsection 24(3) of the *Public Service Act 1999*; or (d) instruments that are made under section 23 or subsection 24(3) of the *Parliamentary Service Act 1999*; or (e) instruments that are required to be laid before the Parliament under subsection 7(7) of the *Remuneration Tribunal Act 1973*
21	Instruments that comprise, in their entirety, directions to delegates
22	Laws of a State or self-governing Territory that apply in a non-self-governing Territory and instruments made under those laws
23	Ordinances of the former Colony of Singapore that apply in a non-self-governing Territory and instruments made under those Ordinances
24	Instruments that are prescribed by the regulations for the purposes of this table

(2) The inclusion of a kind of instrument in the table in subsection (1) does not imply that an instrument of that kind would be a legislative instrument if it were not included in the table.

(3) If:

(a) the making of an instrument is authorised before the commencing day; and

(b) the instrument is of a kind included in the table in subsection (1) or is not otherwise a legislative instrument; and

(c) the instrument is required:

(i) to have its text, or particulars of its making, published in the *Gazette*; or

(ii) to be laid before either or both of the Houses of the Parliament without provision for its disallowance;

that requirement is unaffected by this Act whether the instrument is made before, on or after the commencing day.

8 Definition—power delegated by the Parliament

A reference in this Act to a power delegated by the Parliament includes a reference to a power delegated by the Parliament to a rule-maker and then, under the authority of the Parliament, further delegated by the rule-maker to another rule-maker.

9 Rules of court are not legislative instruments

Rules of court for the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia are not legislative instruments for the purposes of this Act.

Note: Rules of court are treated as if they were legislative instruments by express amendment of the legislation providing for them to be made.

10 Attorney-General may certify whether an instrument is legislative instrument or not

(1) If a person or body having authority to make instruments of a particular kind is uncertain whether an instrument of that kind:

(a) that was made before the commencing day; and

(b) that is not registered;

Legislation (Exemptions and Other Matters) Regulation 2015

Select Legislative Instrument No. 158, 2015

made under the

Legislation Act 2003

Compilation No. 1

Compilation date:	16 June 2016
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Part 2—Instruments that are not legislative instruments

6 Classes of instruments that are not legislative instruments

(1) For paragraph 8(6)(b) of the Act and subject to subsection (2), an instrument in a class of instruments referred to in an item of the following table is not a legislative instrument.

Classes of instruments that are not legislative instruments	
Item	**Class of instrument**
1	An instrument of delegation, including any directions to the delegate
2	An instrument that is a direction to a delegate
3	An instrument that is a direction given by a Minister to: (a) a Commonwealth company within the meaning of the *Public Governance, Performance and Accountability Act 2013*; or (b) a corporate Commonwealth entity within the meaning of that Act; other than any such direction: (c) that is required to be laid before the Houses of the Parliament under the legislation that authorises the giving of the direction; or (d) the full text of which is required to be published in the Gazette or elsewhere under the legislation that authorises the giving of the direction
4	Each of the following: (a) an instrument that has the effect of authorising or approving a particular person to take a particular action or act in a particular way; (b) an application for an instrument referred to in paragraph (a)
5	An instrument the effect of which is to approve a manner or method of doing an act
6	An instrument prescribing or approving a form
7	An instrument acknowledging the receipt of a thing
8	Each of the following: (a) an instrument of appointment, engagement or employment; (b) an instrument suspending or terminating an appointment, engagement or employment; (c) an instrument authorising a person to hold a particular position or office
9	An instrument of resignation
10	An instrument: (a) relating to terms and conditions of appointment, engagement, employment or service; or (b) granting leave of absence; other than an instrument that is required to be laid before the Parliament under subsection 7(7) of the *Remuneration Tribunal Act 1973*
11	An instrument constituting recommendations or advice
12	A report or review, including an annual or periodic report or review
13	An evidentiary certificate

Classes of instruments that are not legislative instruments	
Item	**Class of instrument**
14	Each of the following: (a) an instrument granting, renewing, transferring, suspending, cancelling or terminating a licence or permit that authorises a particular person to do an act; (b) an instrument of registration of a particular person; (c) an instrument renewing, transferring, suspending, cancelling or terminating a registration of a particular person; (d) an instrument refusing to grant, renew or transfer a licence or permit referred to in paragraph (a) or a registration referred to in paragraph (b); (e) an instrument imposing conditions on such a licence, permit or registration
15	Each of the following: (a) a warrant; (b) an application for a warrant; (c) an instrument supporting an application for a warrant
16	Each of the following: (a) an instrument authorising: (i) the surveillance of a person or thing; or (ii) the retrieval of a device facilitating such surveillance; or (iii) the interception of a thing; (b) an application for an instrument referred to in paragraph (a); (c) an instrument supporting an application for an instrument referred to in paragraph (a)
17	An instrument requesting or requiring a person to attend premises, give evidence, answer questions, produce documents, give information or provide assistance
18	Each of the following: (a) a notice of a decision or proposed decision; (b) a notice of reasons for a decision or proposed decision; (c) a notice of rights of review
19	An instrument the making or issue of which is: (a) a decision that is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*; or (b) a decision that would be reviewable under that Act except for an exemption under that Act or another Act; other than an instrument that includes a provision of a kind referred to in paragraph 8(4)(b) of the *Legislation Act 2003*
20	Each of the following: (a) an agreement, contract or undertaking authorised to be made or given under legislation; (b) an instrument made under such an agreement, contract or undertaking
21	A consent to, acceptance of, rejection of, or withdrawal of an undertaking
22	Each of the following: (a) a nomination, request or invitation; (b) a withdrawal of a nomination, request or invitation
23	Each of the following:

Section 6

Classes of instruments that are not legislative instruments	
Item	**Class of instrument**
	(a) an application for an order, direction or other instrument (a *court or tribunal instrument*) to any of the following (a *relevant person or body*), or a withdrawal of such an application: (i) a court; (ii) a Judge or a Magistrate (including a Judge or Magistrate acting in a personal capacity); (iii) an officer of a court; (iv) a tribunal; (v) the Fair Work Commission; (vi) a member or an officer of a tribunal or the Fair Work Commission; (b) a court or tribunal instrument made in response to an application to a relevant person or body; (c) a court or tribunal instrument made by a relevant person or body in proceedings or in dealing with a matter
24	A practice direction made by a court or tribunal
25	An assessment of tax
26	A garnishee notice
27	Each of the following: (a) an instrument remitting or waiving a penalty in relation to a particular person; (b) an instrument discharging or extinguishing a liability in relation to a particular person
28	An infringement notice
29	Each of the following: (a) an instrument varying, in a particular case, the time for a particular act to be done or a particular event to occur; (b) an instrument extending or shortening, in a particular case, a time period in which a particular act is to be done or a particular event is to occur
30	An instrument that renews, transfers, suspends, cancels or terminates a right created or an obligation imposed by an instrument that is not a legislative instrument
31	An instrument that amends or repeals an instrument that is not a legislative instrument
32	A corporate plan (however described)
33	A law of a self-governing Territory
34	Each of the following: (a) a law of a State or self-governing Territory that applies in a non-self-governing Territory; (b) an instrument made under such a law
35	An Ordinance of the former Colony of Singapore that applies in a non-self-governing Territory and an instrument made under such an Ordinance
36	An instrument that is a notifiable instrument referred to in the table in section 8

(2) An instrument is not included in a class of instruments referred to in an item of the table in subsection (1) if:

(a) the instrument is of a kind that is declared to be a legislative instrument by section 10 of the Act; or

(b) the instrument has effect other than as provided in the item or any other item of the table (disregarding any application, saving or transitional provisions in the instrument).

7 Particular instruments that are not legislative instruments

For paragraph 8(6)(b) of the Act, each instrument referred to in an item of the following table is not a legislative instrument.

Particular instruments that are not legislative instruments

Item	Instrument
1	Each of the following: (a) a declaration made under regulation 6 of the *Airspace Regulations 2007*; (b) a determination made under subregulation 9(2) of those Regulations
2	An order made by the Commissioner under section 38 of the *Australian Federal Police Act 1979*
3	A determination made under section 32 of the *Australian Postal Corporation Act 1989*
4	A guideline given under section 8A of the *Australian Security Intelligence Organisation Act 1979*
5	Each of the following: (a) an instrument made under the *Aviation Transport Security Act 2004* (other than a regulation made under that Act or an instrument made under section 107 of that Act); (b) an instrument made under a regulation made under that Act
6	A notice given under subsection 10(2) of the *Census and Statistics Act 1905*
7	Each of the following: (a) a determination made under section 48, 65, 73, 76 or 76A of the *Commonwealth Electoral Act 1918*; (b) a direction made under section 59 of that Act; (c) an instrument made under section 80 of that Act
8	A record-keeping rule made under subsection 151BU(1) of the *Competition and Consumer Act 2010* for and in relation to one or more specified carriers or one or more specified carriage service providers (other than a carrier or carriage service provider specified by inclusion in a specified class)
9	An instrument (other than a regulation or other instrument that was disallowable before 1 January 2005) made under the *Corporations Act 2001* that, in relation to: (a) a specified person (other than a person specified by membership of a class) or to persons associated with that specified person; or (b) a specified facility (other than a facility specified by membership of a class); or (c) a specified financial product (other than a product specified by membership of a class); has the effect of: (d) exempting the person, facility or product from the rules made under that Act; or (e) modifying the operation of the rules made under that Act in their application to the person, facility or product
10	Each of the following: (a) an instrument made under section 161J of the *Customs Act 1901*;

Migration Act 1958

No. 62, 1958

Compilation No. 131

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Includes amendments up to:	Act No. 34, 2016
Registered:	4 July 2016

This compilation is in 2 volumes

Volume 1:	sections 1–261K
Volume 2:	**sections 262–507**
	Schedule
	Endnotes

Each volume has its own contents

This compilation includes commenced amendments made by Act No. 59, 2015

Prepared by the Office of Parliamentary Counsel, Canberra

495B Minister may substitute more favourable decisions for certain computer-based decisions

(1) The Minister may substitute a decision (the ***substituted decision***) for a decision (the ***initial decision***) made by the operation of a computer program under an arrangement made under subsection 495A(1) if:

(a) a certificate under paragraph 271(1)(l) relates to the computer program and to the initial decision; and

(b) the certificate states that the computer program was not functioning correctly; and

(c) the substituted decision could have been made under the same provision of the designated migration law as the initial decision; and

(d) the substituted decision is more favourable to the applicant.

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

(3) Subsection (1) has effect despite:

(a) any law of the Commonwealth; or

(b) any rule of common law;

to the contrary effect.

496 Delegation

(1) The Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under this Act.

(1A) The delegate is, in the exercise of a power delegated under subsection (1), subject to the directions of the Minister.

(2) The Secretary may, by writing signed by him or her, delegate to a person any of the Secretary's powers under this Act.

(3) If an application for a visa that has a health criterion is made, the Minister may:

(a) delegate to a person the power to consider and decide whether that criterion is satisfied; and

(b) consider and decide, or delegate to another person the power to consider and decide, all other aspects of the application.

(4) To avoid doubt, if there is a delegation described in paragraph (3)(a) in relation to an application for a visa:

(a) Subdivision AB of Division 3 of Part 2 has effect accordingly; and

(b) for the purposes of subsection 65(1), the Minister is satisfied or not satisfied that the health criterion for the visa has been satisfied if the delegate who was given that delegation is so satisfied or not so satisfied, as the case may be.

(5) Subsection (1A) does not limit subsection 499(1).

497 Delegate not required to perform certain administrative tasks

(1) If the Minister delegates the power to grant or refuse to grant visas, the delegation does not require the delegate personally to perform any task in connection with the grant or refusal, except the taking of a decision in each case whether or not a visa should be granted.

(2) If the Minister delegates the power to cancel visas, the delegation does not require the delegate personally to perform any task in connection with the cancellation, except the taking of a decision in each case whether a visa should be cancelled.

(3) Nothing in subsection (1) or (2) shall be taken to imply that:

(a) a person on whom a power is conferred by or under this or any other Act; or

(b) a delegate of such a person;

is required personally to perform all administrative and clerical tasks connected with the exercise of the power.