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Non-Compellable Powers: A Relational Analysis

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This article proposes a new prism through which to examine the statutory, doctrinal, conceptual and operational architecture associated with "non-compellable" powers in Australian administrative law. By exploring how the design and operation of non-compellable powers construct and sustain relationships between those in whom such powers are reposed and those who are ultimately subject to them, the article aims to contribute to an emerging body of scholarship concerned to tease out the character and implications of this unorthodox form of administrative discretion. Though the focus of the analysis is on the specific example of non-compellable powers and the wider questions of doctrine that have shaped judicial consideration of these powers so far (the application of common law rules of procedural fairness and the scope of judicial supervision under s 75(v) of the Constitution), the article also seeks to advocate for greater attention to the relational dimensions of administrative power more generally.

I. Introduction

What have become known among Australian administrative lawyers as "non-compellable powers" typically take on the following structure:

(1) The Minister may [do X] if they think it is in the public interest to do so.
(2) The power under subs (1) may only be exercised by the Minister personally.
(3) The Minister does not have a duty to consider whether to exercise the power under subs (1), whether the Minister is requested to do so by any person or in any other circumstances.

Non-compellable powers are a relatively new legislative device for reposing administrative discretion. As their description suggests, the distinguishing feature of powers of this kind is their non-compellability. The repository of a non-compellable power has no obligation to exercise the power upon an application to do so, and any such refusal cannot be subject to a writ of mandamus. Though presenting in a wide range of statutory contexts,[1] non-compellable powers have become especially prevalent in the *Migration Act 1958* (Cth), where they provide additional powers to the Minister to consider granting visas outside of the primary statutory process. This adjunct character of non-compellable powers has in turn supported the development of separate administrative processes to "screen out" applications for the exercise of the powers without any statutory decision being made.

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[1] Non-compellable powers appear in a wide range of statutory contexts: see, eg, *Australian Citizenship Act 2007* (Cth) ss 22A(7), 22B(7), 33AA(15), 35(10), 48(4); *Australian Crime Commission Act 2002* (Cth) s 9(1); *Competition and Consumer Act 2010* (Cth) ss 44X(4), 44ZZAAA(10), 151AQB(2), 125AM(3), 152BCN(5), 152BDAA(7), 152CBDA(4), 151AQB(2); *Migration Act 1958* (Cth) ss 37A(6), 46A(7), 46B(7), 48B(6), 72(7), 91F(6), 91L(6), 91Q(7), 133A(8), 133C(8), 137N(4), 195A(4), 197AE, 261K(2), 351(7), 417(7), 473DC(2), 495B(2), 501A(6), 501J(8), 503A(3A); *National Broadband Network Companies Act 2011* (Cth) ss 26(5), 30(3); *National Health Act 1953* (Cth) s 90A(5); *National Radioactive Waste Management Act 2012* (Cth) s 9(3); *Taxation Administration Act 1953* (Cth) Sch 1 cl 357-70(2); *Telecommunications Act 1997* (Cth) Sch 1 cls 75(5G), 76(7), 80(3); *Trade Marks Act 1995* (Cth) s 84A(6). Relevantly for present purposes, however, non-compellable powers are especially prevalent in the migration context where, among other purposes, they are given the function of assigning discretions to confer the right to apply for visas outside of the visa application system otherwise provided under the *Migration Act*. For a helpful summary of how these powers work in the context of the *Migration Act*, see Emily Hammond, "Procedural Fairness in Application Cases: Is Compellability of Consideration a Critical Safeguard?" (2018) 25(2) AJ Admin L 122, 126.

The High Court of Australia dismissed a constitutional challenge to the validity of certain non-compellable powers in the *Migration Act* in the case of *Plaintiff M61/2010 v Commonwealth*.[2] The Court concluded that this "form of grant of power not unknown to the federal statute book, at least in recent years"[3] did not clash with s 75(v) of the *Constitution* and its guarantee of a minimum entrenched provision of judicial review for jurisdictional error. As the Court expressed it, "[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise".[4]

Plaintiff M61 might have settled this constitutional point, but non-compellable powers have continued to trouble Australian public lawyers concerned to tease out the wider implications of this peculiar species of administrative discretion.[5] The aim of this article is to contribute to this emerging body of scholarship, but from a different starting point. Though set against a doctrinal background, the primary concern of what follows lies with how the design and operation of administrative power construct and sustain *relationships* between those in whom such power is reposed and those who are ultimately subject to it. Such an investigation of what might be described as the "internal sociology" of administrative power could be brought to any number of administrative regimes. The purpose of this article, however, is to show that non-compellable powers are especially ripe for such an analysis precisely because the design and operation of these powers ensures that their relational dimensions remain contingent. This relational landscape, as argued below, deserves greater attention for how it constitutes a distinct kind of experience of administrative power on the part of those who apply for the exercise of non-compellable powers, for how it operates to limit the availability of procedural fairness protections, and for how it shapes the availability of effective judicial supervision of administrative actions associated with this unorthodox form of administrative discretion.

The article proceeds as follows. Part II begins by defending the value of examining the relational dimensions of administrative power as an object of administrative law inquiry in its own right. Changes in the relational dynamics between repositories of administrative power and those subject to such powers are increasingly apparent within the design and performance of contemporary government.[6] If we are to witness and evaluate these dynamics, however, we need a prism of analysis suited to the task. The argument made in Part II is that an analysis of administrative power that foregrounds what is going on in relationships between repositories and subjects not only offers a helpful lens through which to identify and analyse these changes, but also a new perspective from which to evaluate the adequacy of prevailing doctrinal commitments in the face of concerns associated with this dimension of administrative power.

Turning to non-compellable powers specifically, Part III outlines the key features of the legal architecture that has developed in association with these powers. This background sets the scene for the relational analysis of non-compellable powers developed in Part IV, which gives particular attention to how the elements of that architecture together function to optionalise or otherwise attenuate the relational dimensions of this particular species of administrative power, at multiple levels.

Part V turns to the wider doctrinal context within which non-compellable powers have been received to examine some of the key common law and constitutional commitments that have arguably prevented adequate judicial engagement with the implications of these powers for relationally significant

[2] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41.

[3] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 347 [56] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); [2010] HCA 41.

[4] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 347 [57]; [2010] HCA 41.

[5] See, eg, Hammond, n 1; Debra Mortimer, "The Constitutionalisation of Administrative Law" in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP, 2018) 696, 714–716; Christopher Tran, "The 'Fatal Conundrum' of 'No-Consideration' Clauses after Plaintiff M61" (2011) 39(2) *Federal Law Review* 303; Anlee Khuu, "Non-Statutory Filters in Government Decision-Making: Compatible with Administrative Justice?" (2016) 6 *Victoria University Law and Justice Journal* 10; Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 116–121. Compare Leighton McDonald, "Graham and the Constitutionalisation of Australian Administrative Law" (2018) 91 *AIAL Forum* 47, 48–49.

[6] The increasing role of automation in administrative decision-making is one example.

administrative law protections. In the discussion of how the common law of procedural fairness operates upon the statutory and non-statutory structure within which non-compellable powers are (optionally) exercised, the question of *to what* protections of procedural fairness need to be directed provides an opportunity for a broader examination of how the law of procedural fairness acknowledges the relational dimensions of administrative power. Of special interest here is the question of what has been lost in the demise of the doctrine of procedural legitimate expectations for the regulation of those relational dimensions. In the second part of Part V it is asked why constitutional arguments have featured only marginally in legal argumentation around non-compellable powers to this point, and what we might learn from this about the responsiveness of constitutional law to the relational dimensions of administrative power. Part VI concludes by situating the analysis in the context of other features of Australian administrative law that shape the nature and quality of doctrinal engagement with the relational dimensions of administrative power.

II. Establishing a Relational Perspective on Administrative Power

The analysis to follow commences from the idea that to possess and exercise administrative power in relation to a person is to stand in a governing relationship with them. So understood, administrative power is an inherently relational phenomenon. Every design of administrative power will set down the frame within which this potential or actual relationship will play out, and conditions bearing upon the exercise of the power will then determine the particular qualities of that relationship.

In proposing a relational analysis of administrative power, it is suggested that bringing these inherently relational dimensions to the fore will leave us better placed to observe how the design and exercise of particular administrative powers position repositories and subjects in their relationships to each other. From here we might in turn be better placed to consider whether and how our received administrative law protections extend to an examination of these relational dynamics in instances where they have become troubling.

Conditions that bear upon the way that the design and operation of administrative power construct and sustain relationships between its repositories and its subjects have not typically occupied the focus of administrative law scholars – or, at least, not explicitly. Such an inquiry attends primarily to a study of administrative law in its facilitative or power-conferring aspect, whereas the primary focus of administrative law scholarship tends to be directed to doctrinal resources salient to the supervisory function of courts in reviewing administrative action.

That said, the line between the two is rarely a bright one, and there are a number of key respects in which administrative law doctrine addresses the position and experience of the subject in relation to a repository of administrative power. The now well-settled presumption that an obligation to afford procedural fairness conditions the exercise of a statutory power exemplifies the way that administrative law in its supervisory aspect has come to recognise and place demands on the relational dynamics between a repository of administrative power and the person subject to that power.[7] A complaint about breach of procedural fairness is fundamentally a complaint about how the subject was or is being treated by the repository of administrative power, and that such treatment is material to the legality of the relevant administrative action.

The significance of procedural fairness protections to the specific goal of this article to offer a relational analysis of non-compellable powers is discussed further below. For the purpose of establishing that relational perspective, the point to emphasise is that a complaint about breach of procedural fairness might in some circumstances be more broadly understood as a symptom of a wider concern about the nature and quality of interactions with repositories of power that particular administrative regimes allow. In this larger picture, it is common to hear administrative lawyers articulate their concerns in terms of the demands of "the rule of law" and the need to avoid "arbitrariness" in the exercise of administrative power. The relational dimensions of such a complaint might be more implicit than explicit. Still, evoking

[7] The further statutory presumption that demands of reasonableness condition the exercise of a procedural discretion might count as another example of this orientation: see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

expectations about how the power held by the repository ought to be exercised from the perspective of the person subject to that power, a charge of "arbitrariness" at least presupposes some existing or future relationship between the two.[8]

These familiar refrains of administrative law are surely compatible with the proposal developed here to examine instances of administrative power through a specifically relational lens.[9] Nonetheless, the point advanced here is that these other registers are, on their own, insufficient to the task of identifying *what* is distinctive about the design and exercise of certain kinds of administrative powers, and *why* we might be concerned about them. It is precisely the possibility that more familiar ways of framing concerns about administrative power might fail to illuminate the distinctiveness of new developments that indicates the need for new approaches. This article suggests that non-compellable powers are such a new development, and one that is especially suited to analysis through a relational lens.

III. Non-compellable Powers: Setting the Scene

The typical structure of non-compellable powers was explained above. First, such powers are vested in the Minister "personally". Secondly, their exercise is conditioned on considerations of the "public interest". Thirdly, that exercise is specified to not give rise to any duty that can be compelled, thus removing the potential operation of the writ of mandamus. As Hammond has described the significance of this third feature:

> 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 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 implies the existence of a duty to determine any application that is made". The implied duty to determine applications is justified by reference to a general law presumption that statutory powers are to be exercised reasonably.[10]

Hammond's emphasis on *procedural* non-compellability – as distinct from *substantive* non-compellability – reflects how this legislative structure has been held to comprise two separate "decision-making" stages: the procedural decision to *consider* exercising the power; and the substantive decision to *exercise* the power.[11] Crucially, the first non-compellable procedural decision is not subject to judicial review. Equally crucially, it is this first non-compellable procedural decision that enables the repository of that power "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".[12]

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[8] This worry might in turn be fleshed out in various ways by other concepts that grasp at problems going to how administrative power is experienced by those who are subject to it. Talk of "grey holes" is one example: see Nabila Lucente, "Grey Holes and Fatal Conundrums" (unpublished research essay, University of Melbourne, 2018), engaging with David Dyzenhaus's idea that broadly framed statutory discretions effectively create legal "grey holes": David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006) 2–3. Also notable is the characterisation of non-compellable powers and other extremely wide discretions in the *Migration Act 1958* (Cth) as "God powers", seen in Liberty Victoria's Rights Advocacy Project, *Playing God: The Immigration Minister's Unrestrained Power* (Liberty Victoria, 2017).

[9] It is notable that the High Court in the seminal case of *Plaintiff S157/2002* suggested a certain equivalence between the idea of "the rule of law" and the specific constitutional point that s 75(v) provides a minimum entrenched guarantee of judicial review: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); [2003] HCA 2. This point finds expression in *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 347 [58]; [2010] HCA 41. It is yet to be seen whether this alignment operates to narrow the idea of "the rule of law" that animates Australian administrative law.

[10] Hammond, n 1, 124–125, quoting *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 17–18 (Mason J).

[11] These two stages equally imply the possibility of decisions *not* to consider or exercise the power: *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 236 [44] (French CJ, Hayne, Crennan, Kiefel and Keane JJ); [2014] HCA 34. See also *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 197 [43], 200 [53] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ); [2014] HCA 29; *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 350 [70]; [2010] HCA 41.

[12] Hammond, n 1, 124.

That it was the purpose of the legislative design of non-compellable powers that no legal rights should accrue to a putative subject of the statutory power within this separate domain of administrative action that operates to "screen-out" requests for the exercise of the statutory power is clear from arguments made by the Commonwealth in the case of *Plaintiff M61*. Before the High Court in that case, the Commonwealth insisted that both the initial assessment and review stages of this adjunct process were undertaken in the exercise of non-statutory executive power under s 61 of the *Constitution*.[13] From this starting point, it followed "that there was no obligation to afford procedural fairness in the conduct of those assessments and reviews, and that it mattered not whether those who undertook the inquiries had misunderstood or misapplied the law".[14]

The High Court ultimately rejected this argument in circumstances where the "screening-out" process was undertaken with respect to persons detained under the statutory authority of the *Migration Act.* This fact of continuing detention in *Plaintiff M61* thus provided a circumstantial legal nexus between the "screening-out" processes and the statute, effectively rendering what would otherwise have been a purely non-statutory process into a process in aid of the exercise of the statutory power to consider exercising the non-compellable powers at issue.[15] Procedural fairness protections were thus held to attach to the relevant non-compellable powers under the Act, including in the adjunct assessment and review processes, because the plaintiffs clearly had an interest – their liberty – in processes that prolonged their detention.

A different conclusion followed in the case of *Plaintiff S10/2011*, where there was no issue of prolonged detention and the question concerned whether procedural fairness was owed in relation to guidelines issued by the Minister for the "screening-out" process. The plurality of Gummow, Hayne, Crennan and Bell JJ held that, although the issuance of guidelines *did* constitute part of the Minister's decision whether to consider the exercise of the non-compellable powers – and thus would in other circumstances support a statutory obligation to afford procedural fairness – the Act displayed the "necessary intendment" to rebut this presumption. This was evident, in part, from the "distinctive nature" of the non-compellable powers as "personal" and "public interest" powers.[16] Heydon J held that, because the Minister could consider the "public interest" to the exclusion of the individual interests of the appellants, there could be no requirement of procedural fairness.[17] French CJ and Kiefel J held that procedural fairness did not apply to processes under the guidelines because, rather than being part of the Minister's decision whether to consider exercising their non-compellable powers, these were executive functions "incidental to the administration of the Act" pursuant to s 61 of the *Constitution*.[18] A further High Court case, *Minister for Immigration and Border Protection v SZSSJ*, in turn confirmed that whether the Minister had "decided" to consider the exercise of a non-compellable power, as allegedly evidenced in that case through a related departmental process, will be a question of fact.[19]

Expressed at its simplest, the law in relation to the availability of procedural fairness protections in association with non-compellable powers might be summarised as follows. If the facts indicate that the Minister made a decision to consider exercising the statutory power – whether by explicit statement, action or some other indication[20] – then procedural fairness protections will be held to apply to the

[13] The nature of these Refugee Status Assessments and Independent Merits Review processes are explained in *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 343–344 [41]–[49]; [2010] HCA 41.

[14] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 336 [15]; [2010] HCA 41.

[15] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 334–335 [9], 337–339 [21]–[27], 341 [34]–[36], 342 [40], 348–351 [62]–[71], 353–354 [76]–[78].

[16] *Plaintiff S10/2011 v Minister for Immigration and Citizenship*, by issuing "guidelines" to aid the screening-out process: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 668 [100]; [2012] HCA 31.

[17] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 671–672 [114], 673 [119]; [2012] HCA 31.

[18] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 655 [51]–[52]; [2012] HCA 31.

[19] *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 200 [55]; [2014] HCA 29.

[20] In *Plaintiff M61/2010* this "fact" was established by the "Minister's announcement": *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 347 [37]–[40], 350–351 [70]; [2010] HCA 41; and (as noted above) in *Plaintiff S10/2011* by issuing

"screening-out" process. This is because, in these instances, the "screening-out" process will be deemed to be authorised by statute for its connection to aiding the Minister in the exercise (or not) of the substantive power to grant the relevant statutory right. The usual presumption that procedural fairness protections condition the exercise of a statutory power will therefore hold. If, however, it is *not* apparent on the facts that the Minister made a decision to consider exercising the power, the legal authority for the screening-out process will (as the Commonwealth argued in *Plaintiff M61*) lie in non-statutory executive power rather than in the statute. In this circumstance, obligations of procedural fairness will *not* be presumptively owed for the reason that such obligations are presently thought to attach to administrative powers sourced in statute, and not to administrative powers generally. This will be so even though an adverse decision at either the initial or review stage of this process is effectively determinative of the putative subject's claim to the statutory right.

The net effect of this legal landscape has been summarised by Hammond as follows:

> 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.[21]

Part V returns to the wider legal landscape within which these conclusions are situated. The task for now is to examine what has just been described in a different register. In the relational analysis to follow, non-compellable powers are specifically examined for how they function to either foreclose the existence of any administrative relationship between repository and subject, or to otherwise ensure that any such relational dimensions remain contingent at best.

IV. Non-compellable Powers: A Relational Analysis

The relational concerns presented by the legislative, administrative and doctrinal architecture reviewed above are built into its very foundations. The combination of the statutory power being reposed in the Minister "personally", and then made non-compellable, establishes the basis from which the administrative relationship between the Minister and the person who applies for its exercise is rendered optional at the outset.[22] Because the named repository of the non-compellable power, the Minister, has no obligations triggered by that application, a legally recognisable relationship between the repository and (putative) subject will only arise should the Minister make *both* the decision to consider the exercise of the power and the decision to exercise the power.

Yet as explained above, in the refugee status assessment context in which non-compellable powers have become especially prevalent the relationship between the named repository of the non-compellable power and its putative subject is not the only administrative relationship at issue. The putative subject's application for the exercise of the statutory power triggers the "screening out" process designed to inform the Minister whether they ought to consider exercising the power at all, and to what effect. The person seeking to have a non-compellable power exercised in their favour is clearly subject to *this*

"guidelines" to aid the screening-out process: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 664–665 [90]–[91] (Gummow, Hayne, Crennan and Bell JJ); [2012] HCA 31.

[21] Hammond, n 1, 132 (emphasis added).

[22] There are few better descriptions of the intention for this optional and contingent relationship than that given by Dr Andrew Theophanous when explaining the nature and effect of a non-compellable power proposed in key amendments to the *Migration Act 1958* (Cth) made in 1989 to the Parliament: "… much depends on the Minister's desire to exercise the amendments to s 64U. If a Minister does not feel like exercising that power very much, that Minister will look at only a small number of cases. On the other hand, a Minister who feels like exercising that power comprehensively may desire to look at a very large number of cases. The situation is left in the hands of the Minister. There is no requirement – and this is very important – for the Minister to look at cases if he does not feel that the compassionate circumstances warrant anything more than a cursory glance. In other words, the Minister can decide to use his own system for determining which of those cases will come to his attention and how to deal with them. That is as it should be": Commonwealth, *Parliamentary Debates*, House of Representatives, 21 December 1989, 3465 (Andrew Theophanous), quoted in *Plaintiff M61/2010E v Commonwealth* [2010] HCATrans 218, 2838–2851.

administrative action – and by extension to the terms of *this* administrative relationship – even if they are only contingently subject to the statutory power itself.

The relational dimensions of this administrative relationship arising in the context of the "screening-out" process are equally characterised by contingency, insofar as whether that relationship is conditioned by obligations of procedural fairness depends on whether the Minister made the (optional) decision to consider exercising the statutory power. As described above, the emerging jurisprudence that grounds the obligation to afford procedural fairness in the *source* of power for this administrative process removes the obligation to afford procedural fairness in instances where it is not apparent on the facts that the Minister made a "decision" to consider exercising the non-compellable power. The point to emphasise here, for a relational analysis, is that administrative relationships convened under the auspices of non-statutory executive power will of their nature be unstructured or, at the very least, have greater potential to be relationally undefined and unanswerable to legal standards otherwise assumed to apply to administrative relationships convened through statutory power.

A relational analysis of non-compellable powers must also assign significance to how the legal status of these "screening-out" or "assessment" processes done under the authority of non-statutory executive power is indeterminate, insofar as they are only sometimes to be regarded as carrying the legal implications that attach to "decisions".[23] As explained above, it is only when it is clear on the facts that the Minister has made a decision to consider exercising a non-compellable power that any "assessment" conducted in connection with that decision will effectively be converted into an artefact that is burdened with an obligation to afford procedural fairness. In carrying that burden, an "assessment" becomes something closer to a "decision" in a legal sense.

The point of interest for present purposes is what this reveals about the role such concepts play in facilitating – or undermining – the possibility of individualisation in the exercise of administrative power. The fact that administrative power affects people, and that administrative decisions are always about *someone*, is acknowledged in administrative law doctrine in a number of ways. It is recognised, for example, in the way that the obligation to afford procedural fairness is presumed to attach to the exercise of (statutory) power apt to affect an individual's interests. It is equally reflected in the rules of standing that govern the legal right to challenge an administrative decision for its legality, where again the person affected is front and centre. The legal conclusions said to follow from the status of "assessments" made in non-statutory "screening-out" processes adjunct to non-compellable statutory powers, however, seem to suggest that much of this individualisation can be lost in the distinction between a "decision" and an "assessment".

The fact that these "assessment" processes have typically been conducted by private contractors, at least in their merits review stage, adds another layer of relational complexity to this picture. Some insight into this complexity can be gained from the case of *Plaintiff M61*. Famously, the High Court in that case left "for another day" the question of whether private contractors involved in administrative decision-making can be "Officers of the Commonwealth" for the purpose of being subject to the Court's entrenched supervisory jurisdiction under s 75(v) of the *Constitution*.[24] Still, there is something important to be learned for a relational analysis of non-compellable powers from arguments advanced by the Commonwealth to support the proposition that the privately contracted assessors were *not* "Officers of the Commonwealth" in the s 75(v) sense.

The point agitated by the Commonwealth was that both the power to conduct the assessment process that "screened-out" applications for the non-compellable power, and the legal duties informing that assessment task, were derived from the contract of employment between each "independent reviewer" and the company that had hired them – in this instance an entity called Wizard People.[25] Wizard People

[23] See Hammond's treatment of this issue: Hammond, n 1, 128–129.

[24] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 345 [51]; [2010] HCA 41.

[25] "The duties owed by independent reviewers are limited to those owed pursuant to the contract between the reviewer and Wizard": Commonwealth and Minister for Immigration and Citizenship, "Submissions of the First and Second Defendants", Submission in *Plaintiff M61/2010E v Commonwealth*, No M61 of 2010, 16 August 2010, 12 [40].

had in turn contracted with the Commonwealth for the provision of the internal review services. It was on the basis of this arrangement that the Commonwealth could argue that it had "no direct legal relationship" with the independent reviewers as a matter of contract law or otherwise. The task undertaken by the independent reviewers at best informed a (possible) exercise of executive power rather than being an exercise of executive power in its own right amenable to supervision under s 75(v) of the *Constitution*.[26] The extent to which the Commonwealth sought to deny the existence of any relevant legal relationship with the independent reviewers is well illustrated in the following passage:

> The Commonwealth has not appointed the independent reviewers to anything. They have no direct legal relationship with the Commonwealth. They are employees of (or, if not, independent contractors to) Wizard. The absence of any direct legal relationship between the Commonwealth and the independent reviewers is confirmed by the provision in the contract by which Wizard undertakes that neither it nor its personnel will represent themselves as "being Personnel of the Department, or as otherwise able to bind or represent the Department".[27]

Whatever might be made of this argument as a matter of fact or law,[28] what is clear is that the interconnected contractual arrangements through which the Commonwealth sought to be insulated from any direct legal relationship with those charged with "screening-out" applications for the exercise of a non-compellable power had the effect of furthering the relational distance between the ultimate repository of the statutory power and the person who applied for its exercise. This relational attenuation was and is a direct product of design, beginning with the non-compellability of the power itself, and continuing through a structure of contractual arrangements designed to replicate and consolidate that contingency by other means.

The first comment that can be made in response to this picture, therefore, concerns the essential consistency of the internal sociology of non-compellable powers across their statutory design and the administrative complex that enlivens these powers in practice. The foundationally optional relationship between the repository of a non-compellable power and the person applying for its exercise that is secured through the statutory design of the power is replicated in the contingency of procedural fairness obligations within the architecture of the adjunct "screening-out" processes designed to inform the exercise (or not) of that statutory power. The indeterminate source of authority (statutory or non-statutory) for these processes bears directly upon relational demands that might otherwise be made within them, at the same time as an associated framework of contracts operates to further restructure legal relationships that might otherwise be assumed. The pattern is clear: at precisely the junctures where recognisable legal relationships might manifest, measures are taken to ensure their dilution or severance.

What is ultimately produced by this arrangement of legislative, administrative, conceptual and contractual devices is two separate but closely related forms of executive control. The first is control of the terms of the administrative relationship itself. The second is control of the terms of its supervision. The connection between the two is not accidental nor, indeed, unexpected. Difficulties that plague a subject's capacity to establish the necessary elements of an application for judicial review in relation to the exercise of a particular administrative power often reflect a corresponding problem in their standing before the administrative state more generally. This conjunction suggests the need for a deeper analysis

[26] Commonwealth and Minister for Immigration and Citizenship, "Submissions of the First and Second Defendants", Submission in *Plaintiff M61/2010E v Commonwealth*, No M61 of 2010, 16 August 2010, 12–13 [40]–[43].

[27] Commonwealth and Minister for Immigration and Citizenship, "Submissions of the First and Second Defendants", Submission in *Plaintiff M61/2010E v Commonwealth*, No M61 of 2010, 16 August 2010, 2–3 [6], fn 3.

[28] This and other aspects of the Commonwealth's account of the legal effect of the relevant contractual structure framing the "screening-out" process were strongly contested by counsel for Plaintiff M69, Stephen McLeish SC, whose written submissions in reply to the Commonwealth argued that there was "no evidence of a contract" between the relevant independent reviewer of Plaintiff M69's claim to refugee status and Wizard People, or any other evidence of "Wizard People taking any steps to engage her or Wizard People directing her": Plaintiff M69 of 2010, "Plaintiff's Written Submissions in Reply", Submission in *Plaintiff M61/2010E v Commonwealth*, No M69 of 2010, 19 August 2010, 2 [8]. The submissions further argued that the direct legal nexus between the assessors and the Commonwealth was evidenced in how the contract between the Commonwealth and Wizard People was varied to include the name of the independent reviewer in its schedule, alongside the names of other independent reviewers on a "'Panel' to which the Minister had made appointments": at 2 [9]. See also Plaintiff M69 of 2010, "Plaintiff's Written Submissions", Submission in *Plaintiff M61/2010E v Commonwealth*, No M69 of 2010, 3 August 2010, 9 [44].

of how (if at all) available doctrinal resources call the relational qualities of administrative power to account.

V. Non-compellable Powers in Context: A Relational Perspective on Current Doctrine

The complexity of the case law that has engaged with non-compellable powers so far reflects the corresponding complexity of the operational structure of the powers themselves. As is clear from the foregoing, two main areas of doctrine have shaped the judicial treatment of this legislative device so far: the question of the availability of procedural fairness protections; and whether non-compellable powers conflict with the *Constitution*. This part teases out some of the features of the current law in relation to these questions in order to assess the responsiveness of current doctrine to the relational dimensions of non-compellable powers and administrative power more generally.

A. Non-Compellable Powers and Procedural Fairness

Following the seminal case of *Kioa v West*,[29] by the mid-1980s procedural fairness protections in Australian administrative law were presumed to apply in connection with an exercise of statutory power apt to affect an individual's interests, broadly understood. In the time since *Kioa v West*, the idea that demands of procedural fairness accompany the exercise of administrative power, unless expressly modified by statute, has become a basic assumption of Australian administrative law.

Yet insofar that procedural fairness has arguably become the most robust administrative law protection of all, it has not assumed that status as a presumption of law per se. As explained in Part III, a distinction based on the source of the power presumptively conditioned by an obligation to afford procedural fairness – statutory or non-statutory – has proven critical to the capacity of persons who seek to engage with non-compellable powers to successfully challenge the legality of "screening-out" processes adjunct to the (optional) exercise of the statutory powers.

The significance of this limitation lies in how a complaint about procedural unfairness is effectively the only legal argument available for persons entangled in the schema of non-compellable powers, at both of the levels of its operation. The unstructured nature of the statutory discretion reposed radically reduces the kinds of administrative law complaints that might be raised against the conditions in which that discretion is exercised, should it be enlivened. But much more significant is how an adverse "assessment" in the "screening-out" process is effectively determinative of the applicant's rights. The contingent availability of procedural fairness protections within this process can therefore prove decisive to the person applying for the exercise of the statutory power. And yet, as Hammond observes, "the Court has conspicuously avoided acknowledging that the individual interests that are affected by adverse statutory decisions are also affected by decisions that 'filter out' requests without any statutory decision".[30]

It is helpful to recall some fundamentals about rules of procedural fairness when reflecting on this picture. Those rules take their roots from philosophical traditions associated with the idea of "natural justice", and still more specifically from the idea of the "naturally just". According to Aristotle, the demands of the "naturally just" were not to be discovered by reference to "higher" moral rules or the content of the positive laws laid down by the sovereign. Rather, they were to be taken from an intelligent and reasonable examination of what was intrinsic to, or immanent in, the situation at hand – in "the very nature of the thing".[31]

If this idea is brought to the modern-day rules of procedural fairness in administrative law, its counsel is that both the implication and the content of those rules should ultimately be shaped by the circumstance of power itself. Yet what is reflected in how the law presently applies to the legislative and administrative

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

[30] Hammond, n 1, 131–132.

[31] For a recent treatment of the idea of the "naturally just", see Garrett Barden and Tim Murphy, *Law and Justice in Community* (OUP, 2010) Ch 4, especially 72–73.

schema associated with non-compellable powers is the idea that the demands of procedural fairness are derived not from actual circumstances of administrative power, but from features of the design and source of the legal authority for that administrative power. This state of affairs is curious at best, and supports Hammond's conclusion that any doctrinal development in this area must articulate "a principled basis for 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".[32]

Beyond possible doctrinal developments of this kind, the relational implications of other choices that have been made in the development of the common law of procedural fairness since *Kioa v West* also warrant attention. The recent demise of the doctrine of procedural "legitimate expectations" in association with the implication of the duty to afford procedural fairness is of particular interest here.[33] The idea carried by that doctrine was that the common law duty to afford procedural fairness ought to attach not only to administrative decisions apt to directly affect a person's "rights" or "interests", but also their "legitimate expectations".[34] That is, where a representation – such as a policy statement, undertaking, regular pattern of conduct, or even the ratification of a treaty[35] – could reasonably give rise to an expectation of some prospective benefit, privilege or interest, the doctrine of legitimate expectations held that a person holding that expectation should have a right to a hearing before it was not fulfilled.[36]

The demise of the doctrine of legitimate expectations in Australian administrative law is to a significant extent the product of the view that the obligation to afford procedural fairness is well protected by the presumption that procedural fairness conditions the exercise of a statutory power apt to affect an individual's interests, broadly understood. The apparent breadth of that category arguably makes the additional offering of the legitimate expectations doctrine redundant, insofar that what might have been caught by the idea of legitimate expectations can readily be absorbed within it.[37] Be that as it may, it is also notable that the demise of the doctrine also fits neatly with the ascendance of what Bateman and McDonald have described as a "statutory" approach to judicial review in which extra-statutory considerations have no place.[38] A subject's legitimate expectations about how an administrative power would be exercised is a prime example of such an extra-statutory consideration.[39]

The points of principle underpinning these explanations for the demise of the doctrine of legitimate expectations surely have merit. Still, from a relational perspective it is striking that the demise of the doctrine has collided with the emergence of new developments in the design of administrative power of the kind seen in non-compellable powers, even if this is merely coincidental. Whatever its alleged excesses and however awkward its fit with an increasingly statute-centred understanding of the law of judicial review, the doctrine of legitimate expectations as a trigger for implying a duty to afford procedural fairness recognised that the exercise of administrative power is an inherently relational phenomenon. It recognised that there are implications, for a subject of administrative power, of standing in a relationship with the repository of that power. Through the doctrine of legitimate expectations, the

[32] Hammond, n 1, 139–140 (emphasis added). See also Hammond's observations on how the administrative complex associated with non-compellable powers departs from standards of administrative justice: at 132–133.

[33] Secured in the case of *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130; [2014] FCAFC 137, see especially the history traced at [30] (Kiefel, Bell and Keane JJ). *WZARH*, however, contains some (small) hints that the bearing of the legitimate expectations doctrine on the content of procedural fairness might still have some life in it.

[34] *Kioa v West* (1985) 159 CLR 550, 582–584 (Mason J).

[35] See *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[36] *Kioa v West* (1985) 159 CLR 550, 582–585 (Mason J); *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 679–682 (McHugh J); *Century Metals & Mining NL v Yeomans* (1989) 40 FCR 564, 589–593 (Fisher, Wilcox and Spender JJ). The doctrine as it developed also made clear that legitimate expectations might equally inform the content of what constitutes procedural fairness in the given circumstances: see *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

[37] *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 400 [30]; [2014] FCAFC 137.

[38] See the compelling analysis by Bateman and McDonald of this development: Will Bateman and Leighton McDonald, "The Normative Structure of Australian Administrative Law" (2017) 45(2) *Federal Law Review* 153.

[39] See the analysis of this point in Stephen Gageler, "Legitimate Expectation: Comment on the Article by the Hon Sir Anthony Mason AC KBE" (2005) 12(2) AJ Admin L 111, 113.

subject was effectively able to say: "I am in your process of exercising power. I am affected by what you do. I am at least owed the opportunity to say something before you head down a road that, on your own indications, I didn't expect you to head down."

In pushing an analysis of the troubles of procedural fairness in relation to non-compellable powers in the direction of the doctrine of legitimate expectations, the point is not that this feature of the development of the common law of procedural fairness in Australia should necessarily be reinstated. Rather, the purpose is to encourage deeper reflection on *what* has been lost in the demise of that doctrine as part of a wider inquiry into what might need to be reclaimed or redeveloped in the common law of procedural fairness if it is to respond to the attenuated relational conditions that increasingly arise in connection with the design of certain administrative powers.

B. Non-Compellable Powers and the Constitution

There can be little doubt that the three key features of the legislative design of non-compellable powers together limit the efficacy of judicial supervision of their exercise. Conditioning the power upon considerations of the "public interest" is designed to trigger a deferential posture on the part of the courts to the judgment of the Executive on matters falling within this essentially political concept. Reposing the power in the Minister "personally" signals that Parliament has determined that the power should only be exercised by a repository who is also directly answerable to modes of political accountability. The third and central feature of non-compellability then operates to exclude the availability of the remedy of mandamus by reversing the presumption that a power reposed in an administrative decision-maker is to be exercised upon an application to do so.

As noted at the outset, none of these features have yet prompted the High Court to regard the legislative design of non-compellable powers as generating an unconstitutional curtailment of supervisory jurisdiction for jurisdictional error in administrative actions taken in association with their exercise. The constitutional standard in view when this assessment has been made is the minimum entrenched provision of judicial review contained in s 75(v) of the *Constitution*.[40] The increasing significance of this constitutional guarantee to the resolution of judicial review cases explains why many have come to speak of the "constitutionalisation" of Australian administrative law.[41]

The Court's assertion that a minimum entrenched provision of judicial review is contained in s 75(v) has proven very effective in the face of legislative measures that have attempted to curtail the availability and efficacy of supervisory jurisdiction over administrative action.[42] The tools in response to such efforts have included direct invalidation of offending legislative provisions,[43] and the application of techniques of statutory interpretation that proceed from a foundational understanding that the Parliament did not and would not seek to oust judicial review of administrative action involving jurisdictional error.[44] Yet what is common to these cases is that an intention to limit the supervisory jurisdiction of courts is clear on the face of the statute.[45]

[40] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); [2003] HCA 2.

[41] See, eg, Mortimer, n 5; McDonald, n 5.

[42] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

[43] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1; [2017] HCA 33.

[44] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

[45] For example, the privative clause in *Plaintiff S157/2002* provided, inter alia, that a relevantly defined "privative clause decision" must not be challenged, appealed against, reviewed, quashed or called in question in any court: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 497 [48]; [2003] HCA 2. The offending provision in *Graham v Minister for Immigration and Border Protection* concerned certain kinds of confidential information, and sought to provide that if the information was communicated to an authorised migration officer, that "officer must not give the information in evidence before a court, a tribunal, a Parliament or parliamentary committee or any other body or person": *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 354–355 [14]; [2017] HCA 33.

A different story has, however, unfolded when the legislative measure in question does not *directly* address the jurisdiction of courts, but rather reposes wide powers in the Executive that obstruct but do not necessarily remove the prospect of judicial supervision. Again, *Plaintiff M61* is the case in point. In rejecting the argument that the non-compellable powers in question ought to be declared invalid for encroachment upon s 75(v), the Court stated that "[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise".[46] This determinative conclusion was noted in Part I. If, however, we are to better understand the Court's response to legislative devices that operate to repose essentially unstructured and non-compellable discretions, it is important to pay closer attention to the kinds of arguments put in support of the proposition that the design of non-compellable powers raises questions of a constitutional nature. These arguments were put by counsel for Plaintiff M69, and were summarised by the Court as follows:

> The argument proceeded from these premises to a conclusion that, not only will the courts declare and enforce the limits of power, there must exist in every case limits on power that can be enforced. More particularly, it was submitted that there cannot be a grant of power on terms of the kind found in s 46A(7): that the person to whom the power is granted need not consider its exercise, whether asked to do so or in any other circumstances. Such a power, it was submitted, would be an arbitrary power. Further support for the argument was sought by reference to three other considerations. First, reference was made to the notion of the rule of law and the well-known dictum of Dixon J in *Australian Communist Party v The Commonwealth* that the *Constitution* is framed in accordance with many traditional conceptions of which some, the rule of law, are simply assumed. Second, reference was made to what was said in *Kirk v Industrial Court (NSW)*: that to deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court "would be to create islands of power immune from supervision and restraint". Third, reference was made to the uncontroversial proposition that "a non-judicial body cannot determine the limits of its own power".[47]

What is striking about this bundle of (ultimately rejected) arguments about how non-compellable powers might be thought to impermissibly encroach upon the constitutional guarantee of supervisory jurisdiction under s 75(v) is how they seek to expand the range of considerations that might bear upon the constitutional limits of administrative power. The arguments engage a wide range of conceptual, institutional and doctrinal ideas that speak to what it means to possess, and what it means to be subject to, administrative power authorised under the *Constitution*. Moreover, even though framed in connection with it, it is notable that only some of the arguments directly address the integrity of the Court's constitutionally guaranteed supervisory jurisdiction. Still, resisting these engagements, the Court held that the content of the relevant non-compellable provision was readily expressed,[48] that its repository did not determine its legal limits, that no "island of power" was created, and that in all other relevant constitutional respects it did not prevent the exercise of supervisory jurisdiction under s 75(v).[49]

Several comments might be made in relation to this picture. There can be little doubt that when the Parliament enacts a legislative provision that expressly seeks to limit the supervisory jurisdiction of courts it will constitute a much more overt institutional attack on the judiciary than when the Parliament vests an especially wide discretion towards which the gaze of supervisory jurisdiction will necessarily be impaired but not wholly removed. Even if this is so, the point to emphasise for present purposes is that, from the perspective of the person subject to that discretion, there is functionally no difference between the two. If there is nothing that such a person can do about the over-reach or under-reach of administrative power, differences of legislative formulation will be of little significance.

That this experiential dimension of non-compellable powers has failed to come under effective constitutional scrutiny through the lens of s 75(v) invites the question of whether such is the only constitutional inquiry

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[46] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 347 [57]; [2010] HCA 41.

[47] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 346 [54]; [2010] HCA 41 (footnotes omitted).

[48] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 346–347 [56]; [2010] HCA 41.

[49] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 347 [58]; [2010] HCA 41.

that can be made about the design and exercise of this species of administrative power, or indeed about administrative powers more generally.[50] Questions going to design and operation of the administrative state are considered to be matters for the Legislature and Executive respectively. It is difficult to challenge this logic within a constitutional order committed to the principle of parliamentary supremacy. Still, the constitutional fate of non-compellable powers to this point indicates why it is important to be alive to the significance of this logic in the context of the kinds of legal complaints that can be made about the design and operation of administrative power. This in turn invites an important question. If the kinds of relational concerns arising in association with non-compellable powers outlined in Part IV can only be seen through the lens of their implications for constitutionally guaranteed supervisory jurisdiction, could there be other ways of looking at this crucial constitutional protection that could bring it closer to such concerns?

This inquiry ultimately reaches beyond the specific example of non-compellable powers to the wider question of whether we have sufficiently mined the content of s 75(v) to enable its constitutional function to be performed in the face of the increasingly complex design and performance of contemporary administrative government. In reflecting on this wider question, it is helpful to return to how the High Court in *Plaintiff M61* left the question of whether private contractors can be "Officers of the Commonwealth" for the purpose of being subject to supervisory jurisdiction under s 75(v) of the *Constitution* "for another day". If on that "other day" this threshold constitutional designation is indeed extended to private contractors involved in the exercise of Commonwealth administrative power, such would involve a significant rereading of one of the apparent criteria that found the jurisdiction offered by s 75(v). The point to contemplate for present purposes is what else might be possible in that rereading. Might there be other elements of s 75(v), or indeed other ways of envisaging its overarching purpose, which could aid more focused consideration of *how* administrative powers bear upon those who are subject to them?

The effort by counsel for Plaintiff M69 in *Plaintiff M61* to describe the purpose of s 75(v) in terms of the prevention of "arbitrary power" is notable here.[51] As observed above, there is an inherently relational aspect to the charge that administrative power has been or stands to be exercised arbitrarily. It might also be possible to argue that the domain of s 75(v) should be more closely associated with the position of the unmentioned person aggrieved who triggers its jurisdiction. These are just two ideas, and there are surely others. The point in raising them is to encourage reflection on *how* current constitutional doctrine understands, articulates, promotes and limits the protections offered by s 75(v) for persons affected by administrative power. Such reflection would appear warranted in light of how this crucial protective provision presently seems to have little to offer in response to innovative designs of administrative discretion of the kind seen in the example of non-compellable powers.

VI. Conclusion

To the lawyer's eye, the distinguishing feature of a non-compellable power is that its exercise cannot be enforced. The fact that such powers typically operate in addition to standard processes for the grant of statutory rights is also important. Nothing said in the foregoing analysis is intended to distract attention from either of these features. Rather, the point of the foregoing has been to show that there is much more to be said in response to this unorthodox form of administrative power. The contingent character of administrative relationships and relationally significant administrative law protections generated by

[50] Burton Crawford has developed a body of scholarship investigating constitutional resources that might produce limitations on the scope of power that can be conferred on the Executive by the legislature. See, eg, Lisa Burton Crawford, "The Entrenched Minimum Provision of Judicial Review and the Limits of 'Law'" (2017) 45(4) *Federal Law Review* 569; Lisa Burton Crawford, "Can Parliament Confer Plenary Executive Power? The Limitations Imposed by Sections 51 and 52 of the Australian Constitution" (2016) 44(2) *Federal Law Review* 287.

[51] In oral argument before the Court, Mr McLeish SC embellished this point through the argument that "the *Constitution* does not allow for a person holding a power of this kind just to feel like whether to exercise it or not, and where there are limits placed on the power and an attempt has been made by a person to engage the power, to have the Minister exercise the power, the Minister is required to do more than simply decide whether he feels like it or not": *Plaintiff M61/2010E v Commonwealth* [2010] HCATrans 218, 2855–2860. In written submissions the argument was put in terms of how "the Minister is in effect empowered to act under s 46A(2) capriciously, arbitrarily or unfairly, free from judicial restraint": Plaintiff M69 of 2010, "Plaintiff's Written Submissions", Submission in *Plaintiff M61/2010E v Commonwealth*, No M69 of 2010, 19 August 2010, 5 [18].

the design and operation of non-compellable powers raises irretrievably normative questions about the relational qualities we might expect of administrative action, as a matter of law. The phenomenon at issue is distinctive, relatively new and strains the registers through which lawyers have previously sought to articulate and evaluate the limits of administrative power.

In an effort to grapple with this complex picture, the foregoing analysis commenced from the idea that to possess and exercise administrative power in relation to a person is to stand in a governing relationship with them. Every design of administrative power sets down a frame for a potential or actual relationship between the repository of administrative power and the person subject to that power. If developments occurring in this space raise concerns – as is the case for the administrative complex associated with non-compellable power – then a suitable lens must be brought to their examination and evaluation. From this perspective, new observations on current, former and future practices might be generated, and new responses to these practices might be offered.

It is fitting to conclude with two such observations about the wider context in which the relational worries associated with non-compellable powers arise. The first concerns how other key concepts in the Australian administrative law toolkit operate to keep the relational dimensions of administrative power at the margins of legal examination. Here we might especially pay attention to the idea of "jurisdiction", which has come to dominate the conceptual landscape of Australian administrative law, and which offers little by way of relational subtlety. To have jurisdiction, it seems, is to possess the legally recognised authority to exercise power. So understood, there seems to be little to distinguish the idea of "jurisdiction" from that of "authorisation". Nonetheless, to be authorised to exercise power in administrative law is to be authorised to possess and exercise administrative power over *someone*. The relational dimension is always immanent, indeed inevitable, whether or not it is expressly acknowledged.

Secondly, we might also reflect on how far the complex of practices associated with non-compellable powers appears to depart from the impulse to improve the standing of subjects of administrative power in their relations with the Australian administrative state advanced in the New Administrative Law reforms of the 1970s. Within this picture, the subject of administrative power was envisaged as an active player in the administrative order, to whom intelligible and accessible avenues for participating in decisions affecting them ought to be available as a matter of law. The New Administrative Law reforms were thus squarely concerned with what has been described above as the internal sociology of administrative power, at least at the level of a subject's interactions with the wider administrative state.

Yet what the New Administrative Law reforms did *not* do was make demands on the design of administrative power itself. The reason for this is readily found in our constitutional arrangements and was noted above – questions going to the design of administrative power, at least in its statutory form, belong to the legislature. Still, it does not seem a stretch to suggest that the enfranchised vision of the subject's interactions with the administrative state that was pursued in the New Administrative Law reforms at the very least rested on assumptions, perhaps even expectations, that administrative powers designed by Parliament would be appropriately bounded, limited and intelligible to those subject to them.[52]

The relational analysis of non-compellable powers offered here might not resolve these questions, at least on its own. But in encouraging a new way of seeing the nature and effects of this "form of grant of power not unknown to the federal statute book, at least in recent years",[53] it is hoped that it might go some way towards posing and refining the next round of questions to be asked about how administrative law attends to the quality of relationships constituted by the design and exercise of administrative power.

[52] A concern of precisely this nature was expressed by Chris Evans, then Minister for Immigration and Citizenship: Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 19 February 2008, 31 (Chris Evans), quoted in Liberty Victoria's Rights Advocacy Project, n 8, 1. The extent to which non-compellable powers have been normalised in the legislative design of administrative power is therefore striking. On that score it is notable that the presentation to Parliament of recent legislative amendments that saw further non-compellable powers entrenched in the *Migration Act 1958* (Cth) by the then responsible Minister made no mention of their non-compellable features: see Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 2011, 10945–10948 (Chris Bowen, Minister for Immigration and Citizenship) (Second Reading Speech, *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011* (Cth)).

[53] *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 347 [56] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); [2010] HCA 41.