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Recent developments

Katherine Cook

The Australian Competition and Consumer Commission (ACCC) and the Office of the Australian Information Commissioner (OAIC) have jointly released the Compliance and Enforcement Policy for the Consumer Data Right.

The policy outlines the approach that the ACCC and the OAIC have adopted to encourage compliance with, and address breaches of, the Consumer Data Right regulatory framework. The policy has been developed following consultation with current and future data holders and recipients.

'The Consumer Data Right is an important reform that will give consumers greater access to and control over their data', ACCC Commissioner Sarah Court said.

'With this important reform come significant and serious safeguards.

'It is the responsibility of each Consumer Data Right participant to be fully aware of their regulatory obligations or face scrutiny by the ACCC and the OAIC', Ms Court said.

'Today's release of the Compliance and Enforcement Policy helps clarify these obligations as people prepare to participate in the Consumer Data Right from July 2020.'

The ACCC and OAIC have adopted a strategic risk-based approach to compliance and enforcement, which focuses on building consumer confidence in the security and integrity of the Consumer Data Right system.

'My office and the ACCC will work in partnership to monitor and actively enforce participants' compliance with their regulatory obligations, including the privacy safeguards', Australian Information Commissioner and Privacy Commissioner, Angelene Falk, said.

'A strong regulatory framework is in place to protect privacy and build public confidence in the Consumer Data Right, and the Compliance and Enforcement Policy provides increased certainty about how we will uphold these consumer protections.

'Economic reforms like the Consumer Data Right which build consumer confidence in the use of their personal information and encourage innovation will be critical to our recovery after the COVID-19 outbreak', Commissioner Falk said.

The ACCC and OAIC will regularly review the Compliance and Enforcement Policy so that it continues to reflect best practice regulation and evolves with the Consumer Data Right regime.

Principles

The ACCC and OAIC will adopt a strategic risk-based approach to compliance and enforcement which recognises the joint regulatory model and a requirement to deal with

breaches of the legislation efficiently and effectively. Both agencies will act with integrity, professionalism and in the public interest, guided by the principles of accountability, efficiency, fairness, proportionality and transparency.

Compliance monitoring tools

The ACCC and OAIC will use a wide range of information sources and monitoring tools to assess compliance and identify potential breaches of the Consumer Data Right legislation (including Privacy Safeguards, Consumer Data Right Rules and Data Standards). These sources and tools will include:

- stakeholder intelligence and complaints
- business reporting, which will include summaries of Consumer Data Right complaint data
- audits and assessments
- information requests and compulsory notices.

Enforcement options

There are a range of enforcement options available to respond to and resolve breaches of the Consumer Data Right legislation (including the Privacy Safeguards, Consumer Data Right Rules and Data Standards). These include:

- administrative resolutions, whereby a business provides a voluntary written commitment to address a non-compliance issue
- infringement notices and court-enforceable undertakings
- suspension or revocation of accreditation by the ACCC (as the accreditor)
- determination and declarations, using the OAIC's power to make a determination following an investigation, to either dismiss or substantiate a breach of a Privacy Safeguard or Rule relating to the privacy or confidentiality of Consumer Data Right data
- court proceedings (which may result in penalties, injunctions and other orders).

<https://www.oaic.gov.au/updates/news-and-media/consumer-data-right-compliance-and-enforcement-policy-released/>

Complaints about nepotism in Victorian government schools 'continue unabated'

Family members and associates of principals in Victorian government schools continue to be hired without principals properly declaring or managing their conflicts of interest, the Victorian Ombudsman has warned.

Tabling her Investigations into allegations of nepotism in government schools report in the Victorian Parliament, Ombudsman Deborah Glass said she hoped her report would draw attention to the problem and its consequences.

‘Over the past decade, the Department of Education has built a comprehensive policy framework including detailed advice about conflicts of interest’, Ms Glass said.

‘Despite this, complaints about nepotism in schools continue unabated.

‘Troublingly, many investigations continue to find that jobs and contracts are given to family members, associates or related businesses of principals or other senior staff without their conflicts of interest being declared or managed.’

Her report includes three case studies investigated by her office over the past year:

- a principal who instigated the engagement of their partner for almost $80 000 of maintenance work, without declaring a conflict of interest or advertising the position
- a principal who suggested two of their adult children be employed in casual support roles, without initially declaring a conflict of interest to the department
- a principal who endorsed the appointment of one of their children to a fixed-term teaching role, without letting the department know of their conflict until a year later.

Ms Glass welcomed efforts by the department to better communicate its integrity framework. She found the department’s policies were spread across multiple documents on multiple sites, and all of the principals were unclear about their obligations.

‘Mostly, the subjects of these allegations were well-intentioned, busy people trying to solve problems, who got it wrong’, Ms Glass said.

‘The cost to these individuals was high’, Ms Glass said. ‘Their actions led people to question their integrity. The suitability of their family members for the roles to which they were appointed was questioned.’

‘The inevitable effect is that confidence in merit-based decisions at the schools was compromised.’

Ms Glass said she hoped her report would assist the department in getting the message through to principals and senior staff.

‘My message to principals and others is simple: Leadership starts at the top.

‘If you can, avoid hiring your partners, children, friends or other associates.

‘In any event, be aware of the rules — and the consequences of getting it wrong.’

<https://www.ombudsman.vic.gov.au/our-impact/news/nepotism-schools/>

Management of child safety complaints — second report

The Queensland Ombudsman’s report, *Management of Child Safety Complaints — Second Report: An Investigation into the Management of Child Safety Complaints within the Department of Child Safety, Youth and Women*, was tabled by the Honourable Curtis Pitt MP, Speaker of the Queensland Parliament.

This report follows an earlier Ombudsman investigation into the then Department of Communities, Child Safety and Disability Services' (now the Department of Child Safety, Youth and Women) management of child safety complaints. While the 2016 investigation focused on the accuracy of the then department's complaints data, this investigation focused on how the department manages child safety complaints and its interaction with the Office of the Public Guardian (OPG).

The department's complaints management system is crucial to ensuring any clients' concerns with the actions and decisions of the department in administering Queensland's child protection system can be raised and rectified appropriately. This investigation found that the current complaints management system is not an effective mechanism to rectify poor decision-making or improve business practices.

The investigation identified concerns about the accessibility of the department's complaints management system. The department's attempts to resolve clients' concerns locally, before classifying them as a complaint, often resulted in a drawn-out cycle of interactions with agency officers without effective resolution.

Further, the department miscategorised many complaints as 'case issues' rather than complaints. This often resulted in a frustrating cycle of interactions for the department's clients before their concerns were responded to as a complaint.

'As a result of the failures in its complaints handling, the department is almost certainly under-reporting its child safety complaints and is potentially wasting resources through duplication of effort', said Mr Clarke.

Even when a client's concerns were handled as a complaint, the department's complaints-handling process was unnecessarily complex and confusing. This resulted in frustration, delay, and a lack of clarity about the outcome of the complaint.

Decision-making in the management of complaints was a key concern identified in the investigation. A lack of clarity about how a decision should be made and who should be the decision-maker has resulted in poor outcomes for complainants.

The department has also failed to maintain a meaningful reporting framework to identify systemic issues in complaints management and child safety administrative decisions generally. This undermines a key benefit of effective complaints management, to identify improvements to current practices and uncover problematic patterns in administrative decisions.

The OPG refers child safety related complaints received by its Community Visitors to the department. The 2016 investigation identified a need for better coordination between the OPG and the department. While both agencies have taken steps towards better coordination, further steps are required.

The availability of accessible, fair and efficient complaints handling is critical to the proper operation of the child safety system in Queensland. The department's current complaints management system is not meeting that need. This report makes recommendations aimed

at assisting the department to implement best practice across all facets of complaints management.

<https://www.ombudsman.qld.gov.au/about-us/media/media-release-management-of-child-safety-complaints-second-report>

Retired Supreme Court judge heads South Australian royal commission review

Retired Supreme Court judge the Hon Ann Vanstone QC has been appointed to lead a review of the legislation governing royal commissions undertaken in South Australia.

Attorney-General, Vickie Chapman, said that, in the 103 years that the Royal Commissions Act 1917 had been in place, there had never been a substantive review of the laws.

'Obviously there have been a number of amendments to the Act — but the most recent, substantial changes were made in the 1990s', Ms Chapman said.

'Given there will always be matters of public interest that warrant independent scrutiny, and the immense cost of undertaking a royal commission, it's appropriate to review the laws that exist around Royal Commissions to ensure they offer the most effective means of inquiry.'

Attorney-General Chapman said the review would also consider:

- the scope of powers available to royal commissioners
- how offences relating to commissions should be prosecuted
- suggestions for legislative reform proposed or raised under previous royal commissions.

'Ms Vanstone will also look at whether there is need for alternative forms of inquiry that offer greater flexibility, less formality and greater cost-effectiveness, and the powers that could apply in such an instance', Ms Chapman said.

'Any alternatives could ensure we retain the independence and rigour of the commission, while embracing a more flexible approach to such matters.

'Ms Vanstone has had a long and distinguished career both in the public sector and on the District and Supreme Courts and I believe she has a strong understanding of the issues she will be considering.

'I look forward to considering her findings in due course.'

<https://www.agd.sa.gov.au/newsroom/retired-supreme-court-judge-heads-royal-commission-review>

Calls to end Indigenous deaths in custody

The Australian Human Rights Commission is shocked and saddened by the death in custody of Black American man George Floyd and the violence that has since erupted in the United States of America.

The global focus on these events reminds Australians of the unacceptably high rates of incarceration and deaths in custody of Aboriginal and Torres Strait Islander peoples.

This was brought into sharp focus yesterday when a police officer in Sydney injured an Indigenous teenager, prompting an internal police investigation.

Australia lost 432 Indigenous people in custody since the 1991 Royal Commission into Aboriginal Deaths in Custody.

First Australians are the most incarcerated people on the planet, making up just 3 per cent of the population but 28 per cent of our prison population.

'We continue to see the over-policing of Australian Indigenous people. Many are introduced to the justice system at a young age and remain in its grip for life. Overincarceration is arguably the most prominent example of generational and systemic discrimination.

'The injustice facing Aboriginal and Torres Strait Islander peoples is at the forefront of my mind and has been, long before the images of civil unrest and violence from the US dominated our television screens in the past week', said Aboriginal Torres Strait Islander Social Justice Commissioner, June Oscar.

'As we watch with concern at the developments in the USA, we should reflect on the task that remains at hand in Australia and undertake the long overdue reforms to our own justice system.

'For almost 30 years, we have referred to the Royal Commission and its recommendations, many that remain unimplemented. Meanwhile, Indigenous people continue to die in our so-called justice system.

'I know there is genuine desire for change across our justice system and within the police force.

'But it will take the courageous leadership of our governments to commit to systems reform and not think the change we need will happen through individual actions alone', said Commissioner Oscar.

The Commission calls for the recommendations of the Australian Law Reform Commission's 2018 report, *Pathways to Justice*, to be fully implemented.

Race Discrimination Commissioner, Chin Tan, said, 'The unrest we are seeing in the US right now is deeply saddening and serves as a warning of what is at stake when authorities fail to prevent injustice and unequal treatment of people from occurring.

'Social cohesion depends on authorities honouring the trust placed in them to treat all people equally, with dignity, respect and fairness, regardless of race or ethnicity', Mr Tan said.

The Commission also calls for all jurisdictions to implement wide-spread strategies and reforms to the justice system, including:

- establishing independent complaints and investigation mechanisms for police misconduct and use of force
- ensuring appropriate monitoring of places of detention, in line with the UN Optional Protocol to the *Convention against Torture and other Cruel, Degrading Treatment and Punishment* (OPCAT) — including monitoring of police holding cells, transport and detention facilities
- working with Indigenous peoples to develop justice reinvestment programs.

'Robust, independent oversight and monitoring is critical to ensure accountability and public trust in the police and justice system', said Commissioner Oscar.

'The approach taken by governments to address the over-representation of Indigenous peoples in our justice system stands in stark contrast with the partnership approach and commitments made to closing the gap on health, education and employment.

'Let us pause, express our grief for our friends in America, and redouble our efforts to address our homegrown challenges. The answers are known and Indigenous people are standing ready to work with government to prevent this crisis in our communities', said Commissioner Oscar.

<https://humanrights.gov.au/about/news/calls-end-indigenous-deaths-custody>

Recent decisions

The palace papers

Hocking v Director-General of the National Archives of Australia

[2020] HCA 19 (11 February 2020)

(Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ)

Sir John Kerr was the Governor General of Australian from 11 July 1974 until 8 December 1977.

Throughout that tumultuous period in Australian constitutional and political history, Sir John engaged in 'personal and confidential' correspondence with Queen Elizabeth II. In 1978, on the instructions of Sir John, the correspondence was deposited with the National Archives of Australia (the Archives) by Mr David Smith, the Official Secretary to the Governor-General, in fulfilment of an arrangement he had made with the then Director-General of the Archives (the Director-General).

The letter of deposit that Mr Smith wrote to the Archives in his capacity as Official Secretary included the following terms: 'In accordance with The Queen's wishes and Sir John's instructions, these papers are to remain closed until 60 years after the end of his appointment as Governor-General — that is, until after 8 December 2037. Thereafter the documents are subject to a further caveat that their release after 60 years should be only

after consultation with the Sovereign's Private Secretary of the day and with the Governor-General's Official Secretary of the day.' More about the contents of the correspondence and about the circumstances of its creation can be gleaned from Sir John's published autobiography and from his unpublished journals. The extracts reveal that Sir John engaged in the correspondence in the performance of what he understood to be a 'duty' of the office of Governor-General to 'keep Her Majesty informed' and that he did so 'with the conscious and deliberate thought' that the reports would be preserved 'in the Archives' as a 'record' of his 'Governor-Generalship'.

On 31 March 2016, Professor Jennifer Hocking, a historian and writer, requested access to Archives Record AA1984/609, which contains the deposited correspondence. That request was rejected by the Director-General on the basis that Record AA1984/609 did not contain Commonwealth records.

Under the *Archives Act 1983* (Cth), the Archives has responsibility for the 'care and management' of 'the archival resources of the Commonwealth'. Section 3(2) of the Archives Act defines the archival resources of the Commonwealth as consisting of 'Commonwealth records and other material' that are 'of national significance or public interest' and that 'relate to', amongst other things, 'the history or government of Australia'. A 'Commonwealth record' is defined in s 3(1) as including 'a record that is the property of the Commonwealth or of a Commonwealth institution'. 'Commonwealth institution' is defined as including 'the official establishment of the Governor-General'. Subject to exceptions, a Commonwealth record within the care of the Archives must be made available for public access once the record is within the 'open access period', which for a Commonwealth record created before 1980 is 31 years after the date of creation. There is no requirement for public access to archival resources of the Commonwealth that are not Commonwealth records.

Ms Hocking sought review of the Director-General's decision in the Federal Court. At first instance, an argument that the deposited correspondence was not the property of the Commonwealth but was private or personal to Sir John Kerr was accepted by the Federal Court. It was also accepted by a majority of the Full Court on appeal.

Before the High Court, Ms Hocking contended that correspondence between Sir John and Queen Elizabeth II constituted 'Commonwealth records' for the purposes of the Archives Act because the correspondence was 'the property of the Commonwealth or of a Commonwealth institution'.

The argument for the Director-General was that legal title to a thing created or received by the holder of a constitutional office in his or her official capacity automatically vests in the Commonwealth as a body politic at the time of creation or receipt only if the holder of the constitutional office is then acting as an 'emanation of the Commonwealth' in creating or receiving the thing. Otherwise, the vesting of legal title is a matter of objectively determined intention.

The majority of the High Court (Kiefel CJ, Bell, Gageler and Keane JJ) held that the correspondence was constituted by Commonwealth records because it was the property of the Commonwealth or of a Commonwealth institution — namely, the official establishment of the Governor-General. Contrary to the arguments of the parties, the outcome of the appeal

did not turn on who might have been the true owner of the correspondence at common law or on expectations held at the time of its deposit with the Archives by reference to constitutional convention or otherwise. Rather, the appeal turned on the construction and application of the elaborate statutory definition of 'Commonwealth record' in the Archives Act.

The majority held that in the statutory context of the Archives Act the term 'property' connoted the existence of a relationship in which the Commonwealth or a Commonwealth institution had a legally endorsed concentration of power to control the custody of a record. Their Honours held that the arrangement by which the correspondence was kept by Mr Smith and then deposited with the Archives demonstrated that lawful power to control the custody of the correspondence lay with the Official Secretary, an office within the official establishment of the Governor-General, such that the correspondence was the property of the official establishment.

The aliens power and Indigenous Australians

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia

[2020] HCA 3 (11 February 2020)

(Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ)

The plaintiffs, Mr Thoms and Mr Love, were both born outside Australia. Mr Thoms was born in New Zealand on 16 October 1988 and is a New Zealand citizen by birth. He has resided permanently in Australia since 23 November 1994. Mr Thoms is a descendant of the Gunggari People through his maternal grandmother. He identifies as a member of that community and is accepted as such by members of the Gunggari People. He is also a common law holder of native title.

Mr Love was born on 25 June 1979 in the Independent State of Papua New Guinea. He is a citizen of that country but has been a permanent resident of Australia since 25 December 1984. Mr Love is a descendant, through his paternal great-grandparents, of Aboriginal persons who inhabited Australia prior to European settlement. He identifies as a descendant of the Kamilaroi tribe and is recognised as such by an elder of that tribe.

Neither plaintiff has been naturalised as an Australian citizen, although that course was open to both Mr Thoms and Mr Love.

The plaintiffs were sentenced for separate and unrelated offences against the *Criminal Code* (Qld). After their convictions, the visas of both men were cancelled by delegates of the Minister for Home Affairs under s 501(3A) of the *Migration Act 1958* (Cth). They were taken into immigration detention under s189 of that Act on suspicion of being 'unlawful non-citizen[s]' and were liable to removal from Australia. In the case of Mr Love, the decision to cancel his visa has since been revoked pursuant to s 501CA(4) of the Migration Act, and he has been released from immigration detention. However, the Commonwealth continued to contend that he has the legal status of an alien who was liable to be removed from Australia.

The Commonwealth relied upon the aliens power in s 51(xix) of the *Constitution* to support the validity of the Migration Act in its application to Mr Thoms and Mr Love.

The question of law stated for the opinion of the High Court in the special cases was whether each of the plaintiffs is an 'alien' within the meaning of s 51(xix) of the *Constitution*.

Before the High Court, the plaintiffs relied on Brennan J's tripartite formulation in *Mabo v Queensland [No 2]* [1992] HCA 23 (*Mabo [No 2]*), for the meaning of 'Aboriginal' Australian: '[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.' The plaintiffs contended that by reference to the tripartite test in *Mabo [No 2]*, the common law of Australia recognises the unique connection which Aboriginal people have with land and waters in Australia. The plaintiffs further contended that that connection is so strong that the common law must be taken to have recognised that Aboriginal persons 'belong' to the land. This recognition is inconsistent with the treatment of Aboriginal persons as strangers or foreigners to Australia. Therefore, the status of alien provided for in s 51(xix) cannot be applied to them.

In separate reasons, the majority (Bell, Nettle, Gordon and Edelman JJ) held that Aboriginal Australians (understood according to the tripartite test in Mabo [No 2]) are not within the reach of the 'aliens' power conferred by s 51(xix) of the *Constitution*. This is the case even if the Aboriginal Australian holds foreign citizenship and is not an Australian citizen under the *Australian Citizenship Act 2007* (Cth). As such, it is not open to the Australian Parliament to treat an Aboriginal Australian as an 'alien' because the constitutional term does not extend to a person who could not possibly answer the description of 'alien' according to the ordinary understanding of the word.

The majority held that Aboriginal Australians have a special cultural, historical and spiritual connection with the territory of Australia, which is central to their traditional laws and customs and which is recognised by the common law. The recognition by the common law of the unique spiritual connection between Aboriginal Australians and their traditional lands is incongruous with the finding that an Aboriginal Australian can be described as alien, within the meaning of s 51(xix) of the *Constitution*, to that land.

The majority held that the determination of whether the plaintiffs were Aboriginal was a question of fact, requiring a claim of Aboriginal descent, identity as a member of an Aboriginal community and a recognition of that claim by the Aboriginal community. The majority agreed that as an Aboriginal Australian Mr Thoms is not within the reach of the aliens power. Mr Thoms identifies as a member of the Gunggari People and is accepted as such by other members of the Gunggari People. He is a common law holder of native title which has been recognised by determinations of native title made by the Federal Court of Australia

However, the majority was unable to agree as to whether Mr Love has been accepted, by elders or others enjoying traditional authority, as a member of the Kamilaroi tribe. As such the majority was unable to answer the question of whether he is an 'alien' within the meaning of s 51(xix) and remitted the question of his status to the Federal Court for the facts to be found.

Apprehended bias — the difference between prejudgment and a conflict of interest

Kirby v Dental Council of NSW

[2020] NSWCA 91 (12 May 2020)

(Brereton JA, Payne JA and Emmett AJA)

On 18 December 2015, following a complaint that Dr Kirby, the applicant and a registered dentist, was applying a substance known as 'Cansema' to the skin of some of his dental patients as a purported treatment for skin cancer, the Dental Council of New South Wales, the respondent, by its duly appointed delegates, suspended Dr Kirby's registration pursuant to s 150(1)(a) of the *Health Practitioner Regulation National Law* (NSW) (the National Law). The complaint against Dr Kirby was lodged after a fellow dentist (Dr Greene) spoke to one of the delegates (the Chair of the Council), and that delegate told him he was bound to report the matter to Council.

While Dr Kirby attended an initial hearing on 11 December 2015, he was unable to attend the hearing on 18 December 2015 because he had hospital patients booked on 18 December 2015 for dental treatment under general anaesthetic.

The 18 December 2015 decision was described by the delegates as 'an interim measure to protect the health and safety of the public', and the suspension of Dr Kirby's registration was intended to operate until varied or until the complaint had been determined.

On 4 January 2016, Dr Kirby applied for a review, pursuant to s 150A of the National Law, of the decision to suspend him, and he provided submissions in support of that review on 3 February 2016.

On 12 February 2016, the same delegates who made the initial decision to suspend Dr Kirby heard the review proceedings. It is apparent, from the reasons for the original decision of 18 December 2015, that the absence of any explanation by Dr Kirby, who was not available to provide one as he did not attend, had contributed to the delegates' concerns. At the review hearing, Dr Kirby was present, with his support person. At the hearing on 12 February 2016 the delegates gave some attention to whether members of the public could be led into believing that Dr Kirby had the necessary qualifications to treat ailments not related to the practice of dentistry when he did not. The delegates found no evidence that Dr Kirby lacked competence in his practice, and determined that Dr Kirby's suspension should be 'lifted' and instead imposed conditions on his registration as a dental practitioner, with effect from 17 February 2016. The conditions, among other things, limited the procedures Dr Kirby was permitted to undertake, restricted him from undertaking sole dental practice and prohibited him from dealing with certain drugs.

On 28 April 2017, Dr Kirby's appeal to the New South Wales Civil and Administrative Tribunal (NCAT), challenging both the s 150 decision to suspend his registration and the s 150A decision to impose conditions, was dismissed. On 6 December 2018, Dr Kirby's appeal to the Supreme Court from the NCAT decision was dismissed. Dr Kirby sought leave to appeal to New South Wales Court of Appeal.

The ultimate issue on the appeal was whether the primary judge erred in holding that NCAT did not err in law — specifically, whether NCAT should have held that the Council's two decisions were affected by apprehended bias. Dr Kirby contended that the delegates of the Council who were charged with making decisions as to Dr Kirby's right to practice had previously been involved in the investigation of the complaint against Dr Kirby.

The Court of Appeal held that the primary judge recognised and proceeded on the basis that Dr Kirby's case was one of apprehended bias founded on an (alleged) conflict of interest arising from prior involvement of the delegates in investigating the complaint, rather than one of (alleged) prejudgment (*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63). The Court of Appeal opined that a 'conflict of interest' case requires a different analysis to a 'prejudgment case'. In a prejudgment case it is necessary to consider the degree of 'closure' of the allegedly closed mind. Whereas in a conflict of interest case, once a conflict is established the reasonable apprehension follows almost as of course.

The Court of Appeal found that, in this case, the primary judge rightly held that the prior involvement of the delegates was not such as to invest them with an 'interest' incompatible with constituting the Tribunal that determined the s 150 proceedings. Under the National Law, the Council is established according to principles of collective deliberation and majority rule based on the expression, through voting, of the will of each member after discussion and debate. Just as a company is said to be entitled to the collective wisdom of its directors, so the community is entitled to the collective wisdom of the Council's members, acting together at a meeting.

Further, in this statutory context, the Court of Appeal held there was no incompatibility between, on one hand, the Chair of the Council advising Dr Green that he should make a complaint about Dr Kirby and, on the other hand, the involvement of the delegates in investigating the complaint and their being the Council's delegates for the purpose of considering whether s 150 action should be taken. This is because nothing they did was such, alone or together, as to associate them, in any reasonable view, with contending for any particular outcome of that consideration. The delegates were not accusers or prosecutors, and their prior involvement did not invest them with a relevant 'interest' in the outcome (*Murray v Legal Services Commissioner* [1999] NSWCA 70; *Carver v Law Society of New South Wales* (1998) 43 NSWLR 71; *Isbester v Knox City Council* [2015] HCA 20, discussed and distinguished).

Administering water policy in the eastern states of Australia: administrative and other challenges

Justice Nicola Pain*

The skies are brass and the plains are bare,
Death and ruin are everywhere —
And all that is left of the last year's flood
Is a sickly stream on the grey-black mud;
The salt-springs bubble and the quagmires quiver,
And — this is the dirge of the Darling River: …
'The Song of the Darling River', Henry Lawson (1889)

The Murray–Darling Basin (MDB) has environmental, cultural, social and economic significance in Australia. It includes 30 000 wetlands (16 of which are internationally significant) and provides habitats for 120 waterbird species and 46 native fish species.[1] A number of rural towns rely on it for their drinking water. The tourism and agricultural industries in the MDB are worth $8 billion and $24 billion respectively.[2] However, the MDB is affected by a number of environmental problems, including reduced water levels and increased salinity, acidity and sedimentation due to over-allocation of water for consumptive uses, land clearing and drought (the frequency and severity of which have increased due to climate change).[3] Most recently, in early 2019 rivers stopped flowing in north-west New South Wales (NSW)[4] and several major fish deaths occurred in NSW at the Menindee Lakes.[5] The above quote from the 1889 Henry Lawson poem about the Darling River suggests that management of the inland rivers of NSW and beyond no doubt has been a challenge for a long time.

The South Australian Murray–Darling Basin Royal Commission identified in its 2019 report a number of upstream policy and governance issues in the management of water in the MDB. There is an umbrella agreement to manage the MDB between Queensland, NSW,

* Justice Pain is a judge of the NSW Land and Environment Court. The author gratefully thanks Georgia Pick, tipstaff and researcher at the NSW Land and Environment Court, for her considerable assistance in the research and preparation of this article. This is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference, Canberra, 18 July 2019.1

1 Murray–Darling Basin Authority, Discover the Basin, Australian Government <https://www.mdba.gov.au/discover-basin>.

2 Ibid

3 Murray–Darling Basin Authority, Drought in the Murray–Darling Basin (18 December 2019) Australian Government <https://www.mdba.gov.au/managing-water/drought-murray-darling-basin>; Murray–Darling Basin Authority, 'Climate Change and the Murray–Darling Basin Plan' (Discussion paper, Australian Government, February 2019) <https://www.mdba.gov.au/sites/default/files/pubs/Climate-change-discussion-paper-Feb-19.pdf>; Murray-Darling Basin Authority, Salinity (16 December 2019) Australian Government <https://www.mdba.gov.au/managing-water/salinity>; Barry T Hart, 'The Australian Murray–Darling Basin Plan: Challenges in Its Implementation (Part 1)' (2016) 32 International Journal of Water Resources Development 819, 819.

4 Anne Davies and Lorena Allam, 'When the River Runs Dry: The Australian Towns Facing Heatwave and Drought', The Guardian (online), 25 January 2019 <https://www.theguardian.com/australia-news/2019/jan/25/when-the-river-runs-dry-the-australian-towns-facing-heatwave-and-drought>.

5 Anne Davies, 'Hundreds of Thousands of Native Fish Dead in Second Murray–Darling Incident', The Guardian (online), 7 January 2019 <https://www.theguardian.com/australia-news/2019/jan/07/hundreds-of-thousands-of-native-fish-dead-in-second-murray-darling-incident>.

Victoria, South Australia and the Australian Capital Territory (ACT) (the Basin states) with the Commonwealth. While overall governance and policy mechanisms are implemented under a Commonwealth Act, management and enforcement of water policy on the ground is largely implemented through Basin state laws. While broadly similar administrative and regulatory regimes exist in all Basin states, there are a number of differences in administrative review availability, whether merits review or judicial review, and in enforcement approaches. Judicial review proceedings challenging water-sharing plans before the NSW Land and Environment Court highlight difficulties for private interests seeking to challenge strategic water allocation policies. Lack of enforcement of water legislation in NSW was highlighted in an ABC Four Corners program aired in 2017.[6] Important changes in enforcement policy made since that program have resulted in greater compliance action by the newly established water regulator in NSW.

Management of the MDB is challenging due to its size and and the federal system of government in Australia, as it spans four states and a territory — an area equivalent to 14 per cent of Australia's land mass.[7] A number of legal and policy arrangements to manage the MDB have been implemented over several decades through policy processes such as the 2004 Intergovernmental Agreement on a National Water Initiative. This article focuses on current arrangements.

Managing the Murray–Darling Basin at the Commonwealth level

The legal framework for managing the MDB includes Commonwealth and Basin state laws and non-legislative instruments. In 2007 the Commonwealth government enacted the *Water Act 2007* (Cth). The Water Act has 10 objects, including 'to ensure the return to environmentally sustainable levels of extraction for water resources that are over allocated or overused' and 'to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin'.[8] Importantly, the object to 'maximise the net economic returns to the Australian community from the use and management of the Basin water resources' is stated explicitly to be subject to the two aforementioned objects. The Water Act established the Murray–Darling Basin Authority (MDBA),[9] which was charged with preparing the *Basin Plan 2012* (Cth) in accordance with specifications outlined in the Water Act.[10] The MDBA is responsible for monitoring the quality and quantity of Basin water resources and the condition of associated water-dependent ecosystems, developing measures for the equitable and sustainable use of Basin water resources, and conducting research and investigations on the MDB.[11] For example, it must conduct annual reviews into the effectiveness of the Basin Plan.[12] The Water Act also established the Commonwealth Environmental Water Holder to manage water acquired by the Commonwealth government pursuant to the Basin Plan.[13]

6 ABC, 'Pumped: Who's Benefitting from the Billions Spent on the Murray Darling?' Four Corners, 24 July 2017.
7 Australian Bureau of Statistics, 'Feature Article: Murray–Darling Basin' in Year Book Australia, 2009–10 (No 1301.0, ABS, 11 November 2015) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1301.0Chapter3042009%E2%80%9310>.
8 *Water Act 2007* (Cth) s 3(d)(i).
9 Ibid s 171
10 Ibid s 41.
11 Ibid s 172.
12 Ibid s 52A.
13 Ibid ss 104, 105.

The two key instruments which regulate the MDB today are the 2008 Murray-Darling Basin Agreement (MDB Agreement)[14] and the 2012 Basin Plan. The MDB Agreement was entered into between the Basin states and the Commonwealth in 2008 to 'promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin' and to 'give effect to the Basin Plan, the Water Act and State water entitlements'.[15] The MDB Agreement established the Ministerial Council, which comprises ministers from each of the Basin states and the Commonwealth and determines outcomes on major policies in relation to the management of the MDB.[16] The MDB Agreement also includes provisions relating to the distribution of water in extreme circumstances and ensuring critical human water needs.[17] Crucially, the MDB Agreement has imposed long-term caps on the amount of water that can be diverted from 'designated river valleys' within the Basin states.[18] Basin states have a duty to report to the MDBA on compliance with the caps on an annual basis.

The Basin Plan, a legislative instrument made pursuant to the Water Act, came into force in November 2012. It outlines a new water accounting and compliance framework based on long-term average sustainable diversion limits (SDLs).[19] SDLs represent the maximum long-term annual average quantities of water that can be taken on a sustainable basis from the Basin water resources as a whole and the water resources of each water resource plan area.[20] Basin states must prepare water resource plans for accreditation by the Commonwealth Minister for Agriculture. Plans must identify both surface water and groundwater SDL resource units for each plan area.[21] SDLs must reflect 'an environmentally sustainable level of take'.[22] The MDBA determined the total surface water SDL for the MDB to be 10 873 gigalitres per year.[23] To achieve this level of take, for environmental purposes 2750 gigalitres per year would need to be recovered from the 2009 baseline diversion level. [24] This framework was intended to come into force on 1 July 2019[25] but has yet to occur, as the accreditation of water resource plans has been delayed.[26] The MDBA must establish

14 Ibid Sch 1.
15 Ibid Sch 1 cl 1.
16 Murray–Darling Basin Agreement (MDB Agreement) (*Water Act 2007* (Cth), Sch 1) cll 7–9. The MDB Agreement also established the Basin Officials Committee, which comprises officials from each of the Basin states and the Commonwealth and advises the Ministerial Council.
17 Ibid cll 131–134.
18 Ibid Sch E
19 Murray–Darling Basin Authority, Transitioning From the Cap to Sustainable Diversion Limits (8 July 2019) Australian Government <https://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits/transitioning-cap-sustainable-diversion-limits>; Murray–Darling Basin Authority, Developing the Basin Plan (15 October 2019) Australian Government <https://www.mdba.gov.au/basin-plan-roll-out/basin-plan/developing-basin-plan>; Basin Plan 2012 s 6.04.
20 *Water Act 2007* (Cth) s 22(1), item 6.
21 Ibid ss 22(1), item 11, 53; see Basin Plan 2012 Ch 10, Pt 2, Sch 2.
22 *Water Act 2007* (Cth) s 23.
23 Murray–Darling Basin Authority, 'Current Diversion Limits for the Basin', 9 December 2019, <https://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits/current-diversion-limits-basin>.
24 Department of Planning, Industry and Environment, NSW, 'The Sustainable Diversion Limit (SDL)', <https://www.industry.nsw.gov.au/water/plans-programs/water-recovery-programs/sustainable-diversion-limits>.
25 Basin Plan 2012 s 6.04(1). However, since 2012 Basin states have been required to report on water take in each SDL resource unit: Murray–Darling Basin Authority, above n 19.
26 The Commonwealth Minister for Agriculture has granted extensions for various proposed plans to be given to the Murray–Darling Basin Authority by 31 December 2019: Department of Agriculture, Murray–Darling Basin Plan (4 November 2019) Australian Government <http://agriculture.gov.au/water/mdb/basin-plan>.

a register of take for each SDL resource unit to determine for each water accounting period whether there has been compliance with the SDLs.[27] The register commences on the first water accounting period for each SDL resource unit after 30 June 2019.

In addition to the SDL framework, the Basin Plan sets out an environmental watering plan which specifies the overall environmental objectives of the MDB, targets by which to measure progress towards achieving those objectives, and a framework for planned environmental water (water preserved for the purpose of achieving environmental outcomes).[28] A water quality and salinity management plan is also established which outlines the key causes of water quality degradation in the MDB, water quality objectives for the MDB and water quality targets.[29]

The Basin Plan places various obligations on Basin states, particularly in relation to water resource plan requirements and reporting. First, water resource plans must include rules to ensure that the quantity of water taken from each SDL resource unit for consumptive use in a water accounting period beginning on or after 1 July 2019 is less than the annual permitted take.[30] They must also provide for environmental water in a way that is consistent with the environmental watering plan and contributes to the achievement of the environmental objectives of the MDB.[31] Secondly, the Basin states must report to the MDBA on the level of water taken in each water resource plan area compared with that permitted to be taken, an assessment of compliance with long-term annual diversion limits, the achievement of environmental outcomes, progress towards water quality targets, and compliance with water resource plans.[32]

South Australian Murray-Darling Basin Royal Commission

The South Australian Government established the Murray-Darling Basin Royal Commission in January 2018. The terms of reference included whether the implementation of the Basin Plan is likely to achieve the objects of the Water Act and whether the enforcement and compliance powers under the Water Act are adequate to prevent and address noncompliance with it and the Basin Plan. The Commissioner's report was published in January 2019. The Royal Commission found that there were major problems with the MDBA's approach to determining the Basin-wide environmentally sustainable level of take and its management in the MDB system amongst many other systemic problems. One positive finding made by the Royal Commission was that the compliance and enforcement framework under the Water Act, if properly implemented, is suitable to advance the objects of the Act and the Basin Plan[33].

27 Basin Plan 2012 s 6.08
28 Ibid s 8.01.
29 Ibid s 9.01.
30 Ibid s 10.11.
31 Ibid s 10.26. See Ch 8, Pt 2, for the environmental objectives.
32 Ibid s 13.14, Sch 12; *Water Act 2007* (Cth) s 71.
33 Bret Walker SC, Commissioner, *Murray–Darling Basin Royal Commission Report* (South Australian Government, 29 January 2019) 665.

Managing the Murray-Darling Basin at the state and territory level

All Basin states have a statutory framework that outlines rules that apply to specific areas for the granting of entitlements to take water, approval to use water for specific purposes and construction of water-related works, and protection of a proportion of water for the environment. The relevant instrument in NSW is known as a water-sharing plan.[34] These operational frameworks are being replaced by the water resource plans made by Basin states pursuant to the Basin Plan once accredited by the Commonwealth Minister for Agriculture.[35] While this is supposed to commence from 1 July 2019, the timeframe for most water resource plans was extended to the end of 2019.

Review of administrative decisions by Basin state courts and tribunals

As in most regulated natural resource regimes, there are a number of avenues for review of administrative decisions. Review of administrative decisions is most commonly in the form of merits appeals concerning water licensing and approvals in courts or tribunals and, where available, judicial review proceedings. The two forms of review are markedly different in nature and outcome.

Merits appeals

In all Basin states, merits appeals lie to courts or tribunals by applicants in relation to decisions made by water authorities/departments, such as authorising the taking of water, approvals to use water for specified purposes and approvals for works related to water use.[36] In South Australia, standing to appeal is confined to the applicant of the particular approval.[37] In Queensland, it extends to any person who properly made a submission about the water licence application.[38] In NSW, there appear to be non-applicant appeal rights for various decisions, but this may not apply in relation to the granting of access licences.[39] In Victoria and the ACT, standing extends to any person whose interests are affected by the decision.[40]

In Victoria, the phrase 'any person whose interests are affected' has been construed broadly. In *Paul v Goulburn Murray Rural Water Corporation*,[41] the Victorian Civil and Administrative

34 See *Water Management Act 2000* (NSW) ss 19–21; NSW Department of Industry, How Water Sharing Plans Work (NSW Government) <https://www.industry.nsw.gov.au/water/plans-programs/water-sharing-plans/how-water-sharing-plans-work>. Similar or equivalent frameworks in the other Basin states include water allocation plans in South Australia; permissible consumptive volumes, sustainable water strategies and management plans in Victoria; water plans and water management protocols in Queensland; and water management areas and environmental flow guidelines in the ACT: Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths Australia, 2nd ed, 2018) 309–11.

35 See NSW Department of Industry, Basin Plan (NSW Government) <https://www.industry.nsw.gov.au/water/basins-catchments/murray-darling/basin-plan>.

36 See *Water Act 1989* (Vic) ss 64, 64AN, 83; *Water Management Act 2000* (NSW) s 368; *Water Act 2000* (Qld) Ch 6, Pt 3; *Natural Resources Management Act 2004* (SA) s 202; *Water Resources Act 2007* (ACT) s 96, Sch 1.

37 *Natural Resources Act 2004* (SA) s 202(1).

38 *Water Act 2000* (Qld) ss 114, 851, 877.

39 *Water Management Act 2000* (NSW) ss 62, 368. Access licences have effect until cancelled, s 69.

40 See, eg, *Water Act 1989* (Vic) s 64(1); *Water Resources Act 2007* (ACT) s 96(b).

41 [2009] VCAT 970.

Tribunal (VCAT) considered whether the applicant, who owned land three kilometres away from owners of land who had been granted a groundwater licence, could seek review of the decision to grant the licence since the matters that had to be considered in granting the licence were broad ('the existing and projected availability of water in the area', 'any adverse effect that the allocation … is likely to have on existing authorised uses of water' and 'the need to protect the environment') — 'interests' in the context of this particular decision should be construed relatively broadly. VCAT found that the applicant had standing to appeal the decision since he benefited from a groundwater bore in part of the same hydrogeological system as the nearby land.

A relatively large number of merits appeal cases have been heard in VCAT under the *Water Act 1989* (Vic)[42] and in the Environment, Resources and Development Court (ERD Court) under the *Natural Resources Management Act 2004* (SA) compared with other Basin states.[43] Fewer cases have been heard in the Queensland Land Court under the *Water Act 2000* (Qld).[44] Only two have been heard in the NSW Land and Environment Court under the *Water Management Act 2000* (NSW)[45] and one case has been heard in the ACT Administrative Appeals Tribunal under the *Water Resources Act 2007 (ACT).*[46]

It is relevant when considering review mechanisms to identify differences across the Basin states' legislative schemes in relation to what needs to be considered by the relevant decision-maker and by extension the court or tribunal considering the merits of a decision upon appeal when, for example, authorising the taking of water.

42 See, eg, *Senserrick v Melbourne Water* [2001] VCAT 1644; *Bates v Southern Rural Water* [2004] VCAT 2045; *Leonard v Southern Rural Water* [2007] VCAT 1562; *Castle v Southern Rural Water* [2008] VCAT 2440; *Foote v Melbourne Water* [2008] VCAT 2319; *Cox & Ors v Southern Rural Water Authority* [2009] VCAT 1001;*Conroy v Goulburn Murray Water & Ors* [2009] VCAT 2108; *Alanvale Pty Ltd & Anor v Southern Rural Water & Ors* [2010] VCAT 480; *Hosken v Goulburn Murray Water – Tatura* [2010] VCAT 776; *Paul v Goulburn Murray Water Corporation & Ors* [2010] VCAT 1755; *Norman v Goulburn Murray Water Authority – Tatura* [2010] VCAT 845; *Rigoni v Goulburn Murray Water & Anor (Correction)* [2011] VCAT 129; *Gattini & Partners v Knox City Council* [2011] VCAT 201; *Pomona Farms v Grampians Wimmera Mallee Water Authority* [2011] VCAT 1378; *Jerram v Southern Rural Water – Maffra* [2011] VCAT 2003.

43 See, eg, *Simes v Minister for Environment & Conservation* [2006] SAERDC 90*; Jack Sims & Son Pty Ltd v Minister for Environment And Conservation (No 2)* [2007] SAERDC 28*; Glengyle Proprietors P/L v Minister for Environment & Conservation* [2009] SAERDC 34*; Mayalukalily P/L v Minister for Sustainability, Environment & Conservation* [2016] SAERDC 9*; Falkenberg & Anor v Minister for Environment & Conservation* [2011] SAERDC 52*; Ka Loller Pty Ltd v The Minister for Environment and Conservation* [2012] SAERDC 62*; Lincoln Minerals Ltd v Minister for Sustainability, Environment & Conservation* [2014] SAERDC 33*; Fechner v Minister for Environment & Conservation (No 2)* [2015] SAERDC 34*; Blefari v Minister for Sustainability, Environment & Conservation* [2016] SAERDC 22; *Metjac Holdings P/L v Minister for Sustainability, Environment & Conservation* [2017] SAERDC 24.

44 *Gorton v Department of Natural Resources and Mines* [2004] QLC 17; *Gallo & Ors v Chief Executive, Department of Environment and Resource Management* [2012] QLC 15 (which was appealed in *Gallo v Chief Executive, Department of Environment & Resource Management* [2013] QLAC 6); *Vanbrogue Pty Ltd v Department of Environment and Resource Management (No 2)* [2013] QLC 8; *Reed v Department of Natural Resources and Mines & Ors No 2* [2014] QLC 6.

45 *Shaw & Anor v The Minister Administering the Water Management Act 2000 & Ors* [2013] NSWLEC 102; *Zizza v Minister Administering the Water Management Act 2000* [2014] NSWLEC 1017 (which was appealed on a question of law in *Zizza v Minister Administering the Water Management Act 2000* [2014] NSWLEC 170).

46 *Rashleigh and Environment Protection Authority* [2004] ACTAAT 31, which was appealed to the Supreme Court and the Court of Appeal (ACT) in *Rashleigh v Environment Protection Authority* [2005] ACTSC 18 and *Environment Protection Authority v Rashleigh* [2005] ACTCA 42 respectively.

In Victoria, when deciding whether to grant a licence to take and use water under s 51 of the *Water Act 1989* (Vic), the Minister must consider 10 factors, including the existing and projected availability and quality of water in the area; any adverse effect that the allocation or use of water is likely to have on existing authorised uses of water, a waterway or aquifer and the maintenance of the environmental water reserve in accordance with the environmental water reserve objective; the need to protect the environment; the conservation policy of the government; and government policies concerning the preferred allocation or use of water resources.[47]

In *Bates v Southern Rural Water*[48] the applicant challenged the Southern Rural Water Board's refusal of his licence application to take groundwater for irrigation from an aquifer that had been over-allocated. VCAT rejected the appeal in the absence of any declared permissible consumptive volume or approved management plan imposing a legal limit on water allocations. A similarly large licence application had been recently granted to the applicant's neighbour.[49] A key reason for VCAT's decision was that the over-allocation of water in the region and environmental damage to the relevant aquifer would be exacerbated if the licence application was granted.[50] Broad environmental impacts were also considered in *Alanvale Pty Ltd & Anor v Southern Rural Water & Ors*[51] — an appeal of a decision not to grant licences for groundwater extraction. VCAT considered the impacts of climate change on rainfall recharge of aquifers. Applying the precautionary principle, VCAT decided that the relevant licences should not be granted due to lack of certainty about the existing and future projected availability of groundwater within the relevant groundwater management area. Ultimately, VCAT focused on the long-term sustainability of the relevant groundwater resources, the likely impact to water quality and the impact on other existing authorised users in affirming the original decision.

In South Australia, the Minister's decision to grant a water licence must be made in the public interest and, if it relates to a water resource within the MDB, it must take into account the terms or requirements of the MDB Agreement.[52] A water allocation granted by the Minister must be consistent with the relevant water allocation plan.[53] In *Simes v Minister for Environment & Conservation*,[54] the applicant appealed the Minister's decision to refuse his water licence application. The ERD Court found that the allocation sought by the applicant would be consistent with the relevant water allocation plan, and there was no evidence indicating that the allocation would not be in the public interest.[55] Since the total volume of water (determined on a sustainable basis to be available for allocation) had not been allocated, it would not be in the public interest to refuse an application for a water allocation far less than the remaining volume permitted to be allocated. This decision was reversed by the Supreme Court in *Minister for Environment and Conservation v Simes*.[56] The fact that

47 *Water Act 1989* (Vic) ss 40(1), 53(1)(b).
48 [2004] VCAT 2045.
49 Gardner et al, above n 34, 414.
50 *Bates v Southern Rural Water* [2004] VCAT 2045 [26]. .
51 [2010] VCAT 480. See also *Paul v Goulburn Murray Water Corporation & Ors* [2010] VCAT 1755.
52 *Natural Resources Management Act 2004* (SA) s 147(5)–(6).
53 Ibid s 151(1).
54 [2006] SAERDC 90.
55 Ibid [27].
56 [2007] SASC 248.

actual allocations were shown to be below the maximum available did not give the Minister or the ERD Court authority to make an additional allocation that was not authorised by the plan or consistent with the plan.[57] Further, the ERD Court erred in finding that the grant of a licence to the applicant would be in the public interest. It was inappropriate for the ERD Court to hold that, because nothing was put to suggest that an allocation would not be in the public interest, the making of an allocation would be in the public interest. The identification of positive reasons as to why the grant of a licence to the particular applicant was in the public interest and not just that of the applicant was required.

In NSW, under the *Water Management Act 2000* (NSW) the factors to be considered by the Minister are general, suggesting the discretion is wider than in the Victorian and South Australian schemes. An access licence must not be granted unless the Minister is satisfied that 'adequate arrangements are in force to ensure that no more than minimal harm will be done to any water source as a consequence of water being taken from the water source under the licence'.[58] Further, it is the duty of all persons exercising functions under the *Water Management Act 2000* (NSW) to take all reasonable steps to do so in accordance with and so as to promote the water management principles under the Act, and give effect to the State Water Management Outcomes Plan (SWMOP).[59] The water management principles include that water quality should be protected and enhanced where possible; the cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems should be considered and minimised; and the social and economic benefits to the community should be maximised.[60]

In Zizza v *Minister Administering the Water Management Act 2000*,[61] an appeal of the NSW Office of Water's refusal to approve a water supply work and water use application, a commissioner of the NSW Land and Environment Court had to decide whether the proposal fulfilled the objects and adhered to the water management principles of the *Water Management Act 2000* (NSW).[62] The commissioner found the volume of water to be extracted was a relevant consideration pursuant to s 96(b) of the *Water Management Act 2000* (NSW). The commissioner found that the volume of water to be taken was excessive given that the purpose for water extraction was an ornamental lake. Ultimately, the commissioner was not satisfied that the proposal was consistent with the water management principles; it failed to minimise the cumulative impacts of water management licences and approvals; and it failed to minimise effects on dependent ecosystems.

In Queensland, the Chief Executive in deciding whether to grant or refuse a water licence application under the *Water Act 2000* (Qld) must consider the relevant water plan, the long-term average SDLs included in the Basin Plan (if the application relates to the MDB), and all submissions made about the application.[63] In *Gallo & Ors v Chief Executive, Department of Environment and Resource Management*,[64] the applicants appealed the respondent's

57 Ibid [47].
58 *Water Management Act 2000* (NSW) s 63(2)(b).
59 Ibid s 9(1).
60 Ibid s 5(2).
61 [2014] NSWLEC 1017.
62 Ibid [73]
63 *Water Act 2000* (Qld) s 113.
64 [2012] QLC 15.

decision to grant them a limited allocation to take underground water for irrigation, stock and domestic supply purposes up to an entitlement of 130 megalitres per annum. The licence application had sought 990 megalitres per annum for that purpose. The Land Court dismissed the appeal, and the applicants appealed to the Land Appeal Court.[65] The principal issues before the Land Court and the Land Appeal Court were whether the appellants had provided sufficient information in their licence application as to their proposed use of any water allocation and the volume of water to be taken.

The Land Appeal Court allowed the appeal and directed the respondent to issue a licence to the appellants to take 267 megalitres per annum.[66] Consideration of all the evidence as to whether it was sufficient to discharge the requirements of the *Water Act 2000* (Qld) and any relevant provision of any applicable water resource plan was required.[67] Merely because the appellants did not complete the application form fully did not mean that they automatically failed.

In the ACT, under the *Water Resources Act 2007* (ACT) the Environment Protection Authority must not issue a licence to take water or a waterway work licence, for example, unless satisfied it is appropriate to do so having regard to the applicant's environmental record and whether issuing the licence may adversely affect the environmental flows for a particular waterway or aquifer that are required under the environmental flow guidelines or adversely affect the environment in any other way or the interests of other water users.[68] In *Rashleigh and Environment Protection Authority*,[69] the Administrative Appeal Tribunal's decision to uphold the Environment Protection Authority's refusal of a licence application to take water from a bore centred on its consideration of whether the grant of the licence would adversely affect the environmental flows of the particular aquifer and have an adverse effect on the environment, and the application of the precautionary principle.[70]

Judicial review of water-sharing plans

In NSW there have been several challenges to water-sharing plans in judicial review proceedings over a number of years. Pursuant to s 336 of the *Water Management Act 2000* (NSW), any person may bring proceedings in the NSW Land and Environment Court for an order to remedy or restrain a breach of Act.[71] Section 47 of the Act specifies the time limit for commencing judicial review proceedings challenging water management plans, which includes water sharing plans.[72] Applicants in judicial review proceedings in NSW have relied on various well-established grounds (illegality, irrationality and procedural fairness) in challenging water sharing plans. There have been no challenges to equivalent instruments in the other Basin states identified to date.

65 *Gallo & Ors v Chief Executive, Department of Environment and Resource Management* [2013] QLAC 6.
66 Ibid [99].
67 Ibid [195].
68 *Water Resources Act 2007* (ACT) ss 30(3), 44(2).
69 [2004] ACTAAT 31.
70 Ibid [70]–[88]. This decision was reversed by the Supreme Court in *Rashleigh v Environment Protection Authority* [2005] ACTSC 18; the Administrative Appeal Tribunal's decision was reinstated by the Court of Appeal (ACT) in *Environment Protection Authority v Rashleigh* [2005] ACTCA 42.
71 *Water Management Act 2000* (NSW) s 336.
72 Ibid s 15.

Illegality

A water-sharing plan made by the Minister under s 50 of the *Water Management Act 2000* (NSW) 'must in general terms deal with any matters that a management plan is required to deal with', which are outlined in s 20. Under s 45(1)(a), the Minister may amend a water-sharing plan if, among other things, they are satisfied that it is in the public interest to do so. Further, it is the duty of a minister when making or amending water-sharing plans 'to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles' of the Act.[73] In relation to water sharing specifically, the principles include the protection of water resources and dependent ecosystems, and the protection of basic landholder rights. Between these two principles, the former must be given priority.[74] The Minister must also have due regard to the socio-economic impacts of the proposals considered for inclusion in a draft plan.[75] Water-sharing plans must also be made 'in a manner which gives effect to the State Water Management Outcomes Plan'.[76] These statutory requirements have formed the basis of judicial review proceedings challenging water sharing plans in NSW.

In *Murrumbidgee Horticulture Council v Minister for Land and Water (NSW)*,[77] the Murrumbidgee Horticulture Council, which represented horticulturalists and high-security irrigators in the Murrumbidgee region, challenged the validity of the relevant water-sharing plan because a provision prohibited the trade of high-security licence annual allocations after 1 September in any water year. Consequently, this type of trading was confined to the first two months of the water year. The purpose of this limit was to manage historical issues of over-allocation. The Council argued that this provision was beyond the power conferred on the Minister of the *Water Management Act 2000* (NSW) to make water-sharing plans. First, it was inconsistent with s 58 of the Act, which sets the water access priorities of different licences. Secondly, it was inconsistent with the target of the SWMOP that all share components of access licences be tradeable. Thirdly, it did not comply with access licence dealing principles made by ministerial order pursuant to the Water Management Act 2000 (NSW), which has the objective to facilitate the maximisation of 'social and economic benefits to the community of access licences'.[78]

I rejected the Council's argument that time limits on dealings in water allocations to high-security access licence holders in the plan was an infringement of the priorities in s 58.[79] There was no unfettered right to deal in water allocations specified in the Act. Further, there was no breach of the statutory requirement for the plan to be consistent with the SWMOP. The requirement that the plan 'be consistent with' the SWMOP means that the plan must be in general terms consistent with the whole of the SWMOP.[80] Plans must 'in general terms' deal with any matter that a plan is required to deal with. The drafting of the SWMOP did not

73 Ibid s 9.
74 Ibid s 9(1)(b).
75 Ibid s 18(1); *Arnold v Minister Administering the Water Management Act 2000* [2014] NSWCA 386 [14] (Tobias AJA, with Meagher and Barrett JJA agreeing at [1] and [2] respectively).
76 Ibid s 9(2).
77 (2003) 127 LGERA 450.
78 Ibid [32].
79 Ibid [41]–[47].
80 Ibid [87]–[89].

suggest that the targets were intended to have a 'binding rule-like quality such that a breach would give rise to invalidity'. Since other targets dealing with environmental objectives were met by the plan, it could not be said in this case that the plan was inconsistent with the SWMOP. Lastly, I held that a water-sharing plan should comply in general terms with the access licence dealing principles.[81] The social and economic benefits objective was subject to other principles set out in the ministerial order, including a provision regarding impact on water sources. In this case, the Minister had sought through the relevant provision of the plan to reduce water extraction in the MDB for environmental purposes, which satisfied these other principles in the ministerial order.

Regarding the duty imposed on the Minister 'to take all reasonable steps' to promote the water management principles of the *Water Management Act 2000* (NSW), Molesworth AJ stated in *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4):*

> The only qualitative variable in these provisions is the reference to reasonableness - to take all reasonable steps. Whereas a duty to take 'all' reasonable steps is stronger than just a duty to take reasonable steps, nevertheless, the pivotal test of proper adherence will always come back to what was reasonable in the relevant circumstances.[82]

In that case, his Honour rejected a challenge to the relevant water-sharing plan on the basis that it was made in breach of the duty to act in accordance with the water management principles. This duty does not require the classification of every water source according to the risk it might face or that every decision must equally protect and restore every dependent ecosystem. In this case, therefore, the degradation of a water body following the approval of the relevant water-sharing plan did not invalidate this decision. As Molesworth AJ observed, '[e]very decision, however correctly made, cannot be expected to achieve perfect outcomes. An imperfect outcome is not an indication that the decision-making process was flawed'.[83]

Similarly, Biscoe J held in *Arnold v Minister Administering the Water Management Act 2000 (No 6)*[84] that:

> [The Minister] is not bound to achieve any end to which the water management principles are directed, being principles that need to be balanced to some extent. That is apparent from the language of 'take all reasonable steps' in s 9(1)(a) and the introductory word 'Generally' in s 5(2) [which lists the general water management principles].[85]

In that case, his Honour rejected a challenge to the relevant water-sharing plan on the ground that, in order to comply with s 9, a numerical groundwater model was required because this was the only way to predict the cumulative impacts of groundwater extraction on the groundwater resource (the consideration and minimisation of which is a water management principle under s 5(2)(d)).[86]

81 Ibid [48]–[82].
82 [2019] NSWLEC 5 [294].
83 Ibid [423].
84 [2013] NSWLEC 73.
85 Ibid [180].
86 Ibid [164].

On appeal the NSW Court of Appeal affirmed Biscoe J's finding that the above provisions did not create a mandatory requirement that, before the making of a water-sharing plan which provides for a sustainable yield or recharge, the Minister is bound to consider a sound and reliable numerical hydrogeological model.[87] The objects and water management principles identified in ss 3 and 5 of the Act are stated in far too general terms to give rise to a mandatory obligation of that kind. Another ground of appeal was whether the Minister failed to consider the socio-economic impacts of proposals considered for inclusion in the draft plan by neglecting to undertake a formal socio-economic study or a farm-by-farm analysis of the proposed plan. The Court of Appeal held that the Minister was obliged under ss 18(1) and 5(2)(g) to have due regard to the socio-economic impacts of the proposal considered for inclusion in the plan.[88] The evidence established that the Minister or his delegates had considered an extensive list of matters with respect to the socio-economic impact of the proposals considered for inclusion in the plan.[89] The failure to conduct a socio-economic study on a farm-by-farm basis was not a failure to comply with the obligation to consider the socio-economic impacts of proposals considered for inclusion in the plan. Such a study was one way by which the impacts of the proposals could be measured, but it was not the only way. The Minister was only required to have 'due regard' to the socio-economic impacts; he was not required to eliminate them.

Irrationality

A decision made in the exercise of a statutory power is unreasonable in a legal sense when it lacks an evident and intelligible justification.[90] That may be so where a decision is one which no reasonable person could have arrived at.[91] If probative evidence can give rise to different processes of reasoning and if reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said to be irrational or unreasonable simply because one conclusion has been preferred to another possible conclusion.[92]

In *Murrumbidgee Groundwater Preservation Association v Minister for Natural Resources*,[93] a groundwater-sharing plan was challenged, amongst other grounds, as irrational because it made a proportionate reduction of all entitlements, regardless of the history of extraction and the variable sustainable yields from the water resource in different parts of the management area.[94] Upholding the NSW Land and Environment Court's decision, the NSW Court of Appeal held that nothing in the nature, scope and purpose of the *Water Management Act 2000* (NSW) prevented the Minister from implementing a scheme which operated to the detriment of some persons, and to the advantage of others, in a manner not determined by availability of water but by broader considerations of what the Minister regarded as equitable.[95]

87 *Arnold v Minister Administering the Water Management Act 2000* [2014] NSWCA 386 [84]–[87] (Tobias AJA, with Meagher and Barrett JJA agreeing at [1] and [2] respectively)
88 Ibid [14] (Tobias AJA, with Meagher and Barrett JJA agreeing at [1] and [2] respectively).
89 Ibid [161]–[165] (Tobias AJA, with Meagher and Barrett JJA agreeing at [1] and [2] respectively).
90 *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332, 367 [76].
91 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.
92 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 [131].
93 (2005) 138 LGERA 11.
94 Gardner et al, above n 34, 411.
95 *Murrumbidgee Groundwater Preservation Association v Minister for Natural Resources* (2005)138 LGERA 11, [153] (Spigelman CJ), [156] (Beazley JA), [157] (Tobias JA).

In *Arnold v Minister Administering the Water Management Act 2000*[96] (referred to above), the NSW Court of Appeal rejected the applicant's ground that the Minister's decision to make the plan was manifestly unreasonable because the extraction limit in the plan was based on a model which was so flawed and unreliable that it was irrational to adopt it.[97] While the model was generally in conformity with best practice, as the estimated sustainable yield values were 'roughly in the correct order' and could be adopted as interim measures, the applicants' expert stated that it was unreasonable and irrational to use the model without first calibrating it to address the known issues. The NSW Court of Appeal found that it was open to the NSW Land and Environment Court to accept the expert evidence that considered the model to be of some value, the model had some probative value and it was capable of use in determining an appropriate extraction limit.[98]

Procedural fairness

In *Harvey and Tubbo v Minister Administering the Water Management Act 2000*,[99] the applicants challenged an amendment to a water-sharing plan which abandoned the proportionate reduction of all entitlements in favour of a policy of reductions based on historical extraction.[100] Those licensees who had a history of extraction greater than their new entitlement could still receive supplementary water access licences, which would reduce to zero over the life of the plan. A special circumstances schedule determined whether licensees could receive supplementary water access licences. The applicants argued that the Minister owed them a duty of procedural fairness because the inclusion of the special circumstances schedule identified particular individuals and treated them in a particular way in relation to important entitlements. The applicants were effectively invited to have their individual positions dealt with as potentially constituting special circumstances too.[101] They argued that they had been denied procedural fairness because they were not properly informed about the nature of the consultation exercise and criteria that would be applied in determining the schedule of special circumstances licensees. Accordingly, their submissions did not address the criteria and they were not given the opportunity to respond to the adverse conclusions drawn from these.

Rejecting these arguments, Jagot J held that s 45(1)(a) required consideration of the interests of the public generally rather than the interests of any individual or particular group of individuals.[102] The legislature was more likely to intend that procedural fairness applies to the exercise of a power that singles out individuals and affects their interests in a manner differently from the way in which the interests of the public at large are affected.[103] The power of the Minister under s 45(1)(a) to amend a water-sharing plan at any time 'if satisfied it is in

96 [2014] NSWCA 386.
97 Ibid [30].
98 Ibid [107]–[108].
99 (2008) 160 LGERA 50.
100 Gardner et al, above n 34, 412.
101 Ibid, citing *Harvey and Tubbo v Minister Administering the Water Management Act 2000* (2008) 160 LGERA 50 [84].
102 *Harvey and Tubbo v Minister Administering the Water Management Act 2000* (2008) 160 LGERA 50 [74], followed in NA & *J Investments Pty Ltd v Minister Administering the Water Management Act 2000*; *Arnold v Minister Administering the Water Management Act 2000* [2011] NSWLEC 51 [43].

the public interest to do so' did not attract the duty of procedural fairness.[104] The exercise of this power 'does not involve an impact on individuals in the requisite direct and immediate sense … [a]ny amendment to a plan will necessarily impact on all people with any interest in the water source as a class even though the impact itself might be different'. This was so even though the plan was expressed to operate in a particular manner in respect of certain licensees named in the special circumstances schedule.[105] Because a plan set a cap on the overall level of water extraction and then shared that resource between different licensees, a variation in the allocation of water to one licensee necessarily meant that there would have to be a variation in the allocation of water to others.

On appeal,[106] the appellants first argued that they were denied procedural fairness with respect to the adoption of the criterion for inclusion in and exclusion from the special circumstances schedule. Secondly, they argued that they were denied procedural fairness with respect to the decision as to whether or not they satisfied the criterion and, accordingly, ought to have been included in the schedule. The NSW Court of Appeal found it unnecessary to determine the case on the basis of the existence of the duty to afford procedural fairness.[107] The relevant question was what the duty to act fairly required in the circumstances of the case.[108] In the context of the statutory scheme as a whole and the circumstances of the case, fairness did not require the appellants to be given a hearing as to the adoption of the 'criterion' or as to whether the 'criterion' applied to a particular licence holder.[109] In the application of the test of 'special circumstances', no individual component of the decision-making process could be severed from the entirety of the polycentric decision-making process, involving interconnected and incommensurable interests in the context of the public interest.[110] The appellants had the opportunity to air any grievance. Fairness did not require the appellants to be afforded further opportunities, as it would risk an infinite regression of counter disputation.[111]

Gardner et al argue that the specialised ministerial planning powers under the *Water Management Act 2000* (NSW) to make and amend plans have been given a broad effect by judicial interpretation, unconfined by a common law duty of procedural fairness despite the highly discretionary nature of these powers.[112]

Broadly similar provisions exist in the legislative schemes of other Basin states. For example, under the *Natural Resources Management Act 2004* (SA) water allocation plans 'should be consistent with the other parts of the regional NRM [natural resource management] plan',[113] which among other things set strategic directions for all natural resource management activities to be undertaken in relation to the particular region.[114] Further, if the taking and/or use of water from a water resource is likely to have a detrimental effect on the quantity or

104 Ibid [200].
105 Gardner et al, above n 34, 337.
106 *Tubbo Pty Ltd v Minister Administering the Water Management Act 2008* (2008) 302 ALR 299.
107 Ibid [58].
108 Ibid [63]–[65].
109 Ibid [73], [86].
110 Ibid [75]–[79].
111 Ibid [84], [88], [90].
112 Gardner et al, above n 34, 339.
113 *Natural Resources Management Act 2004* (SA) s 76(5).
114 Ibid s 75.

quality of water that is available from another water resource, the water allocation plan for the first-mentioned resource must take into account the needs of persons and ecosystems using water from the other resource as well as the needs of persons and ecosystems using water from its own resource.[115] To the extent that a natural resource management plan or water allocation plan applies to the MDB, it should be consistent with the terms of requirements of the MDB Agreement and any relevant provisions of the *Basin Plan*.[116]

In contrast, under the *Water Act 1989* (Vic) the Minister's discretion to declare permissible consumptive volumes (the total volume of surface and/or groundwater that may be taken in a particular area) is unqualified.[117] However, when sustainable water strategies are prepared for regions of Victoria they must provide for specific forms of strategic planning of the use of water resources, including the identification of threats to the reliability of the supply and quality of water.[118] Strategic water strategies must also take into account the results of any long-term water resources assessment undertaken pursuant to the Act and various principles set out in the *Environment Protection Act 1970* (Vic), including the principle of integration of economic, social and environmental considerations, the principle of intergenerational equity and the precautionary principle. In relation to management plans, a consultative committee appointed under the Act must consider any comments made by interested persons and make appropriate changes to the draft management plan.[119]

In Queensland, the Minister must consider various factors when making a draft water plan, including regional plans, specified environmental values, the Basin Plan (if the draft water plan is within the MDB), the public interest, the results of any public consultation undertaken and the water-related effects of climate change on water availability.[120] Particular factors must also be considered when making a draft water use plan.[121]

Schwennesen v Minister for Environment and Resource Management[122] *(Schwennesen)* was an appeal of the primary judge's finding that the Minister's determination of the appellant's rights and conditions attaching to his water allocations in relation to the governor in council's decision to make a resource operation plan was not a decision 'of an administrative character'. Therefore, the appellant was not entitled to make an application for the reasons of the decision pursuant to the *Judicial Review Act 1991* (Qld). The Court of Appeal (Qld) dismissed the appeal, finding that the Minister's decision was not 'of an administrative character' for several reasons. First, the prescribed content of a resource operation plan did not focus on any individual interest. Resource operation plans have a broad scope in that they regulate the long-term use of the relevant water resource 'to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water'.[123] Within the large area the plan applied to, it regulated among other things the purposes for which water taken under a water allocation could be

115 Ibid s 76(6).
116 Ibid s 87.
117 *Water Act 1989* (Vic) s 22A.
118 Ibid s 22C.
119 Ibid s 31(1A).
120 *Water Act 2000* (Qld) s 45.
121 Ibid s 60.
122 [2010] QCA 340.
123 Ibid [14].

used and all future applications for water licences. The Court found these provisions to be legislative in character, providing an extensive series of new rules of general application in a large geographical area for subsequent implementation by the executive. Secondly, the legislative character of the plan was indicated by the fact that the Act allowed for the amendments of resource operations plans.[124] Thirdly, the binding legal effect of the plan indicated that the decision was of a legislative character.[125]

In the ACT, when determining the total amount of surface water and groundwater that is available for taking in water management areas, the Minister must take into account the environmental flow guidelines and the total resources of the territory.[126]

The question of why judicial review challenges to the equivalent of water-sharing plans in jurisdictions other than NSW have not been mounted arises. Speculation leads me to suggest the absence of a broad standing provision such as s 336 in the *Water Management Act 2000* (NSW) and the express provision in s 47 concerning judicial review proceedings. The equivalent of water-sharing plans in other jurisdictions may have a different legal character. In Queensland in *Schwennesen* the resource operation plan was considered legislative rather than administrative in character and not amenable to review under the *Judicial Review Act 1991* (Qld).

Notification of applications

In NSW, South Australia, Queensland and the ACT, there is an obligation to advertise to the public applications to take and use water, for example, and/or notify objectors of the determination of the application.[127] However, in Victoria there is no such obligation. Providing notice of an application is at the discretion of the water authority.[128] Further, there is no obligation imposed on the water authority to give notice of its decision to anyone. This has implications for access to justice for those wishing to object to such applications.

These procedural issues were highlighted in *Conroy v Goulburn Murray Water & Ors*,[129] where the relevant water authority did not give notice to objectors of its decision to grant licences for the construction of a bore and to take and use groundwater until well after the expiry of the 28-day period from the date of the decision within which an application for review must be lodged under s 64 of the *Water Act 1989* (Vic). An application for an extension of time within which to commence the proceeding under s 126 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) was refused by VCAT for the following reasons. First, a significant length of time (18 months) elapsed since the applicant first put in their objection. There was no evidence that they had been proactive in any way in terms of following up on

124 Ibid [24].
125 Ibid [29].
126 *Water Resources Act 2007* (ACT) s 17(2).
127 *Water Management Act 2000 (NSW)* ss 61(3), 64; *Water Act 2000* (Qld) ss 112, 114(7); *Natural Resources Management Act 2004* (SA) s 146(4)–(5); Water Resources Act 2007 (ACT) s 95, Sch 1 (the authority must also take reasonable steps to give a reviewable decision notice to any person in addition to the applicant whose interests are affected by the decision — see *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 67A).
128 *Water Act 1989* (Vic) s 49.
129 [2009] VCAT 2108.

that objection or seeking to find out what had occurred.[130] Secondly, if the application was granted the proponent would suffer prejudice [131] such as significant financial loss associated with investment made in the bore and irrigation infrastructure and consequential losses in connection with the operation of their farming enterprise. Thirdly, there is a strong public policy interest in providing certainty to licence and permit holders which is evident by cl 65 of Sch 1 of the *Victorian Civil and Administrative Act 1998*. That schedule states that VCAT must not extend the time for commencing a proceeding under a planning enactment if a permit, licence or works approval has been issued to any person on or after the expiration of the time appointed for lodging an application for review of the decision to grant that permit, licence or approval.

VCAT observed that there were procedural issues relating to the *Water Act 1989* (Vic) which necessitated legislative reform. Since providing notice of an application is at the discretion of the relevant water authority, a person's right of review may be compromised by a failure to give notice in time for a person to exercise their right (which occurred in this case). This is particularly an issue because rights of review are not limited to licence applicants or objectors (they are available to a person whose interests are affected), and there is growing interest by people in the grant of new licences and the construction of new bores given the pressures on water resources.

Enforcement

Basin state legislative schemes are focused on ensuring compliance by individuals and corporate entities. The 2019 South Australian Royal Commission report concluded that Basin states' water legislation 'generally appears sufficiently robust to provide for a range of enforcement options against individuals for instances of non-compliance'.[132] The report also observed a high degree of inconsistency between Basin states regarding the range of offence provisions and the use of administrative orders. The report suggested legislative reform to increase uniformity across the different enforcement schemes. Basin states' monitoring capacity and compliance culture are crucial to the achievement enforcement outcomes and these are highly variable.[133]

Civil enforcement by regulator

A range of enforcement tools is available to Basin state regulatory authorities. These include administrative orders to prohibit water use and unlawful construction or use of water works, to protect the environment and generally ensure compliance with legislation.[134] It may be an

130 Ibid [31].
131 Ibid [32].
132 Walker SC, above n 33.
133 Ibid 650. The MDBA compliance review published in November 2017 found significant variations between the Basin states regarding compliance culture, the level of resourcing, the extent of transparency and the clarity of their policy frameworks. For example, between 2012 and 2016, 94 per cent of surface water was metered in South Australia compared with between 25 and 51 per cent in the northern MDB (northern NSW and southern Queensland): Murray–Darling Basin Authority and Independent Review Panel, The *Murray Darling Basin Water Compliance Review* (No 44/17, MDBA, November 2017) 12, 17.
134 *Water Act 1989 (Vic) s 78; Water Management Act 2000* (NSW) ss 324–327, 329, 330, 333; *Natural Resources Management Act 2004* (SA) ss 193, 195, 197; *Water Resources Act 2007* (ACT) ss 71–76.

offence to fail to comply with such an order.[135] Basin state authorities can also apply to the relevant court or tribunal to have these administrative orders enforced and for a range of other orders to be made — for example, restraining a breach of legislation.[136]

Citizen enforcement

In NSW, s 336 of the *Water Management Act 2000* (NSW) is being relied on in *Inland Rivers Network Incorporated v Harris and Others* in the NSW Land and Environment Court. The applicant community organisation has commenced proceedings seeking a declaration that the respondents during various time periods took water from the Barwon–Darling rivers in contravention of s 60A(4) of the *Water Management Act 2000* (NSW), being a volume of water in excess of that authorised to be taken under the relevant water access licence. The applicant is also seeking an order restraining the respondents from taking water otherwise than in accordance with the water access licence and an order requiring them to return to the river system a large volume of water equivalent to what was taken. These proceedings are presently stayed pending the outcome of contested criminal proceedings in *WaterNSW v Harris*, referred to below.

In Queensland, a person may bring proceedings in the District Court for, among other things, an order to remedy or restrain the commission of an offence against the *Water Act 2000* (Qld).[137] A person may bring such a proceeding regardless of whether any right of that person has been infringed by the commission of the offence.

Criminal enforcement

There are differences between legislative schemes in the Basin states, but all broadly provide that it is an offence to take water unless authorised to do so,[138] contravene licence conditions,[139] use water without relevant approvals[140] and construct water-related works without approval.[141] There are also offences relating to water metering, such as metering tampering.[142] Criminal enforcement in NSW and Victoria is discussed below. Prosecutions have occurred in other Basin states, but comprehensive research is difficult when most cases are heard in local or magistrates courts which do not publish judgments and/or the regulator does not provide public information on its enforcement activities as does the Victorian Department of Environment, Land, Water and Planning.

135 *Water Management Act 2000* (NSW) s 336C; *Natural Resources Management Act 2004* (SA) s 130(2); *Water Resources Act 2007* (ACT) s 77I.
136 *Water Management Act 2000* (NSW) ss 335, 336; *Water Act 2000* (Qld) s 784; *Natural Resources Management Act 2004* (SA) ss 201, 220.
137 *Water Act 2000* (Qld) s 784
138 *Water Act 1989* (Vic) s 33E; *Water Management Act 2000* (NSW) s 60A; *Water Act 2000* (Qld) s 808; *Natural Resources Management Act 2004* (SA) s 127(1), (6); *Water Resources Act 2007* (ACT) s 77A.
139 *Water Act 1989* (Vic) s 64AF; *Water Management Act 2000* (NSW) s 60B; *Water Resources Act 2007* (ACT) ss 28, 77A.
140 *Water Act 1989* (Vic) s 64J; *Water Management Act 2000* (NSW) s 91A.
141 *Water Act 1989* (Vic) s 75; *Water Management Act 2000* (NSW) s 91B–D; *Natural Resources Management Act 2004* (SA) s 127(3), (6); *Water Resources Act 2007* (ACT) s 77C
142 *Water Management Act 2000* (NSW) ss 91H, 91I, 91IA, 91J, 91K; *Water Act 2000* (Qld) s 811; *Water Resources Act 2007* (ACT) s 77J.

New South Wales

The ABC's Four Corners program 'Pumped: Who's Benefitting from the Billions Spent on the Murray-Darling?' was aired on 24 July 2017.[143] The program identified significant community concern about lack of enforcement of water licence conditions by the Department of Industry and WaterNSW. An independent investigation commissioned by the Department of Industry into NSW water management and compliance was conducted by Ken Matthews. His final report was published on 24 November 2017.[144] After the publication of this report the Natural Resources Access Regulator (NRAR) was established on 14 December 2017 as an independent regulator under the *Natural Resources Access Regulator Act 2017* (NSW) with complete carriage of the compliance and enforcement of water management legislation in NSW.[145] Prior to the NRAR, enforcement of the *Water Management Act 2000* (NSW) was split between the Department of Industry and WaterNSW.[146]

According to NSW Land and Environment Court statistics, between January 2016 and July 2017, WaterNSW commenced five class 5 (summary criminal enforcement) proceedings. Between July 2017 and February 2019 (a similar period), WaterNSW and the NRAR commenced 30 class 5 proceedings — a substantial increase. More broadly, 69 class 5 summonses were filed between June 2009 and 2017, while 27 summonses were filed between 2018 and June 2019 (constituting 28 per cent of all cases filed over the 10-year period).

The creation of the NRAR has resulted in a significant increase in the number of compliance officers working in the state.[147] Compared with 2017, in 2018 the NRAR received 70 per cent more cases for investigation and finalised 80 per cent more cases. Further, there were:

- five times as many allegations of unlawful water take received
- more than four times as many directions to remove unlawful water management works
- more than three times the number of penalty notices issued
- more than double the total number of enforcement actions determined.

Interestingly, when comparing 2018 with 2017, the NRAR expressly referred to the MDB in stating that there were approximately 110 per cent more cases received for investigation, over 10 per cent more cases finalised and over 150 per cent more enforcement actions determined in the MDB.[148]

143 ABC, above n 6.

144 Ken Matthews, Independent Investigation into NSW Water Management and Compliance: Advice on Implementation (Final report, NSW Department of Industry, 2017) <https://www.industry.nsw.gov.au/__data/assets/pdf_file/0019/131905/Matthews-final-report-NSW-water-management-and-compliance.pdf>.

145 NSW Department of Industry, About NRAR (NSW Government) <https://www.industry.nsw.gov.au/natural-resources-access-regulator/about-nrar>.

146 Ibid.

147 Natural Resources Access Regulator, Compliance Outcomes: 2018 Compared with 2017 (NSW Department of Industry, March 2019) <https://www.industry.nsw.gov.au/__data/assets/pdf_file/0011/227378/NRAR-compliance-outcomes-2018-compared-with-2017.pdf>.

148 Ibid.

Two recent NSW Land and Environment Court cases reflect the greater focus of the regulator(s) in NSW on prosecuting. In *WaterNSW v Harris*,[149] the defendant pleaded not guilty to two charges of contravening a condition of a water supply works and water use approval — an offence specified in s 91G(2) of the *Water Management Act 2000* (NSW). The alleged conduct occurred in Brewarrina. Judgment is reserved before Robson J. In *WaterNSW v Barlow*[150] the defendant was fined a total of $102 866 for two charges of taking water from the Barwon River when metering equipment not working (an offence under s 91I(2) of the *Water Management Act 2000* (NSW)) — a strict liability offence. The defendant was also fined $86 625 for one charge of failing to comply with an embargo on taking water (s 336C(1)) — a strict liability offence.

Victoria

An increase in enforcement activities can be seen in Victoria. Between 1 July 2014 and 30 June 2017, a total of 11 prosecutions under the *Water Act 1989* (Vic) were initiated by Victorian water corporations (statutory entities responsible for monitoring water take in non-urban areas and enforcing the *Water Act 1989* (Vic)).[151] In contrast, between 1 July 2017 and 30 June 2018, 14 prosecutions were initiated.[152] Since July 2014 there has also been a marked increase in the number of reported alleged compliance breaches of the Water Act 1989 (Vic)) (most of which were addressed by at least an advisory letter).[153]

According to the Victorian Department of Environment, Land, Water and Planning:

> [The increase in alleged breaches reported between the 2016 and 2017 periods] is due to a combination of factors including increased capacity of water corporations to detect breaches and resolve to take enforcement actions targeting overuse against an allocation bank account (unauthorised use), and strong

149 *WaterNSW v Harris (No 3)* [2020] NSWLEC 18.

150 [2019] NSWLEC 30.

151 Victorian Department of Environment, Land, Water and Planning, Water *Compliance Report 2014–15* (16 July 2018) Victorian Government <https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2014-15>; Victorian Department of Environment, Land, Water and Planning, *Water Compliance Report 2015–16* (16 January 2019) Victorian Government <https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2015-16>; Victorian Department of Environment, Land, Water and Planning, *Water Compliance Report 2016–17* (16 January 2019) Victorian Government <*https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2016-17*>.

152 Victorian Department of Environment, Land, Water and Planning, *Water Compliance Report 2017–18* (16 January 2019) Victorian Government <https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/compliance-report-2017-18>.

153 382 (1 July 2014 to 30 June 2015); 1077 (1 July 2015 to 30 June 2016); 1117 (1 July 2016 to 30 June 2017); 1625 (1 July 2017-30 June 2018): Victorian Department of Environment, Land, Water and Planning, *Water Compliance Report 2014–15* (16 July 2018) Victorian Government <*https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2014-15*>; Victorian Department of Environment, Land, Water and Planning, *Water Compliance Report 2015–16* (16 January 2019) Victorian Government <https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2015-16>; Victorian Department of Environment, Land, Water and Planning, Water Compliance Report 2016–17 (16 January 2019) Victorian Government <https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2016-17>; Victorian Department of Environment, Land, Water and Planning, *Water Compliance Report 2017–18* (16 January 2019) Victorian Government <https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/compliance-report-2017-18>.

demand for water in regulated surface water markets combined with dry conditions. In most cases, the amount of unauthorised use is small and dealt with through advisory or warning letters.[154]

Conclusion

Substantial changes in the management of the MDB are underway with the aim of better integration between Commonwealth and Basin state water-sharing instruments under the Water Act (Cth) and Basin state water legislation. The Basin Plan requires Basin state water resource plans to be approved by the MDBA in 2019. The commencement date of 1 July 2019 has been extended, as many plans have yet to be accredited. How the scheme will be enforced practically is unknowable at this stage. The MDBA has released a compliance policy 2018–21, which sets out how it considers things will work at the Commonwealth level. Whether water resource plans will be judicially reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is also difficult to predict.

To date a variety of administrative decisions have been subject to merits review in Basin state courts and tribunals. Not surprisingly, the factors considered in merits appeals by courts and tribunals reflect the respective statutory schemes, particularly those matters which are required to be taken into account in such decisions. All regimes have mandatory environmental considerations to varying degrees. The experience in Victoria particularly identifies the importance of such considerations in the granting or refusal of water access licences in that jurisdiction.

Interestingly, judicial review challenges to overarching strategic water-sharing plans have only been attempted in NSW, without success by any applicant to date. A number of these challenges have been summarised in this article and demonstrate the difficulty for individual water users, who consider their interests have been adversely affected, to challenge water management plans where ministerial decision-making must have regard to numerous factors and balance a number of matters in the overall public interest.

Another area of variation between Basin states is the extent to which open standing provisions enable citizen enforcement of water laws. Resort to criminal enforcement also varies across Basin states, reflecting differences in enforcement culture according to the South Australian Royal Commission and the MDBA. Significant changes in the enforcement entities and compliance policies in NSW since the end of 2017 have resulted in far greater water regulation prosecution rates than in previous years.

Management of the MDB is a significant ongoing challenge for the Commonwealth and Basin state governments. The overall implementation of the Basin Plan in the next few years through their respective jurisdictions by these levels of government will determine whether the scheme is a good one in balancing the many human demands on a complex natural system while attempting to preserve its environmental integrity.

154 Victorian Department of Environment, Land, Water and Planning, *Water Compliance Report 2017–18* (16 January 2019) Victorian Government <https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/compliance-report-2017-18>.

Judicial review and public interest immunity

*Matthew Varley and Tristan Lockwood**

Public interest immunity recognises that the administration of justice demands courts have due regard to public interests beyond those arising in dispute between the parties. Public interest immunity by its nature exposes tensions between competing public interests; but in no context are these tensions rendered starker than in judicial review proceedings. This is because, first, a successful public interest immunity claim in judicial review proceedings may substantially (if not totally) impair an applicant's practical ability to obtain review of a decision; and, second, the residual power of a court to prevent unfairness by ordering a stay of proceedings has no utility in judicial review proceedings.

In this context, this article first explains public interest immunity and its role in judicial review proceedings before considering how courts have used stays and, less frequently, other mechanisms (including closed evidence and special advocates) to grapple with the stark effects of public interest immunity. In doing so, this article seeks to expose the inherent tensions that arise in the context of public interest immunity claims in judicial review proceedings, and the limits of closed evidence and special advocates as potential 'solutions'.

Public interest immunity in judicial review

Public interest immunity

The core function of the courts is to deliver justice according to law. To this end, the common law has long recognised the principles of open justice and natural justice as fundamental. These principles take form in courtrooms every day as the common law trial. Modified only superficially by codified rules of evidence and procedure, the core ideas that informed the earliest common law trials remain to this today: proceedings are conducted and judgments are delivered in public, and parties should know and can respond to the case against them by calling witnesses and cross-examining opposing witnesses.[1]

The common law recognises instances in which the principles of open justice and natural justice may be curtailed. For example, in relation to the former, courts may protect secret information, such as the identity of informants, by closing courtrooms and suppressing information. While such exceptions are closely guarded, the instances where courts will exercise such power are not fixed.[2] As Kirby P (as he then was) observed in the seminal case of *John Fairfax Group v Local Court of New South Wales*:

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1 *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531

2 *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 [21] (French CJ).

> Open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourages its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of a particular case.[3]

In this context, public interest immunity might be understood as a bargain struck by the executive and the courts to this effect: while the prevailing public interests in the disclosure of relevant information in a particular case might sometimes need to give way to the public interest in non-disclosure, natural justice demands that, as a general rule, non-disclosure apply equally to all. The price of a successful public interest immunity claim is thus denial of access to information not only for the party calling for it but the court and (for the purposes of the case) the party asserting the immunity as well.[4]

This understanding of public interest immunity as a 'deal' of sorts is reinforced by a consideration of the doctrine's historical origins. 'Crown privilege' (as public interest immunity was known until the mid-20th century) entitled the executive as of right to resist production in response to compulsory court processes on the grounds that public disclosure of the documents in question would be prejudicial to the public interest. In Australia and in the United Kingdom, a statement by the responsible Minister asserting that claim was regarded as determinative.[5]

This understanding of Crown privilege finds its roots in the Crown's immunity from suit more generally and, in particular, its prerogative to resist discovery sought against it. At the Commonwealth level, the High Court in *Commonwealth v Miller*[6] recognised that ss 56 and 64 of the *Judiciary Act 1903* (Cth) had the effect of submitting the Commonwealth (in right of the Crown) to the jurisdiction of the Courts, including in relation to its obligation to give discovery as any party would.[7] However, as Isaacs J went on to explain:

> The order to make a proper discovery does not destroy the privilege of public interest, and, when it comes to a question of disclosure as distinguished from proper discovery there the ground of public policy and interest may intervene and prevent the injury to the community which further coercive action might produce.[8]

The High Court in *The Marconi's Wireless Telegraph Company Limited v The Commonwealth [No 2]*[9] recognised that the courts have always had the power to test the basis of a claim of

3 (1992) 26 NSWLR 131, 141.
4 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532 [24] (Gummow, Hayne, Heydon and Kiefel JJ).
5 *Duncan v Cammell Laird* & Co [1942] AC 624.
6 [1910] HCA 46; 10 CLR 742.
7 To a similar effect, Crown immunity from suit had prior to federation already been abolished by each state, other than Victoria: see *Claims Against the Government and Crown Suits Act 1912* (NSW) s 4; *Crown Proceedings Act 1980* (Qld) s 8; *Crown Proceedings Act 1958* (Vic) s 23; *Crown Proceedings Act 1972* (SA) s 10; *Crown Suits Act 1947* (WA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 64.
8 Ibid 757.
9 (1913) 16 CLR 178.

public interest immunity.[10] However, a fundamental shift in the treatment of public interest immunity in Australia was effected by the High Court in *Sankey v Whitlam*[11] *(Sankey)* by the recognition of a duty of the court not only to test the basis for a claim but also to balance the public interest as expressed by the Minister and public interests in favour of disclosure.

The case law that developed following *Sankey* has grappled with conceptual difficulties between so-called 'class claims' and 'content claims', but on any view it is now clear that all public interest immunity claims whatever their species must be resolved by the courts on the balance of the competing aspects of the public interest.[12]

Under the modern law of public interest immunity, a party asserting a claim is required to identify a public interest favouring non-disclosure. Where such an interest is identified, and the party seeking disclosure identifies a public interest favouring such disclosure, it then falls to the court to weigh the competing interests favouring disclosure against those favouring non-disclosure.[13]

Section 130(1) of the Uniform Evidence Acts, to a similar effect, provides:

> If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.[14]

While this section generally reflects the common law position, it is clearly not intended as an exhaustive codification of it.[15]

Unlike legal professional privilege, public interest immunity is not capable of waiver (even by express intendment),[16] save as perhaps in extraordinary circumstances with leave of the court. This reflects the status of public interest immunity not as a privilege of the Crown but, rather, as a true substantive immunity and an inherent aspect of the proper administration of justice.[17] One interesting consequence of this status is that, while the public interest at issue might be undermined by the disclosure of information properly the subject of a claim for public interest immunity, that is not necessarily determinative of claim (although, of course, it may affect both the balancing exercise and, indeed, whether a public interest in favour of non-disclosure remains at all).

10 See 186–7 (Griffiths CJ), 193–4 (Barton J) and 206–9 (Isaacs J, dissenting). See in this regard the discussion in G Goldring, 'Crown Privilege, Scrutiny of the Administration and the Public Interest — A Comment on *Sankey v Whitlam*' (1979) 10 *Federal Law Review* 80. See also *Conway v Rimmer* [1968] AC 910.

11 (1978) 142 CLR 1.

12 *Kamasaee v Commonwealth of Australia (No 3)* [2016] VSC 438 [8].

13 See, eg, *State of Victoria v Brazel* [2008] VSCA 37

14 Uniform Evidence Acts, s 130(1).

15 There is some debate emerging on the cases as to whether the scope of s 130 truly reflects the common law or whether it modifies its scope, but nothing presently relevant turns on that point.

16 See TG Cooper, *Crown Privilege* (1990), pp 2–3; *Air Canada v Secretary of State for Trade* (No 2) [1983] 2 AC 394, 436.

17 *R v Lewes Justices; Ex parte Secretary of State for the Home Department* [1973] AC 388, 400 (Lord Reid); *Attorney-General (NSW) v Lipton* [2012] NSWCCA 156; 224 A Crim R 177 (Basten JA) [34].

In recent years the common law concept of public interest immunity has been re-appropriated by the legislature for the executive. Various statutory frameworks at both the state/territory and Commonwealth levels provide for information to be withheld on the basis of certificates issued by the executive or on the basis that information meets a certain description.[18] Such frameworks should not be confused with the ministerial statements referred to above that were recognised by the common law, but they do provide a useful analogue and might perhaps be seen as a nod to bygone years where the courts took the executive on their word. The general idea is that a statutory framework will provide that, in a particular context, the certificate or statutory description is determinative of the confidentiality of the material specified. In some cases, that decision is not reviewable by a court; in others, the court may inspect the documents to ensure that they meet the description in the certificate or the statute.[19]

In *Graham v Minister for Immigration and Border Protection*,[20] the High Court considered a scheme in the Commonwealth context that provided for a public interest certificate issued by the Minister to be determinative of High Court's right to access the material referred to in the certificate, including for the purpose of considering whether there was a proper basis for the certificate. Entertaining an analogy with the common law doctrine of public interest immunity, the High Court held that the legislation was invalid on the basis that it was inconsistent with the minimum standard of judicial review effected by s 75(v) of the *Constitution* — at least insofar as it purported to exclude the High Court from being able to test the basis of the certificate.[21]

Public interest immunity in judicial review

As has been explained, public interest immunity can operate to protect the activities of the executive from scrutiny where the public interest in non-disclosure of information about those activities outweighs the public interest in disclosure. Judicial review is a mechanism by which the activities of the executive are scrutinised. There is an obvious potential for tension when public interest immunity is invoked in judicial review proceedings.

A decision-maker should consider all the relevant material available; a good decision-maker will ensure that all relevant material has been identified and considered. At the Commonwealth level, these obligations are reflected in para 4 of Appendix B to the *Legal Services Directions 2017* and in s 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth). It is unsurprising that information that the executive considers to be worthy of public interest immunity would be considered in the course of decision-making from time to time.

Where a public interest immunity claim is made over information to which the decision-maker had regard, or which was available to the decision-maker when the decision

18 For example, see ss 38A, 39A and 46 of the *Administrative Appeals Tribunal Act 1975* (Cth); see also *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532.

19 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; 252 CLR 38; *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21; 78 NSWLR 340 [182].

20 [2017] HCA 33; 91 ALJR 890.

21 Ibid [60]–[61]

was made, a successful claim may prevent the court and the applicant from having regard to information that might otherwise reveal an error of law.[22] Where the claim is made over part of the reasons themselves, a successful claim may similarly prevent the court from having regard to information that might reveal error.[23]

Courts have accepted such 'self-imposed restraints' as an incidence of the proper administration of justice.[24] In some cases, the effect of a successful public interest immunity claim may be that a court does not have regard to all relevant information when reviewing a decision. In such a case the court weighs the public interests for and against disclosure and concludes that the latter outweighs the former.[25]

National security provides one obvious intersection between decision-making and secrecy. Several of the cases considered in this article concern the Australian Security Intelligence Organisation (ASIO). In some of those cases, ASIO made a security assessment, which was challenged directly by way of judicial review. In others, a security assessment was taken into account in the making of another decision — for example, a decision to refuse a visa.

For example, in *Parkin v O'Sullivan*,[26] the applicants sought orders quashing security assessments made by the Director-General of Security and declarations that various steps taken the Director-General were unlawful. The Director-General claimed public interest immunity from production of the security assessment of the applicant and documents that ASIO had created in the course of preparing that assessment. In *El Ossman v Minister for Immigration and Border Protection*[27] *(El Ossman)*, the Director-General claimed immunity from production of parts of the statement of grounds supporting the security assessment, among other documents.[28]

Claims over reasons and relevant information are not unique to national security cases. In a wide range of contexts, decision-makers receive information from informers,[29] obtain commercially sensitive reports[30] and rely on police intelligence.[31] Each such category of information (and, indeed, many more) can attract public interest immunity.

The fact that a decision may be made or has been made may itself be secret. While this sounds anathema to mainstream decision-making, decisions to issue warrants or to disclose information between investigators are routinely — perhaps invariably — made without notice to those affected by the decision.[32] Decisions of this kind are rarely challenged, either

22 *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314, 327–8.
23 *Sagar v O'Sullivan* [2011] FCA 182; 193 FCR 311 [64].
24 *Ibid [82]; Plaintiff M47 v Director-General of Security & Ors* [2012] HCA 46; 251 CLR 1 [361] (Heydon J).
25 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1 [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
26 [2009] FCA 1096; 260 ALR 503.
27 [2017] FCA 636; 248 FCR 491.
28 Ibid [27]–[28]
29 *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314.
30 *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54; 95 NSWLR 1.
31 *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562; 148 A Crim R 74.
32 *Johns v Australian Securities Commission* (1993) 178 CLR 408 is one example.

because those affected do not know about them or because flaws in a criminal investigation can be challenged (to some extent) in a subsequent trial.[33]

If secret information is considered in the course of making a decision, or if the decision is made in secret, it necessarily follows that the reasons, or part of them, would be withheld from the subject of the decision, at least at the time the decision is made. Unsurprisingly, security assessments conducted by the Director-General of Security may be withheld pursuant to a ministerial certificate.[34] Also unsurprisingly, some subjects of such decisions seek the full security assessment in a judicial review of the assessment, and such attempts may be met with claims of public interest immunity.[35]

An attempt to compel the production of information that was withheld from the subject of the decision may engage the same public interests that led the information to be withheld at the decision-making stage.[36] In *Jaffarie v Director-General of Security*[37] *(Jaffarie)*, the Full Court, stated:

> [111] The touchstone of present relevance is whether enough information had been disclosed to Mr Jaffarie in the 'Unclassified Reasons' to enable him to make meaningful submissions. The mere fact that more information may have been made available to him during the course of the present hearing does not necessarily say anything as to whether the initial disclosure in the 'Unclassified Reasons' was sufficient to afford procedural fairness.
>
> [112] In resolving that question a balance necessarily must be struck between protecting that information which must remain undisclosed by reason of the claim for public interest immunity and the legitimate and important rights of ensuring procedural fairness to Mr Jaffarie: cf *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314.[38]

Given that the withholding of information or reasons at the decision-making stage may be followed by an allegation of denial of procedural fairness, care should be taken to distinguish the exercise involved at each stage. The matters that must be put to the subject of a decision are determined by the statutory framework and the issues to which the decision-maker proposes to have regard. The public interest may affect the content of that obligation.[39] That is not to say that the information will necessarily be the subject of a successful public interest immunity claim in subsequent proceedings; it is merely to say that similar although functionally distinct considerations will arise when determining the public interest immunity claim and the content of the obligation of procedural fairness.

33 See, eg, *Bunning v Cross* [1978] HCA 22; 141 CLR 54; cf *Ousley v The Queen* [1997] HCA 49; 192 CLR 69.

34 *Australian Security Intelligence Organisation Act 1979* (Cth) s 38(2).

35 *Parkin v O'Sullivan* [2009] FCA 1096; 260 ALR 503; *Jaffarie v Director-General of Security* [2014] FCAFC 102; 226 FCR 505; *Sagar v O'Sullivan* [2011] FCA 182; 193 FCR 311; *Plaintiff M46 of 2013 v Minister* for *Immigration and Border Protection* [2014] FCA 90; 139 ALD 227.

36 Whether or not an applicant takes steps to compel production of the reasons and the material that the decision-maker considered, court rules sometimes provide for the production of such documents early in the judicial review. For example, r 33.03 of the Federal Court Rules 2011 provides in a taxation appeal for the Commissioner of Taxation to file all relevant documents in his or her possession relevant to the hearing. More generally, it is common enough for courts to order the filing of documents relevant to the decision as a matter of course.

37 [2014] FCAFC 102; 226 FCR 505.

38 Ibid.

39 *Chu v Minister for Immigration and Ethnic Affairs (1997)* 78 FCR 314, 328; *Leghaei v Director-General of Security* [2007] FCAFC 27; 241 ALR 141 [43]–[55]; *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562; 148 A Crim R 74.

As has been explained, public interest immunity involves a claim by the executive to immunity from production or disclosure and a balancing of public interests by the judiciary. The public interest in national security that conditions the content of procedural fairness might be the same public interest identified by the executive when claiming immunity.[40] However the balancing exercise that characterises the judicial determination of a public interest immunity is not necessarily the same or even a part of determining the content of procedural fairness. Indeed, the content of that balancing exercise at the judicial review stage will depend on factors that may not be apparent, or perhaps even knowable, when the decision is made.

As an example, an applicant who defeats a public interest immunity claim over information that was withheld from them at the decision-making stage may be able to rely on the information to show that they were denied procedural fairness. But, to defeat the public interest immunity claim, they must persuade the court that the public interest in disclosure outweighs whatever public interest that tends towards confidentiality. The public interest immunity claim does not determine the issue of whether procedural fairness was denied, but — subject to the possibility of the court accepting closed evidence — the public interest immunity claim must necessarily be determined before the court turns its attention to the substantive complaint.

In a series of cases, the question of whether the Director-General has afforded procedural fairness has been tested through attempts to compel production of material available to the Director-General when the decision was made, or the entirety of the security assessment, or both. *Jaffarie*[41] was one such case; *El Ossman*[42] and *BSX15 v Minister for Immigration and Border Protection*[43] *(BSX15)* are two others. In each case, it was determined that information that had been withheld at the decision-making stage could not be withheld on the basis of public interest immunity in the judicial review. In both *El Ossman and BSX15*, the court held that there had been a denial of procedural fairness. But that result did not flow from the mere fact that information was withheld from the applicant at the decision-making stage that could not be withheld on the subsequent judicial review. Rather, it followed from a finding that the information available at the decision-making stage could have been disclosed to the applicant and, as a separate consideration, should have been disclosed so as to afford procedural fairness.

In contexts far removed from national security, the analysis may be the same. In *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government*,[44] a report was prepared by consultants engaged by the State of New South Wales, but only a summary of the report was provided to the delegate and the applicant council. A majority of the New South Wales Court of Appeal set aside the primary judge's orders upholding a public interest immunity claim over the full report.[45] It was at least possible that, despite that finding, some countervailing public interest in confidence could have been

40 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; 225 CLR 88 [24].
41 [2014] FCAFC 102; 226 FCR 505.
42 [2017] FCA 636; 248 FCR 491.
43 [2017] FCAFC 104; 249 FCR 1
44 [2017] NSWCA 54; 95 NSWLR 1.
45 Ibid [93]–[95] (Basten JA, Macfarlan JA agreeing).

identified to save the decision from complaints of constructive failure to exercise statutory function[46] and procedural unfairness.[47]

A successful public interest immunity claim renders some information unavailable to the court. However, as Mason J said in *Church of Scientology Inc v Woodward:*

> The fact that a successful claim for [public interest immunity] handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials.[48]

Sometimes a successful public interest immunity claim impairs, or entirely defeats, an applicant's ability to establish certain grounds of review.[49] Nevertheless, the information subject to the immunity has been considered by the court 'in limine' and thus the court can and has exercised its jurisdiction.[50]

In this connection, it is interesting to consider the types of public interests that might loom large in the context of a public interest immunity claim in judicial review proceedings. A few cases illustrate the flexibility of the analysis.

In *SBEG v Secretary, Department of Immigration and Citizenship*,[51] the applicant sought an injunction for his release from immigration detention. In connection with that proceeding, the applicant sought to obtain from ASIO a decision explaining the basis for an adverse security assessment issued in respect of him. In this context, while ultimately upholding the claim for public interest immunity, the court appeared to take apparent account of the fact that the proceeding concerned the applicant's liberty, despite the proceeding being civil and not criminal.

In *Sankey*,[52] cabinet documents were found not to sustain a public interest immunity claim in a private prosecution brought against former Prime Minister Gough Whitlam and other politicians. The prosecution effectively entailed an allegation of misfeasance in public office. In view of the nature of the proceeding, the High Court found that it was appropriate for the documents to be disclosed despite the fact that such documents would ordinarily sustain a public interest immunity claim.

It remains to be seen whether, in an appropriate case, the effective inability of an applicant to obtain review of executive action is itself a consideration to be weighed in the public interest immunity balancing exercise.[53] It is already established that the maintenance of integrity of

46 Ibid [101] (Basten JA; Macfarlan JA agreeing).
47 Ibid [105]–[106] (Basten JA; Macfarlan JA agreeing).
48 [1982] HCA 78; 154 CLR 25, 61. Cited with approval in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532 [24]; see also *Plaintiff M47 v Director-General of Security & Ors* [2012] HCA 46; 251 CLR 1, 143 (Heydon J).
49 *Sagar v O'Sullivan* [2011] FCA 182; 193 FCR 311.
50 *Graham v Minister for Immigration and Border Protection ; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1 [61].
51 [2012] FCA 277.
52 (1978) 142 CLR 1.
53 The High Court's reasoning in *Sankey v Whitlam* (1978) 142 CLR 1 seems consistent with this view. In this regard, see also *Church of Scientology v Woodward* [1982] HCA 78; 154 CLR 25, esp at 76 (Mason J); *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 91 ALJR 890 [61].

the criminal justice system is such a consideration.[54] Whatever weight may be given to the ability of an applicant to obtain review, cases like *Parkin v O'Sullivan*[55] suggest that it is not determinative.

After a claim: stays, closed evidence and special advocates

Yet courts have sometimes proven unwilling to proceed on 'something less than the entirety of the relevant materials'. Courts may order a stay of proceedings following the success of some public interest immunity claims, providing a check on the scope for such claims to undermine fairness in the justice system. However, given the nature of judicial review proceedings, a stay mechanism has no utility. Closed evidence and special advocates have emerged sporadically as ad hoc mechanisms to address the effect of public interest immunity, but they rest on a shaky doctrinal footing.

Stays

The absoluteness of a successful public interest immunity claim is rendered most stark in instances where both sides of the scale are heavily weighted.[56] For example, it is easy enough to imagine a situation where the disclosure of information might place large groups of people at a near certain risk of death but also give rise to a reasonable doubt in criminal proceedings. In such a case, there is both a clear public interest in disclosing and not disclosing relevant information. That information would give rise to a reasonable doubt in criminal proceedings (or be necessarily disclosed in order to prevent gross unfairness) will always weigh heavily in any public interest balancing exercise. However, it will not always mean that a public interest immunity claim should be overruled.

Such situations expose tension between public interests favouring non-disclosure and the specific public interest in the administration of justice. Courts remain reluctant to exercise their jurisdiction in a manner that will cause gross unfairness in a particular case and, relatedly, bring the administration of justice into disrepute.[57] That is notwithstanding the fact that the public interest balancing exercise may have resulted in a determination that the public interest in disclosure is outweighed by the public interest in non-disclosure. In exceptional circumstances, which nonetheless cast some light on the issue, the High Court in AB *(a pseudonym) v CD (a pseudonym)* unanimously held:

> [There is a clear public interest in maintaining the anonymity of a police informer, and so, where a question of disclosure of a police informer's identity arises before the trial of an accused, and the Crown is not

54 AB *(a pseudonym)* v CD *(a pseudonym) EF (a pseudonym) v CD (a pseudonym)* [2018] HCA 58; 93 ALJR 59.

55 [2009] FCA 1096; 260 ALR 503

56 See, eg, *The Queen v Yucel (Ruling No 6)* [2018] VSC 371.

57 *Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53; 93 ALJR 1; *Barton v R* (1980) 147 CLR 75, 96–97 (Gibbs ACJ and Mason J, with whom Aickin J and Wilson J agreed), 105 (Stephen J), 107 (Murphy J); *Jago v District Court of New South Wales* (1989) 168 CLR 23, 29 (Mason CJ), 57–8 (Deane J), 74–7 (Gaudron J); *Williams v Spautz* (1992) 174 CLR 509, 518–19 (Mason CJ; Dawson, Toohey and McHugh JJ); *Walton v Gardiner* (1993) 177 CLR 378, 392–5 (Mason CJ; Deane and Dawson JJ). Courts have recognised mechanisms other than stays to ensure fairness, including, for example, a power to strike out pleadings on this basis: see Sands v State of *South Australia* [2015] SASCFC 36; 122 SASR 195 [157].

> prepared to disclose the identity of the informer, as is sometimes the case, the Crown may choose not to proceed with the prosecution or the trial may be stayed.
>
> [However, in the unique situation of this case] [t]he public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.[58]

In that case, the fact that the affected persons had already been convicted meant that the tension could only be resolved within the paradigm of the public interest immunity determination. However, the way in which this tension is usually resolved is through the exercise of the inherent power of superior courts to prevent a trial proceeding in a manner that will be unfair, including by ordering a stay of proceedings. The power to do so has been described as an example of the jurisdiction to supervise the executive's involvement in criminal justice.[59]

This power extends to circumstances where a successful public interest immunity claim deprives an accused of a fair trial according to ordinary principles. As Murphy J explained in *Alister v R:*

> There is a public interest in certain official information remaining secret; but there is also public interest in the proper administration of criminal justice. The processes of criminal justice should not be distorted to prevent an accused from defending himself or herself properly. If the public interest demands that material capable of assisting an accused be withheld, then the proper course may be to abandon the prosecution or for the court to stay proceedings.[60]

However, the power to order a stay following the success of a public interest immunity claim is rarely exercised. That is because, where the nature of information is such that it would cause unfairness of a magnitude justifying a stay, it typically follows that a public interest immunity claim would be unsuccessful. In cases where that is not the case, the Crown and/or the party asserting the claim have a strong imperative to seek some practical compromise.[61]

A similar mechanism to resolve this tension exists in non-criminal proceedings. In *Walton v Gardiner*,[62] Mason CJ, Deane and Dawson JJ said:

> The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness … The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in Hunter v Chief Constable of the West Midlands Police as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'.

58 *AB (a pseudonym) v CD (a pseudonym) EF (a pseudonym) v CD (a pseudonym)* [2018] HCA 58; 93 ALJR 59 [9]–[10].
59 Tim Game SC and Julia Roy, 'Unifying Principles in Administrative and Criminal Law', in Neil Williams (ed), *Key Issues in Public Law* (The Federation Press, 2017) 202.
60 (1984) 154 CLR 404, 431.
61 See, eg, *The Queen v Yucel (Ruling No 6)* [2018] VSC 371.
62 (1993) 177 CLR 378.

Consistent with this view, Bell P (Leeming JA and Emmett AJA agreeing) in the recent case of *Moubarak by his tutor Coorey v Holt* explained:[63]

> Coherence is a quality that the common law values. An incoherent legal system is one that is apt to undermine respect for the rule of law and bring the administration of justice into disrepute. It would, in my opinion, tend towards incoherence to maintain that what constitutes a fair trial should differ in cases involving identical factual allegations. If the defendant was not fit to face criminal charges in respect of the plaintiff's complaint to police because 'the minimum requirements for a fair trial' … would not be present, it would, in my opinion, offend commonsense simultaneously to maintain that the defendant could secure a fair civil trial in relation to identical factual allegations.[64]

His Honour was there engaging with a line of authority considering the applicability of the 'fair trial' principles in the civil context arising as a consequence of capacity to provide instructions. However, there is no reason in principle why the same reasoning does not apply equally to the question of whether a successful claim for public interest immunity could found an application for a permanent stay of civil proceedings.[65]

In *Sands v State of South Australia*[66] the Full Court of the Supreme Court of South Australia more clearly held in obiter that there was no reason in principle why a court could not strike out a pleaded defence if the information that substantiated the pleadings was subject to public interest immunity. The Full Court referred to bad faith and abuse of process in advancing such a defence. However, it is hard to imagine where fairness would require such an outcome, as the nature of a successful public interest immunity claim is that all parties are deprived from deploying information, not just the applicant.

In *Prebble v Television New Zealand Ltd*,[67] the Privy Council held that while it was an infringement of parliamentary privilege for any party to legal proceedings to question in those proceedings words spoken or actions done in Parliament, there may be extreme cases where the interests of justice require proceedings to be stayed if as a result of material being excluded by reason of parliamentary privilege it would be impossible for the issues between the parties to be determined fairly.[68]

The above cases illustrate that, even after a court trying a criminal charge or tortious cause of action has determined a public interest immunity claim and found that the public interest in disclosure is outweighed by the public interest in non-disclosure, proceedings may be stayed if the court's processes would result in manifest unfairness or would otherwise bring the administration of justice into disrepute. It may be that a successful public interest immunity claim will mean that a court 'will arrive at a decision on something less than the entirety of the relevant materials'.[69] However, in some cases, the overriding interest in

63 [2019] NSWCA 102.
64 Ibid 392–3.
65 See, generally, *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531.
66 [2015] SASCFC 36; 122 SASR 195 [157].
67 [1995] 1 AC 321.
68 While instructive as to the existence of a residual power to stay proceedings following determination of a claim, the context of parliamentary privilege is somewhat different, as, unlike public interest immunity where information is typically secret, unfairness is more likely to arise in a civil context as information may be in the public domain, despite being inadmissible in court proceedings.
69 *Church of Scientology v Woodward* [1982] HCA 78; 154 CLR 25, 61 (Mason J).

fairness and confidence in the administration of justice may mean that the court should not arrive at a decision on the substance of the proceedings at all. While a stay may be seen as accommodating both the public interest for and against disclosure, it demonstrates that the public interest in the administration of justice is not exhausted by the public interest balancing exercise.

By their nature, judicial review proceedings involve the post-facto review of executive action. An applicant who complains that he or she cannot obtain meaningful review by reason of a successful public interest immunity would have no interest in a stay of proceedings. The safeguard identified above thus does not exist in the context of judicial review.

Closed evidence

Perhaps informed by this context, and in a search for a way to enable meaningful review of decisions that are based on, or involved, information the subject of a successful public interest immunity claim, some courts have identified an ability to rely on closed evidence.

In *Chu v Minister for Immigration and Ethnic Affairs*[70] *(Chu)*, a majority of the Full Court of the Federal Court of Australia admitted closed evidence, withheld it from the applicant and his representatives, and considered it in the course of reaching their decision. Confidential information had been considered by the decision-maker but withheld from the applicant. Instead, a summary of that information had been prepared in purported discharge of the obligation to afford procedural fairness. A majority of the Full Court held:

> It seems to us that a balance can be struck between preserving that public interest and ensuring that there has been procedural fairness, by the Court examining the confidential material and assessing whether the summary is a fair one. We do not see this as any reflection upon the integrity of the decision-maker. The matter is one where there may well be room for differing opinions. Judicial review of the confidential material might be seen simply as the price payable, (on particular occasions such as this), for adjusting procedural fairness requirements downwards in the course of protecting another public interest.[71]

In *Nicopoulos v Commissioner for Corrective Services*[72] *(Nicopoulos)* the Supreme Court of New South Wales hearing an application for judicial review accepted closed evidence, withheld it from the applicant, and dismissed the application in reliance on that evidence. The evidence appears to have consisted of police intelligence about the applicant, who was a solicitor seeking to visit clients in custody. Justice Smart held that the inherent power of the Supreme Court extended to admitting evidence and withholding it from a party and their representatives. His Honour observed:

> There is a tension between the Court having all relevant material especially if it was before the decision-maker and unfairness to the party adversely affected by not being told of it so that party can respond to that evidence. In the circumstances envisaged the public interest in maintaining the secrecy or confidentiality of the material must be compelling. Of course, circumstances may vary greatly and this will affect the balancing exercise. For example, disclosure of the material may be necessary to enable the person affected to obtain a verdict of not guilty. It may destroy the credit of an essential Crown witness. Again, the nature

70 (1997) 78 FCR 314.
71 Ibid [328].
72 [2004] NSWSC 562; 148 A Crim R 74.

> and importance of the civil rights or privileges at issue will be an important consideration in the balancing exercise.[73]

Another example is *Eastman v Director of Public Prosecutions (No 2)*.[74] The court in that case was concerned with the appropriate orders after an inquiry into conviction conducted pursuant to the *Crimes Act 1900* (ACT). A question arose whether or not the Full Court, which was required to have regard to the report of the inquiry, could have regard to a confidential section of the report and closed evidence that was withheld from the parties. After referring to *Chu* and *Nicopoulos*, the Court concluded that:

> The interests of justice can require that one or more, or in very rare cases all, of the parties to the proceedings not be given access to confidential evidence, information or a document to which the court must have regard in order to exercise its jurisdiction. The facts, legislative context and nature of the proceedings will be relevant as to how the court balances the competition between the public interest in the protection of the confidentiality the subject of the immunity under s 130(1) on the one hand and in the administration of justice on the other.[75]

From time to time, closed evidence is contemplated in cases involving national security. In *Leghaei v Director-General of Security* [2005] FCA 1576 the primary judge had regard to closed evidence offered by the Director-General, a course that was apparently approved on appeal.[76] In *Jaffarie*[77] the Director-General sought to rely on an affidavit both in defending a claim of public interest immunity and on the substantive issues in the proceeding.[78] The role of the Director-General in offering, rather than resisting, recourse to closed evidence may have been critical.

Regard has also been had to closed evidence in statutory frameworks where the decision-maker was permitted by the statute to do so and an absurd result would flow if the court was unable to access the same evidence or the decision-maker's reasons dealing with that evidence.[79]

The use of closed evidence is well established in the course of making out claims of public interest immunity, applications for suppression and non-publication orders, and cases involving trade secrets or commercially sensitive information. It may also be more common in criminal proceedings than is generally recognised.[80] As has been identified above, statutory frameworks for the use of closed evidence in courts and tribunals are increasingly common. As more and more decisions are made under these frameworks, and as courts become

73 Ibid [83].
74 [2014] ACTSCFC 2; 9 ACTLR 178.
75 Ibid [167].
76 *Leghaei v Director-General of Security* [2007] FCAFC 37; 241 ALR 141 [61]–[62].
77 [2014] FCAFC 102; 226 FCR 505.
78 Ibid [29].
78 *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21; 78 NSWLR 340 [225]–[226] (Sackville AJA, Allsop P and Handley AJA agreeing); *R (Haralambous) v Crown Court at St Albans* [2018] USKC 1; [2018] AC 236 [57]–[59]. *Eastman v Director of Public Prosecutions (No 2)* [2014] ACTSCFC 2; 9 ACTLR 178 might also fall within this category: see [184].
80 See *HT v R* (High Court of Australia, S123 of 2019), in which the appellant complains that closed evidence was considered by a judge of the District Court at her sentencing and by the Court of Criminal Appeal on appeal. The appeal is listed for hearing before a Full Court of the High Court on 10 September 2019.

familiar with statutory appeals from these decisions, the idea of closed evidence at common law may become more palatable.

Even where the court has regard to closed evidence, this may be of limited comfort to the applicant. After all, the court is not in the same position as the applicant's representatives to identify issues and test the evidence.[81] This is both a practical limitation of closed evidence and the foundation of the incompatibility between closed evidence and natural justice.[82]

Where closed evidence might allow a court to test a ground of judicial review proceedings upon which the applicant bears an onus they will not otherwise be able to discharge, it is easy to see the attraction of admitting such evidence. The alternative to closed evidence in this context is no evidence and certain failure of a ground of review that may have a proper basis. In particular, it may seem tempting to have regard to closed evidence on review, despite the difficulties that course presents to procedural fairness, for the purpose of considering an alleged denial of procedural fairness by the decision-maker. It is perhaps for this reason that several of the cases concerning closed evidence have involved courts seeking to determine the content of procedural fairness obligations and whether those obligations have been met. Further, perhaps objections to closed evidence based on procedural fairness principles have less force when a complaint is made of procedural unfairness on the part of the decision-maker.[83]

Finally, any proposal to have regard to closed evidence at common law, following a successful public interest immunity claim, would have to grapple with the traditional effect of a claim: that the information subject to the claim is wholly excluded.[84]

Special advocates

From time to time the use of 'special advocates' is proposed as a means of alleviating the perceived unfairness flowing from a successful public interest immunity claim, or the use of closed evidence in a statutory framework that permits such evidence.

The role of a special advocate is generally said to involve access to the closed evidence, either for the purpose of making submissions in opposition to a public interest immunity claim in the interests of party who has sought the production of the documents[85] or making submissions on the substantive issues in any closed hearings from which the non-state party is excluded.[86] In statutory frameworks that permit a tribunal to receive and consider closed

81 *Leghaei v Director-General of Security* [2005] FCA 1576 [90]–[91].

82 Cf *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531.

83 In this connection, it is unclear whether support might be drawn for this proposition from the dicta at *Church of Scientology v Woodward* [1982] HCA 78; 154 CLR 25, 76 (Mason J) citing *Sankey v Whitlam* (1978) 142 CLR 1 generally, or whether his observations were in that context directed at the more limited issue for which they were cited by the High Court in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 91 ALJR 890 [61].

84 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532 [24] (Gummow, Hayne, Heydon and Kiefel JJ).

85 *State of New South Wales v Public Transport Ticketing Corporation (No 3)* [2011] NSWCA 200; 81 NSWLR 394.

86 *R v Lodhi* [2006] NSWSC 586; 163 A Crim R 475; *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531.

evidence, a power to appoint a special advocate to consider that same evidence and assist the tribunal may be implied.[87] However, in some instances, a special advocate procedure may be inconsistent with the statutory regime for review.[88]

From time to time, it is also suggested that the non-state party could appoint a lawyer who would access the closed evidence but be excused or restrained from disclosing that information to their client.[89] A similar proposal is one that the non-state party's existing lawyers might access the closed evidence but be excused or restrained from disclosing that material to their client.[90]

It can be seen that the possibilities for the special advocate's role, their relationship with the non-state party and the purpose to which their assistance is directed can be multiplied to create a large number of alternatives.

The difficulties posed by the appointment of special advocates have been identified elsewhere and include:

- where a special advocate is a lawyer retained by the non-state party, whether the court has the power to excuse them from their obligations to their client. If the court has no such power, how the special advocate can discharge their role without breaching those obligations;[91] and
- where a special advocate is unable to communicate with the non-state party after receiving the confidential information, how the special advocate can assist the court in circumstances where he or she cannot obtain instructions.[92]

The second difficulty may be less acute in judicial review proceedings. For example, where the closed evidence consists of a part of the decision maker's reasons and the applicant alleges an error that must appear in those reasons, it may be that the special advocate can assist the court without needing to take instructions to resolve any factual points. Nevertheless, given that a special advocate will only be of assistance when closed evidence is deployed, the conceptual questions identified above relating to closed evidence loom large in any proposal to deploy a special advocate.

Conclusion

Claims of public interest immunity in judicial review proceedings expose difficult tensions between the accountability of the executive and the wide range of public interests that can support such claims. In some cases, successful claims of public interest immunity may make judicial review proceedings difficult to prosecute. While courts have identified that the use of closed evidence may allow meaningful review, especially when an applicant complains of procedural unfairness, a comprehensive theoretical framework has yet to emerge.

87 *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21; 78 NSWLR 340 [183]–[195] (Sackville AJA, Allsop P and Handley AJA agreeing).
88 *GWVR v Director-General of Security* [2010] AATA 1062 [19]–[25].
89 *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd* [2011] NSWCA 21; 78 NSWLR 340 [24]–[25], [169]–[172].
90 *Plaintiff M46 of 2013 v Minister for Immigration and Border Protection* [2014] FCA 90; 139 ALD 227 [38].
91 *R v H* [2004] 2 AC 134 [22].
92 *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531 [36].

Monitoring Australia's national security and counter-terrorism laws in the 21st century

*Dr James Renwick CSC SC**

When Chief Justice Murray Gleeson AC accepted an invitation some years ago to give the ABC's annual Boyer Lecture, he chose to speak about the rule of law. He began in a striking way in his first Boyer Lecture, titled *A Country Planted Thick with Laws*, as follows:

> In Robert Bolt's play *A Man for All Seasons*, the central character is Thomas More, the Lord Chancellor of England who defied Henry VIII on the issue of the legality of his marriage — and was beheaded. Seeking to justify to a critical relative his apparently stubborn adherence to law, religious and secular, in the face of danger, not only to his own life, but also to the welfare of his family, More refers to the laws of England as a shelter. He says:
>
> > This country's planted thick with laws from coast to coast ... and if you cut them down ... d'you really think you could stand upright in the winds that would blow then?
>
> The imagery of law as a windbreak carries an important idea. The law restrains and civilises power.
>
> .... Our system of government is infused by the principle of legality … Law is not the enemy of liberty; it is its partner … One of the ways in which the law seeks to promote justice and individual liberty is in its function as a restraint upon the exercise of power, whether the power in question is that of other individuals or corporations, or whether it is the power of governments. Many Acts of Parliament, and many rules of judge made law, limit the capacity of corporations, or individuals, or bureaucracies, to do what they will. The basic law of Australia, the Commonwealth *Constitution* limits legislative and executive and judicial power. When the jurisdiction of a court is invoked, and the court becomes the instrument of a constraint upon power, the role of the court will often be resented by those whose power is curbed. This is why judges must be, and must be seen to be, independent of people and institutions whose power may be challenged before them. The principle that we are ruled by laws and not by people means that all personal and institutional power is limited.
>
> …
>
> Many Australians are so accustomed to living in a community governed upon those principles that they fail to make the connection when they see, sometimes close to home, violence and disorder, in societies where the rule of law either does not exist, or cannot be taken for granted. In our society, threats to the rule of law are not likely to come from large and violent measures. They are more likely to come from small and sometimes well-intentioned encroachments upon basic principles, sometimes by people who do not understand those principles.[1]

Those fundamental ideas, expressed by a great lawyer, are always in my mind when I undertake my work as Independent National Security Legislation Monitor (INSLM) — a role I have undertaken since the beginning of 2017.[2] This article discusses my work as INSLM, drawing directly on a recent address to the Lowy Institute and on my evidence to recent public hearings on loss of citizenship for terrorist conduct — in particular:

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* Dr James Renwick CSC SC is the Independent National Security Legislation Monitor. The views expressed in this article are the author's own. This is an edited version of a paper presented at Australian Institute of Administrative Law National Conference, Canberra, 18 July 2019.

1 Chief Justice Murray Gleeson, *A Country Planted Thick with Laws*, Boyer Lectures, ABC, 19 November 2000 <https://www.abc.net.au/radionational/programs/boyerlectures/lecture-1-a-country-planted-thick-withlaws/3476934>

2 And which concluded on 30 June 2020.

- the INSLM role and its origins;
- current threats;
- how I go about my work;
- existing inquiries;
- other issues; and
- the overarching theme of trust in a democratic society.

The INSLM role and its origins

Once upon a time — namely, in 2001 — there were no federal anti-terrorism laws and thus no such prosecutions, the Australian Intelligence Security Organisation (ASIO) had shrunk with the end of the cold war, Al Qaeda was hardly a household name and ISIL did not exist.

The attacks on 9/11 changed many things, and they certainly began a process of legislative and government reaction to terrorism activities which has continued to this day and has resulted in over 80 separate statutes being passed, over 100 prosecutions being commenced and 73 or so people — 10 per cent of them children — being convicted, with many receiving lengthy sentences.

And that is not all. There are:

- new or updated laws concerning espionage and sabotage;
- a variety of laws to deal with the still sizeable cohort of foreign fighters, their supporters and dependants; and
- new laws to counter organised criminals and terrorists taking action to 'go dark' as far as the surveillance by police and intelligence authorities is concerned — although, on a recent trip to London, I was told the preferred terms are 'going spotty' or even 'going different', not 'going dark'.

The new laws, like the new threats, were and are often unsettling in their novelty and reach and raise legitimate questions:

- Do they go too far?
- Do they work?
- Do they properly deal with legitimate human rights concerns?

In a sceptical world, it is no longer enough for any government or minister to say, 'just trust us' or 'if you knew what I know you would be satisfied'.

So it was that, in addition to the roles of the independent judiciary, parliamentary committees, the Ombudsman and his intelligence community counterpart, the Inspector-General of Intelligence and Security (IGIS), in 2010 Australia adapted the role of the United Kingdom's Independent Reviewer of Terrorism Legislation by enacting the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act), which

provides for the appointment of a part-time INSLM. With my appointment to that role in early 2017, I followed two eminent lawyers— namely, the Hon Roger Gyles AO QC and, before him, Bret Walker SC.

Fundamentally, to adopt the language of former Independent Reviewer David Lord Anderson QC, both roles share the following features:

- first, independence — which is obviously critical, and which, I should say, is properly respected;
- secondly, an entitlement to see everything of relevance, whether it is Cabinet documents, legal advice or the most highly classified intelligence material — this is one answer to the person unconvinced by any minister who says, 'if you could see what I see', as both the INSLM and Independent Reviewer can and do see just that; and
- thirdly, the requirement for an unclassified version of the report, which goes to the government, to be made public — in my case, tabling of the unclassified report must occur within 15 sitting days so that the Parliament and the public can see and decide for themselves.

As INSLM I do not investigate complaints or look at Bills; rather, I independently:

a. review the operation, effectiveness and implications of national security and counter-terrorism laws; and

b. consider whether such laws:

    i. contain appropriate protections for individual rights;

    ii. remain proportionate to terrorism or national security threats; and

    iii. remain necessary.

Many reviews can be conducted of my own motion. However, the Prime Minister and the Attorney-General can send me anything related to counter-terrorism or national security — a much broader concept. The increasingly important Parliamentary Joint Committee on Intelligence and Security (PJCIS) can also send me certain matters, and in fact they havesent me their first reference — namely, the encryption review.

Current threats

Because I must form a view on whether particular laws remain proportionate to terrorism or national security threats or both, I receive regular briefings as of right from police, policy and intelligence agencies on all matters of relevance to my reviews. As has been the case for the past four years, the current threat of a terrorist act occurring in Australia remains at the 'probable' level.

My views are that:

- The credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future.
- While more complex or extensive attacks cannot be ruled out and must be prepared for, attacks by lone actors using simple but deadly weapons with little, if any, warning are more likely.
- There can be no guarantee that the authorities will detect and prevent all attacks, although most have been.
- There is also the risk of opportunistic, if unconnected, 'follow-up' attacks in the immediate aftermath of a completed attack, at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality.
- The threats come mainly from radical and violent Islamist action — which is not to be confused with the great world religion of Islam, which practises peace — and there are also increasing concerns about radical, violent, right-wing activity.
- The implications of the recent atrocities in Christchurch, New Zealand, and Sri Lanka are yet to be fully worked out, as are the likely roles of the remnant foreign fighters of the so-called Caliphate.
- The arrests in July 2019 are in the words of the Minister for Home Affairs the '16th major terrorist attack that was planned that's been thwarted by the police'.[3]

Pausing there, it would be remiss of me not to both express my condolences to victims of terrorist acts from our society and acknowledge, with gratitude, the dangerous and selfless work by those who seek to prevent such acts.

How I go about my role

My role is a part-time one — about two days a week on average. I have a small staff and retain counsel assisting from the private bar and solicitors assisting from the Australian Government Solicitor to help me with each particular reference. That has many benefits, not least as it provides invaluable assistance and sounding boards for me and creates an informed cohort of able lawyers from whom future Independent Monitors could be drawn.

I approach my role holistically, in the sense of interacting with all parts of the interconnected structure which seeks to protect us from national security and counter-terrorism threats. I note that the recently retired President of the Queen's Bench Division of the High Court of England and Wales, Sir Brian Leveson, has said:

> there is no single criminal justice system. It is a system of systems: a normative system, with Parliament and the courts determining the nature of criminal law; a preventive, detective, and investigative system operated by the police; a prosecutorial system, operated by the DPP and Crown Prosecution Service; an

3 Tom Steinfort, Interview with the Hon Peter Dutton MP, Minister for Home Affairs (Television Interview, *Today Show*, 3 July 2019) <https://minister.homeaffairs.gov.au/peterdutton/Pages/Interview-with-Tom-Steinfort,-Today-Show.aspx>.

> adjudicative system, made up of, and requiring effective access to, legal aid, the legal profession for defence representation, and the courts; and, a punitive and rehabilitative system operating with the Prison Service. As with any ecosystem, its vitality is a product of the effective interaction between its constituent parts and of their individual vitality. A structural weakness in their interaction, a fundamental weakness in any one or more parts, will undermine the system as a whole. Cures to problems in one part of the system may have an adverse impact on the operation of other parts of the system or on the system as a whole. Reform should not be viewed in isolation. It needs to be a co-ordinated, co-operative endeavour. If it is not we run the risk of compounding problems or creating new ones.[4]

I agree with those views. Applying them to my role, this involves regular engagement and consultation, in a scrupulously independent, firm and apolitical way, with:

- Parliament and its committees, especially the PJCIS and its UK equivalent, the Intelligence and Security Committee;
- relevant ministers;
- the judiciary here and in the UK;
- national security focused departments (the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Department of Home Affairs, the Department of Defence and the Department of Foreign Affairs and Trade; and the Home Office in the UK), agencies (ASIO, the Australian Secret Intelligence Service, the Australian Signals Directorate, MI5, MI6, GCHQ) and police services (state police, the Australian Federal Police (AFP) and the UK Metropolitan Police);
- the Commonwealth Director of Public Prosecutions and the Crown Prosecution Service in the UK;
- academics;
- human rights bodies, especially the Human Rights Commissioner;
- civil society generally; and
- certainly not least the IGIS and my UK counterparts as Independent Reviewers, both past and present.

Reviews also involve consideration of international law relating to human rights and security; Australian constitutional law; and Australian and comparative human rights law, criminal law and procedure and the law of evidence. I think it is some of the most interesting law reform in the country.

When a new review begins — whether it is by way of my 'own motion' power or a referral from the Prime Minister, the Attorney-General or the PJCIS — then, having assembled the new team for that review, I and my office usually proceed as follows:

1. We assemble a relevant brief of material. Given I do not consider Bills but, rather, monitor the operation of Acts, I have the benefit of the second reading speeches and explanatory memoranda and, almost always these days, one or more reports from the PJCIS.

4 Sir Brian Leveson, President of The Queen's Bench Division, 'The Pursuit of Criminal Justice' (Criminal Cases Review Commission Annual Lecture, Faculty Of Laws, University College London, 25 April 2018) <https://www.judiciary.uk/wp-content/uploads/2018/04/speech-leveson-ccrc-lecture-april-2018.pdf>.

2. We send out what amounts to interrogatories and subpoenas to the relevant departments and agencies about the operation of the laws: the agencies indicate what can and cannot be made public.

3. We hold separate private hearings with the agencies to discuss the documents and written answers provided to me.

4. We invite submissions, both confidential and public —the latter being posted on my website.

5. We conduct public hearings, which are now live streamed and which begin with me setting out my prima facie views.

6. We write the report (usually a single public report but sometimes a classified report as well) and sometimes consult on draft recommendations.

7. We deliver the report, usually in person, to either the Prime Minister or the Attorney-General, at which time I usually give them a short oral briefing on what I have found — after all, as s 3 of the INSLM Act states, 'The object of this Act is to appoint an Independent National Security Legislation Monitor who will assist Ministers in ensuring that Australia's counter terrorism and national security legislation' meets the relevant requirements as to necessity, proportionality and protection of human rights.

8. We orally brief the PJCIS, which is usually provided with an embargoed copy of the report for its purposes.

9. We wait for the public report to be tabled in Parliament within 15 sitting days, at which point it is posted on my website.

That typically takes six to 12 months and sometimes longer. Some reviews are fixed in time by legislation, often by reference to when the PJCIS must do its own review. So, although at one stage a government announced that the Independent Monitor's work was completely done, I can confidently say that the role has many years of work ahead.

The citizenship review

I have recently concluded the public hearings in this review, which concerns two quite different provisions in the *Australian Citizenship Act 2007* (Cth) — the conviction-based model and the operation of law model. I invite you to look at my opening remarks on my website. I am now proceeding to finalise the report, and the unclassified version will be delivered and then tabled.

The TOLA review

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act* 2018 (Cth) (TOLA) commenced in early December last year, having been introduced as a Bill on 20 September 2018. The PJCIS urgently considered its terms; however, having received advice from the government that there was an immediate need to provide agencies with additional powers and to pass the Bill in the last sitting week of 2018, it cut short its consideration and recommended enactment with some amendments, with the proviso that there be further review by both the PJCIS and my office. This year, the PJCIS referred review of the Act to me.

Some background may be helpful:

- At present, oversight of interception and surveillance powers is spilt across three broad lines: oversight for law enforcement, oversight for intelligence agencies and state and territory oversight.
- Generally speaking, the interception and surveillance activities of law enforcement are independently approved by an 'eligible judge'[5] or a member of the Administrative Appeals Tribunal. The Commonwealth Ombudsman, or in some cases a state and territory oversight agency, inspects and oversees law enforcement use of these powers.
- Intelligence agencies, like ASIO, do not have their powers approved by a judicial body. In most cases, the Commonwealth Attorney-General approves the exercise of ASIO functions and the IGIS reviews the exercise of intelligence and powers and the propriety of their activities. Accordingly, ASIO and other intelligence agencies are not accustomed to prior judicial approval of their functions.
- The Commonwealth does not have a clear constitutional power to regulate all surveillance activities or state and territory law enforcement. While interception is covered by a particular constitutional head of power, broader surveillance activities (including digital surveillance which does not interact with the Australian communication system) can be regarded as matter for state or territory parliaments.

The key features of the TOLA that have received attention are the new ability of federal intelligence agencies and Australian police to get technical assistance from a designated communications provider, either by agreement or, ultimately, by compulsion; and to require that provider to take certain steps to help the authorities, perhaps by giving access to an app or a service offered by an ISP or an encrypted communication. Today is not the day to go into any detail on how this complex Act works: the 2019 report on the Act by the PJCIS is a good summary of the many controversies which attend the Act.

May I suggest at least the following principles, some derived from the report by David Anderson, called *A Question of Trust*, that will guide this review:[6]

1. Just as, in the physical world, we do not accept lawless ghettos where the law does not apply, so also it should be in the virtual world: in this context it means intrusive surveillance powers — conferred by law and with clear thresholds and safeguards — which already apply in the physical world should in principle apply in the analogous virtual world unless there are good reasons otherwise. An example of such a good reason would be if the operation of the law would unduly undermine, say, the integrity of the financial and banking system.

2. What the law permits and forbids must be clear.

3. Oversight and safeguards are vital and there are comparative models of interest.

5 Such as judges of federal courts and state supreme courts.

6 David Anderson QC, Independent Reviewer of Terrorism Legislation, *A Question of Trust: Report of the Investigatory Powers Review* (The Crown, London, 2015) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>.

This is a very complex review and I welcome wide participation.

Key questions

I conclude by asking some key questions which go beyond my current review.

1. How can the role of Parliament and key committees such as the PJCIS, in scrutinising counter-terrorism and national security laws, be enhanced?[7]

2. How can we best achieve the desirable aim 'that material which can properly be made public should be widely available for scrutiny'? One way to start, as I suggested in my latest report to the Prime Minister, is by following the UK practice of regularly making accessible figures on numbers of arrest and convictions. I was pleased to see that the AFP Deputy Commissioner, who gave evidence to me recently, did set out current figures.

3. How can we best enhance the vital role of the guardians, whether that is the judiciary or the bodies like the IGIS, to whom whistleblowers may legitimately turn with any concerns they may have about illegality or maladministration?

4. How do we ensure proper safeguards against misuse of internet technology?[8]

I suggest that one answer to all of those questions is to measure them against the critical issue of trust in a democratic society. As David Anderson has written:

> Public consent to intrusive laws depends on people trusting the authorities, both to keep them safe and not to spy needlessly on them …

7 There is the ever-decreasing time available for scrutiny of Bills and an increasing number of Bills. I am also interested to see what the government says about the important recommendations of the 2017 Independent Intelligence Review concerning an expanded role for the PJCIS: see Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review* (Commonwealth of Australia, 2017) <https://www.pmc.gov.au/sites/default/files/publications/2017-Independent-Intelligence-Review.pdf>:
'Recommendation 23: The role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be expanded by amending relevant legislation to include:

a. a provision enabling the PJCIS to request the Inspector-General of Intelligence and Security (IGIS) conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community (NIC) agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister;
b. a provision enabling the PJCIS to review proposed reforms to counter-terrorism and national security legislation, and to review all such expiring legislation;
c. provisions allowing the PJCIS to initiate its own inquiries into the administration and expenditure of the 10 intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation;
d. provisions enabling the PJCIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PJCIS with a report on matters referred by the PJCIS, and for the Monitor to provide the PJCIS with the outcome of the Monitor's inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister; and
e. a requirement for the PJCIS to be regularly briefed by the Director-General of the Office of National Intelligence, and separately by the IGIS.'

8 Apart from my inquiry, there is, for example, the important Digital Platforms Inquiry of the ACCC: Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Project Overview* <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

> Trust in powerful institutions depends not only on those institutions behaving themselves (though that is an essential prerequisite), but on there being mechanisms to verify that they have done so. Such mechanisms are particularly challenging to achieve in the national security field, where potential conflicts between state power and civil liberties are acute, suspicion rife and yet information tightly rationed …
>
> Respected independent regulators continue to play a vital and distinguished role. But in an age where trust
>
> depends on verification rather than reputation, trust by proxy is not enough. Hence the importance of clear law, fair procedures, rights compliance and transparency.[9]

As INSLM I look forward to playing my part on the issue of trust, as far as the INSLM Act permits me to. It is a privilege to do so.

9 Anderson, above n 6, 13.3–13.4.

Reviewing a decision to call out the troops

*Samuel C Duckett White and Andrew Butler**

> *Emergencies present significant challenges to legal systems committed to the rule of law. While providing considerable latitude for State action to respond as deemed necessary, the legal system nonetheless seeks to limit and render accountable (to some degree) the exercise of extraordinary powers in an attempt to minimise the risk of misuse or over-reaction.*[1]

On 15 December 2014, Man Haron Monis held 18 people hostage in the Lindt Café, Sydney. One hostage, at the direction of Monis, alerted the authorities that 'an Islamic State operative armed with a gun and explosives … had stationed collaborators with bombs in other locations in the city'.[2] While the NSW Police officers acted as first responders, members of the Australian Defence Force (ADF) counter-terrorism unit, Tactical Assault Group (East) (TAG(E)), were concurrently rehearsing methods by which to resolve the hostage situation.[3] After a 16-hour siege, Monis executed a hostage, which triggered the NSW Police to enter the premises, resulting in the death of Monis and a second hostage.[4] The subsequent Coroner's report canvassed, inter alia, the role of the ADF in the siege[5] and concluded that the 'challenge global terrorism poses for State Police Forces calls into question the adequacy of existing arrangements for the transfer of responsibility for terrorist incidents to the ADF'.[6]

In Australia, with the exception of the Australian Federal Police and specialised federal agencies, general law enforcement is the constitutional responsibility of the states and territories, within their respective jurisdictions.[7] There are instances, however, where state and territory law enforcement agencies may 'lack the highly sophisticated military hardware to cope with extremely dangerous emergencies'.[8] As such, it may fall upon ADF members to aid the civil authority.[9]

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1 S Bronitt and D Stephens, 'Flying Under the Radar — The Use Lethal Force Against Hijacked Aircraft' (2007) 7(2) *Oxford University Commonwealth Law Journal 265, 266.*

2 Coroners Court of New South Wales, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations*, Glebe, May 2017, 3 (Lindt Café Coronial).

3 Ibid 201.

4 Ibid 3.

5 Ibid 383–92.

6 Ibid 385.

7 By operation and inference of s 119 of the *Australian Constitution*; see further Peta Stephenson, 'Fertile Grounds for Federalism — Internal Security, the States and Section 119 of the Constitution' (2015) 43 *Federal Law Review* 289, 291.

8 Hoong Phun Lee, 'Military Aid to the Civil Power' in Michael Adams and Colin Campbell (eds), *Emergency Powers in Australia* (Monash University Press, 2018) 223.

9 See Australia and New Zealand Counter-Terrorism Committee, *National Counter-Terrorism Plan* (4th ed, 2017) 35.

International and domestic terrorism,[10] with indiscriminate attacks on civilians and property, has influenced the way the Australian Government has approached constitutional and legal parameters of counterterrorism.[11] On 27 November 2018, the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) (2018 Amendments) was passed with bipartisan support. The 2018 Amendments to Pt IIIAAA of the *Defence Act 1903* (Cth) aimed to 'streamline the legal procedures for call out of the ADF and to enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism'.[12]

This article is concerned with the ability of civilian courts to review a decision to call out the ADF to aid the civil authority — arguably the most important, yet least clarified aspect of Pt IIIAAA and one that would not appear to be covered in any academic literature in the field.[13]

It is clear that a decision of the Governor-General (to make a call-out order) is not subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act).[14] A decision by an Authorising Minister, or alternate Authorising Minister, to make an order or declaration under Pt IIIAAA would be viewed as a decision by an officer of the Commonwealth.[15]

Review of a decision to call out the ADF to aid the civil authority could occur by way of the constitutional writs referred to in s 75(v) of the Constitution. Section 75(v) provides that 'in all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth' the High Court shall have original jurisdiction. Similar

10 Insofar as there is a single definition; see Bruce Hoffman, Inside Terrorism (Columbia University Press, 1998); see further Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2015).

11 Robert Hill (Minister for Defence), 'Australia's National Security: A Defence Update 2003', media release, 26 February 2003, 5. The current National Terrorism Threat Level is PROBABLE.

12 Explanatory Memorandum to Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 2 (Explanatory Memorandum 2018); as corroborated in the second reading speech for the Bill: Commonwealth, *Parliamentary Debates,* House of Representatives, 28 June 2018, 674 (Charles Christian Porter, Attorney-General).

13 See Samuel C Duckett White, 'A Soldier By Any Other Name: A Reappraisal of the "Citizen in Uniform" Doctrine in Light of Part IIIAAA' (2020) 57(2) *Military Law and Law of War Review;* David Letts and Rob McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (The Federation Press, 2019) 112; John Sutton, 'The Increasing Convergence of the Role and Functions of the ADF and Civil Police' (2017) 202 *Australian Defence Force Journal 38*; David Letts and Rob McLaughlin, 'Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications' (2016) 85 *AIAL Forum 63*; Michael Head, *Calling Out the Troops* (The Federation Press, 2009); Cameron Moore, 'The ADF and Internal Security: Some Old Issues with New Relevance' (2005) 28(2) *UNSW Law Journal*, 523; Margaret White, 'The Executive and the Military' (2005) 28(2) *UNSW Law Journal* 438; Norman Charles Laing, 'Call-Out the Guards: Why Australia Should No Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28(2) UNSW Law Journal 508; Michael Head, 'The Military Call-Out Legislation: Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 271; Elizabeth Ward 'Call Out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8, 1997–98, Parliamentary Library, Parliament of Australia); Lee, above n 8; Andrew Hiller, *Public Order and the Law* (Sweet & Maxwell Ltd, 1983).

14 See para (c) of the definition of 'decision to which this Act applies' in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) s 3.

15 See Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36(1) *UNSW Law Journal* 316.

jurisdiction is conferred on the Federal Court of Australia by s 39B(1) of the Judiciary Act 1903 (Cth). Although the courts' powers include granting other administrative law remedies such as certiorari and a declaration, it is not necessary for present purposes to discuss these remedies in any detail. It is sufficient to note that it is possible that one or more of these remedies would be available in relation to a decision of the Authorising Ministers under the proposed threshold if an applicant could demonstrate a legal defect in the reasoning of the Authorising Ministers, such as a failure to consider the mandatory factors.

Any application for judicial review would have to overcome the hurdle of standing, which this article does not engage with but assumes would be possessed by a necessary applicant.[16] It further assumes that reasons will be given for the call-out order, which would address the mandatory considerations. This article will cover the legislative framework of Pt IIIAAA, focusing specifically on the mandatory and discretionary considerations of the Authorising Ministers when making a call-out decision or declaration. It will then address the decision itself before looking at practical barriers to judicial review, such as the presumption of regularity, whether a decision to call out the troops is non-justiciable, and sensitivities surrounding national security evidence. While some might consider this an academic exercise, it is likely that, in a scenario where the ADF was called out under Pt IIIAAA, there would be extreme scrutiny of the decision-making process.

Legislative framework: Pt IIIAAA

Part IIIAAA is predicated on the need to resolve domestic violence incidents, or a threat thereof, as quickly and efficiently as possible. It merits noting from the outset that:

> The threshold (for calling out the troops) … recognises that calling out the ADF to respond to an incident is a significant and exceptional act, and ensures that it is not to be done in relation to incidents that are within the ordinary capability of police.[17]

This threshold will be explored in more detail below. A call-out order is generally made by the Governor-General, on the satisfaction of the Authorising Ministers. The Authorising Ministers are the Prime Minister, the Attorney-General and the Minister for Defence.[18]

An order by the Governor-General requires the Chief of the Defence Force (CDF) to utilise the ADF in 'such a manner as is reasonable and necessary, for the purpose specified in the order'.[19] With the exception of an offshore area, when utilising the ADF under Pt IIIAAA, the CDF must, as far as is reasonably practicable, ensure that ADF members, inter alia,

16 Under the ADJR Act, s 5, a person aggrieved by a 'decision to which this Act applies' may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the grounds specified in the section — eg failing to take a relevant consideration into account in the exercise of a power. The phrase 'decision to which this Act applies' is relevantly defined in s 3 of the ADJR Act to mean 'a decision of administrative character' made under an Act. The term 'decision' is broadly defined in the ADJR Act, s 3(2), and has been interpreted as meaning a determination, for which provision is made by statute, that is 'final or operative and determinative', at least in a practical sense, of the issue of fact calling for consideration: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337.

17 Addendum to the Explanatory Memorandum to the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 3 (Addendum to the Explanatory Memorandum 2018).

18 *Defence Act 1903* (Cth) s 31.

19 Ibid s 39(2).

cooperate with the police force of the relevant state or territory.[20] This does not transfer operational command or control of ADF members to constabulary forces.[21]

It merits first to look at potential call-out situations that may occur under the amended Pt IIIAAA, as outlined in Table 1.

Section	Call-out type
33	Commonwealth interest
34	Commonwealth interest — contingent call-out
35	Protection of states and territories
36	Protection of states and territories — contingent call-out

Call-out orders under ss 33 and 35 are effective for up to 20 days unless revoked earlier.[22] If the Authorising Ministers are still satisfied, the order may be extended for up to another 20 days, without restriction on the number of times an order may be varied.[23] Contingent call-out orders cease to be in force at the end of the time frame specified in the order unless revoked earlier.[24] A call-out order must also specify which Division, as per Table 2 below, it authorises, dictating the powers that might be utilised by ADF members.[25] More than one Division may be in effect at one time.

Table 2: Part IIIAAA Divisions

Number	Division
3	Special powers generally authorised by the Minister
4	Powers exercised in specified areas
5	Powers to protect declared infrastructure

The above framework notes which Divisions are to be authorised to apply in relation to the order. Although not central to the topic of this article, from a holistic perspective it is important that it be understood.

Generally speaking, Div 3 powers may only be exercised when authorised by an Authorising Minister.[26] The powers under Div 3 are focused primarily on 'preventing, ending, and protecting

20 Ibid s 40(1)(ii)
21 Ibid s 40(3).
22 Ibid ss 33(5)(d)(ii), 35(5)(d)(ii).
23 Ibid s 37(2).
24 Ibid ss 34(5)(d)(ii), 36(50(d)(ii).
25 Ibid ss 33(5)(c), 34(5)(c), 35(5)(c), 36(5)(c).
26 Ibid s 41.

people from, acts of violence and threats'.[27] While there is no limitation on the corps or service categorisation of the ADF members to be used (Regular or Reserve), realistically any land-based call-out of the ADF under Div 3 will utilise Australian Special Forces, which include TAG(E) or Tactical Assault Group (West) (TAG(W)). TAG(E) is constituted by members of the 2nd Commando Regiment (2CDO) and is responsible for assisting Australia's eastern seaboard.[28] TAG(W) is constituted by members of the Special Air Service Regiment (SASR) and is responsible for Australia's western seaboard.[29]

Personnel in TAG(E) and TAG(W) are members of Special Operations Command (SOCOMD). The effect of this is that qualified members of SOCOMD are highly trained and experienced in urban combat and are considered the apex of combat soldiers. They are, even within the isolated institution of the ADF, removed both geographically and culturally,[30] their identities, and the tenure of their posting in SOCOMD, are protected (in policy) from both the public and their peers (protected identity herein referred to as PID). Accordingly, there is no requirement for soldiers to wear uniform or have any form of identification while operating under Div 3. While lengthy, the justification merits replication:

> The requirement to wear uniforms and identification applies to proposed Division 4, but not to proposed Division 3. This is because the tasks that the ADF will be required to perform under Division 3 are higher end military actions and may involve the Special Forces. These tasks may require the ADF to operate in a covert manner where uniforms would be detrimental. ADF Special Forces soldiers have protected identity status because they are associated with sensitive capabilities. Protected identity status is required to maintain operational security and the safety of the individual and their family. By virtue of their protected identity status, ADF Special Forces soldiers are able to exercise powers under proposed Division 3 without being required to produce identification or wear uniforms. Tasks under Division 4 are more likely to be related to securing an area with, or in assistance to, the police. When carrying out Division 4 tasks, the ADF is more likely to need to display a visible presence and therefore uniforms will assist the conduct of these tasks.[31]

Division 3 evidently envisages situations which require extreme, deliberate and potentially lethal force to be used. It allows a wide discretion to ADF members on the ground, in the air or on the water to prevent or put an end to violence.

Under Div 4, the Authorising Ministers may declare a 'specified area'.[32] The intent of such a declaration by the Authorising Ministers is to empower an ADF member to search premises in the specified area and also means of transport and persons in the specified area.[33] The search powers under the specified area are accordingly divided into two subdivisions:

27 Explanatory Memorandum 2018, above n 12, 59.
28 Michael Brissenden, 'Sydney Siege: Counter-terrorism Specialist Questions Weapons' *Australian Broadcasting Corporation* (online) 25 January 2015 <https://www.abc.net.au/news/2015-01-29/counter-terrorism-specialist-questions-sydney-siege-weapons/6053706>.
29 Ibid
30 The effect of this isolation on the culture of SOCOMD was addressed in an internal review by sociologist Dr Samantha Crompvoets — see Dan Oakes, 'Claims of Illegal Violence, Drugs and Alcohol Abuse in Leaked Australian Defence Report' *Australian Broadcasting Corporation* (online) 9 June 2018 <https://www.abc.net.au/news/2018-06-08/allegations-of-australian-soldier-misconduct-detailed-in-report/9815182>.
31 Explanatory Memorandum 2018, above n 12, 60.
32 *Defence Act 1903* (Cth) s 51.
33 Explanatory Memorandum 2018, above n 12, 16.

one relating to premises (Subdiv C)[34] and the other to means of transport and people (Subdiv D).[35] The authorisation process for these subdivision search powers differs subtly.

Division 5 develops further on the powers of the ADF when protecting 'declared infrastructure' and is focused primarily on 'preventing and ending damage or disruption to the operation of declared infrastructure, and on preventing, ending and protecting people from acts of violence and threats'.[36] Under Pt IIIAAA the Authorising Ministers may, in writing, declare particular infrastructure, or part thereof, as 'declared infrastructure'.[37] Separately, an expedited infrastructure declaration can be made under Div 7.[38] The criteria by which the Authorising Ministers may declare infrastructure requires belief, on reasonable grounds, that:

> (a) Either:
>
> (i) There is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; or
>
> (ii) If a contingent call out order is in force — if the circumstances specified in the order were to arise, there would be a threat of damage or disruption to the operation of the infrastructure or part of the infrastructure; and
>
> (b) The damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, any person.[39]

The Explanatory Memorandum makes clear that:

> [It is not intended to cover or] … protect nationally significant buildings such as the Opera House in the absence of any concomitant risk to life. The type of infrastructure intended to be declared includes, for example, power stations, water treatment plants, nuclear power stations and hospitals.[40]

However:

> [It is equally linked to] physical facilities, supply chains, information technologies, and communication networks which if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or economic wellbeing of Australia, or affect Australia's ability to conduct national defence and ensure national security.[41]

The question of whether infrastructure such as the Sydney Harbour Bridge — which, if destroyed, would impact on the economic wellbeing of Sydney through significant disruption to its flow of trade and transport — could be deemed declared infrastructure remains open. Declared infrastructure may be either within Australia or the offshore area; and whether a call-out is in force or not.[42] Pertinently, it may relate to infrastructure in a state or territory,

34 *Defence Act 1903* (Cth) s 51A.
35 Ibid s 51B.
36 Explanatory Memorandum 2018, above n 12, 72.
37 *Defence Act 1903* (Cth) s 51H.
38 Ibid s 51F.
39 Ibid s 51H(2).
40 Explanatory Memorandum 2018, above n 12, 71
41 Ibid 32.
42 *Defence Act 1903* (Cth) s 51H.

regardless of whether the relevant state or territory government has requested it.[43] It may only operate while the call-out order is on foot.[44]

When making an order to call out the ADF, the Governor-General must also specify the exact nature of the domestic violence or threat, the specific interest affected in each jurisdiction, and the date on which the call-out ends.[45]

Call-outs

For a Commonwealth interest call-out, the Governor-General may make an order to call out the ADF, on the satisfaction of the Authorising Ministers, that:

(a) any of the following applies:

(i) domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia;

(ii) there is a threat in the Australian offshore area to Commonwealth interests (whether those interests are in that area or elsewhere);

(iii) domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia, and there is a threat in the Australian offshore area to those or any other Commonwealth interests; and

(b) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the domestic violence or threat, or both; and

(c) one or more of Divisions 3, 4 and 5 should apply in relation to the order.[46]

While there is nothing to prevent a state or territory from requesting a Commonwealth interests order, the Commonwealth can also make one on its own initiative to protect Commonwealth interests within a state or territory. Where a Commonwealth interests call-out order is made that a state or territory has not requested, there is a requirement for Authorising Ministers to consult with the state or territory before the order is made (unless, for reasons of urgency, it is not practicable to do so).[47]

The ADF may be used without state or territory request when domestic violence would, or would be likely to, affect a Commonwealth interest.[48] Part IIIAAA fails to provide any definition for the phrase 'Commonwealth interest'. Some interpretive help is found in the Addendum to the Explanatory Memorandum to the Act, where the term is to be read as including 'The protection of: Commonwealth property or facilities; Commonwealth public officials; visiting foreign dignities of heads of state; and major national events, including the Commonwealth Games or G20'.[49]

43 Ibid 51H(6)(7).
44 Ibid 51H(5)(ii).
45 Ibid ss 33(5), 34(5), 35(5) s36(5).
47 Ibid ss 38(2), 51V(6)
48 Ibid s 33(1).
48 Addendum to the Explanatory Memorandum 2018, above n 17, 3.

Indeed, bearing in mind that there has been no judicial consideration of the phrase or any statutorily binding definition, one academic has suggested that where Commonwealth laws or property are affected then, ipso facto, a Commonwealth interest has been affected.[50] Although such a position was posited prior to the 2006 and 2018 Amendments, it is submitted that this assessment may remain valid.

For a state or territory protection call-out, the Governor-General may make an order to call out the ADF if:

> (a) a State Government or Government of a self governing Territory applies to the Commonwealth Government to protect the State or Territory against domestic violence that is occurring, or is likely to occur, in the State or Territory; and
>
> (b) the authorising Ministers are satisfied that:
>
> (i) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the State or Territory against the domestic violence; and
>
> (ii) one or more of Divisions 3, 4 and 5 should apply in relation to the order.[51]

For both Commonwealth interest and state or territory protection call-outs, Pt IIIAAA allows for a mechanism by which the Governor-General may essentially pre-authorise an order for a call-out, triggered by specified circumstances, where for reasons of urgency a normal call-out is impracticable.[52] These are known as contingent call-outs.

Expedited call-outs

Additional to the above, in sudden and extraordinary emergencies, an order may be made by Authorising Ministers, or alternative Authorising Ministers, in lieu of the Governor-General, to call out the ADF.[53] Such an order may simply be made verbally[54] or be an electronically signed email.[55] What constitutes a sudden or extraordinary set of circumstances is undefined, necessarily so due to the flexibility afforded.

There are three different methods by which this can occur. The process may only progress if the preceding option cannot be satisfied. In the first instance, the Prime Minister may unilaterally make an order or declaration.[56] Where the Prime Minister is unavailable to be contacted for the purpose of considering or making such an order or declaration then the two remaining Authorising Ministers may make an order or declaration.[57] In the event that one of the aforementioned Authorising Ministers is unavailable, the remaining Authorising

50 Commonwealth, *Protective Security Review — Report of Mr Justice Hope* (unclassified version), Parliamentary Paper No 397 (1979) (Hope Report), Annex 9; see Michael Head, 'Calling Out the Troops — Disturbing Trends and Unanswered Questions' (2005) 28(2) *UNSW Law Journal 528.*
51 *Defence Act 1903* (Cth) s 35(1).
52 Ibid ss 34(1), 36(1).
53 *Defence Act 1903* (Cth) s 51U
54 Ibid s 51U(3). If this is the case then a written record of its particularity must be made and signed by the decision-maker(s) and the CDF as per s 51U(3). Failure to comply with this requirement will affect the validity of the order or declaration, by implication of *Defence Act 1903* (Cth) s 51U(3).
55 Ibid ss 51(U)(3)(a)(b). This could allow, theoretically, for an expedited call-out in under five minutes.
56 *Defence Act 1903* (Cth) s 51U(2)(a).
57 Ibid s 51U(2)(b).

Minister, jointly with an alternative Minister, may make an order or declaration.[58] An alternate Authorising Minister is any one of the following Ministers: the Deputy Prime Minister; the Foreign Affairs Minister; the Treasurer; or the Minister for Home Affairs.[59] An expedited call-out can only last up to five days.[60] A decision to call out the ADF in these circumstances would involve a decision that would further be subject to judicial review under the ADJR Act.

The decision: mandatory and discretionary factors

The central role of Authorising Ministers under Pt IIIAAA is the logical starting point when assessing the reviewability of a decision to call out the ADF. The Authorising Ministers are required to make a number of assessments, which differ between a Commonwealth interest call-out and a state or territory protection, or expedited, call-out. For a Commonwealth interest call-out, or Commonwealth interest contingent call-out, the Authorising Ministers:

i. must consider the nature of the domestic violence; and

ii. must consider whether the utilisation of the Defence Force would be likely to enhance the ability of each of those States and Territories to protect the Commonwealth interests against the domestic violence; and

iii. may consider any other matter that the authorising Ministers consider relevant.[61]

This is compared with the test for a state or territory protection call-out, which requires that the Authorising Ministers:

i. must consider the nature of the domestic violence; and

ii. must consider whether the utilisation of the Defence Force would be likely to enhance the ability of the State or Territory to protect the State or Territory against the domestic violence; and

iii. may consider any other matter that the authorising Ministers consider relevant.[62]

Further, when making a call-out order or declaration with respect to Divs 3 and 5, the Authorising Ministers must have regard to Australia's international obligations.[63]

What can be seen, however, is that both require, in essence, a mandatory consideration of the nature of the domestic violence and the ability of the ADF to enhance state or territory constabulary forces' ability to protect the relevant interest against the domestic violence.

Domestic violence

The language used in Pt IIIAAA aims to reflect s 119 of the *Constitution* — the 'wallflower of

58 Ibid s 51U(2)(c).
59 Ibid s 51U(2)(c). In an era of rapidly changing political portfolios, the Minister for Home Affairs is defined as the Minister who administers the *Australian Federal Police Act 1979* (Cth) as per s 31.
60 *Defence Act 1903* (Cth) s 51V(4)(b).
61 Ibid ss 33(2)(a)(b), 34(2)(a)(b).
62 Ibid ss 35(2)(a)(b), 36(2)(a)(b).
63 Ibid ss 45, 51G.

the *Constitution*'.[64] Viewed through the prism of a continual cycle of industrial struggles in the 1890s,[65] Sir Samuel Griffiths, as Premier of Queensland, is thought to have inserted the original provision on or around March 1891[66] in light of his deployment, two months earlier, of 1442 troops to break the Shearer's Strike.[67] The provision of the Constitution reads:

> The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

The term 'domestic violence' finds no definition in the Constitution or the Defence Act, nor has it received any jurisprudential commentary. The Addendum to the Explanatory Memorandum to the Act notes that:

> 'domestic violence' … refers to *conduct that is marked by great physical force, and would include a terrorist attack, hostage situation, and widespread or significant violence*. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the *Constitution*, which deals with state requests for assistance in responding to domestic violence. Peaceful protests, industrial action or civil disobedience would not fall within the definition of 'domestic violence.'[68]

When considering the nature of the domestic violence:

> [Consideration could include] matters such as *the type of violence, the types of weapons used, the number of perpetrators* involved, as well as the scale of domestic violence (or anticipated domestic violence) where such information is available. For example, the ADF could be called out in response to unique types of violence, such as chemical, biological, radiological or nuclear attack … The ADF could also be called out where the type of violence is not unique — for example an active shooter — but *where the violence is so widespread, or there are so many shooters involved*, that law enforcement resources are in danger of being exhausted. [69]

This direction, however, is merely advisory. There is thus a large ambit of discretion granted to Authorising Ministers to be satisfied in making their recommendation to the Governor-General. A possible ground of review would be that the situation that resulted in the ADF being called out did not meet the threshold for amounting to 'domestic violence' — potentially such as the Lindt Café hostage situation, which, although involving a hostage situation, did not involve widespread violence.

ADF's involvement enhances

The second mandatory consideration requires an assessment of the differing capabilities and capacity of the various states or territories.[70] The constabulary forces of New South Wales, for example, require less assistance than those of Tasmania. This is ostensibly aimed at ensuring that:

64 Peta Stephenson, 'Fertile Grounds for Federalism — Internal Security, the States and Section 119 of the Constitution' (2015) 43 *Federal Law Review* 289, 291.
65 Head, above n 13, 45.
66 See John A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).
67 Which the Queensland Government viewed as amounting to an insurrection and troops were called in to suppress it. See Commonwealth, above n 50, 330.
68 Explanatory Memorandum 2018, above n 12, 6 (emphasis added).
69 Ibid 36 (emphasis added).
70 Anthony Blackshield, 'The Siege of Bowral — The Legal Issues' (1978) 4(9) *Pacific Defence Reporter* 36.

> [The ADF is called out in situations] where the ADF has relevant specialist capabilities that could be brought to bear … (allowing for) greater flexibility for the ADF to be used to provide the most rapid, effective or appropriate specialist support to the states and territories, while respecting the states' and territories' position as first responders.[71]

Arguably, one ADF member equipped with a service rifle could enhance the capabilities of a state or territory constabulary force; equally, a lack of training and communication systems could hinder the effectiveness of coordinated responses.[72] Although it is a balancing act, the use of the ADF is a significant and exceptional act not intended to respond to 'incidents ordinarily and easily dealt with by police'.[73] Reviewing an assessment by a decision-maker as to what level of enhancement might be achieved by utilising the ADF is thus a more difficult consideration to challenge than what constitutes domestic violence.[74]

Contingent call-outs

The same follows for contingent call-outs. As noted above, contingent call-outs may occur for any call-out situations[75] and are triggered by 'specified circumstances'.[76] Under s 34:

> [Contingent call-out orders will typically be] used as part of a request for ADF security support for major international events hosted within Australia, where there is a foreseeable or anticipated threat against Commonwealth interests. Such orders have been regularly made as part of security measures to protect major Commonwealth events including the 2014 G20 Leaders' Summit in Brisbane, the 2018 Gold Coast Commonwealth Games and the 2018 ASEAN–Australia Summit, from circumstances involving air threats.[77]

This is shared for contingent call-outs under s 36, in relation to state or territory protection orders.[78] Specifically, a contingent call-out under s 36 may occur where 'the relevant state or territory may have limited, or no, capability to respond to such an attack'.[79]

These specified circumstances must be 'sufficiently particular to allow Authorising Ministers to make the assessment required'[80] and are not intended to be made 'on the basis of vague or indefinite specified circumstances'.[81] But what exactly 'specified circumstances' constitute, and the level and reliability of the intelligence required for offshore and land contingencies,

71 Explanatory Memorandum 2018, above n 12, 25.
72 'Working with Police' (2019) 56 *Smart Soldier* 29–32.
73 Explanatory Memorandum 2018, above n 12, 6.
74 The Lindt Café Coronial found that the preconditions for a call-out, under the relevant legislation at the time, were not met because NSW Police considered it had the capacity to respond effectively to Monis' actions and did not advise the NSW Government otherwise. See Lindt Café Coronial, above n 2, 384.
75 The Lindt Café Coronial found that the preconditions for a call-out, under the relevant legislation at the time, were not met because NSW Police considered it had the capacity to respond effectively to Monis' actions and did not advise the NSW Government otherwise. See Lindt Café Coronial, above n 2, 384. The Lindt Café Coronial found that the preconditions for a call-out, under the relevant legislation at the time, were not met because NSW Police considered it had the capacity to respond effectively to Monis' actions and did not advise the NSW Government otherwise. See Lindt Café Coronial, above n 2, 384.
76 *Defence Act 1903* (Cth) ss 34(1), 36(1).
77 Addendum to the Explanatory Memorandum 2018, above n 17, 3.
78 Ibid 5.
79 Ibid 4
80 Ibid 4
81 Ibid 3

was a significant issue in the drafting stages.[82] The Explanatory Memorandum notes that there 'are a range of circumstances that could give rise to a contingent call out order. What constitutes specified circumstances will depend on the situation in question'.[83] The effectiveness and viability of contingent call-outs have been raised elsewhere and will not be covered in this article.[84]

A contingent call-out order could be made, for example, to protect Commonwealth interests during a major international summit where there is a foreseeable risk based on intelligence of a chemical, biological, radiological or nuclear (CBRN) attack at a summit venue. It would be appropriate for a contingent call-out order to be in place to deal with this foreseeable risk, empowering the ADF to use its specialist capabilities should the specified circumstances of an imminent or actual CBRN attack at the summit arise without having to use the normal or expedited call-out process when the specified circumstances actually arise. Moreover, this applies to possible aviation or maritime threats. It would appear then unlikely that any possible challenge or review could be conducted on the decision to call out troops under a contingency.

International obligations

Divisions 3 and 5 of Pt IIIAAA require Authorising Ministers to have regard to Australia's international obligations.[85] Failure to do so would constitute a jurisdictional error under a judicial review application. Some examples include the application of Art *3bis* to the *Convention on International Civil Aviation* [86] (Chicago Convention), with respect to use of force against a civil aircraft; as well as the *Freedom of Association and Protection of the Right to Organise Convention 1948* (No 87),[87] the *Right to Organise and Collective Bargaining Convention 1949* (No 98)[88] and Art 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights*[89] (ICESCR) with respect to use of the ADF in industrial actions.

82 See Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Defence Legislation Amendment (Aid to the Civilian Authorities) Bill 2005* (2006) 44.

83 Addendum to the Explanatory Memorandum 2018, above n 17, 5.

84 Justice Robert Hope, in his seminal Hope Report (Commonwealth, above n 50, 161) commented that the past has established in many parts of the world a great variety of emergent circumstances, some of which would have fallen within a predictable pattern but some of which would not. The last two decades have shown how quickly different situations can develop, thereby creating entirely new challenges to law enforcement authorities. The prescription of the circumstances in which the Defence Force can be used, or of the criteria to be applied in deciding whether that use should be approved, is impracticable and would impose too great an inflexibility upon a situation, which although unusual, of its very nature requires flexibility.

85 *Defence Act 1903* (Cth) ss 45, 51G.

86 Opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

87 Opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950), ratified by Australia 28 February 1974.

88 Opened for signature 1 July 19489, 96 UNTS 257 (entered into force 18 July 1951), ratified by Australia 28 February 1974

89 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), ratified by Australia 10 March 1976.

Barriers affecting review

Presumption of regularity and mala fides

A key practical difficulty is the 'presumption of regularity', which would also be applicable in relation to a call-out order. In *Minister for Natural Resources v New South Wales Aboriginal Land Council*,[90] McHugh JA stated that 'where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled'.

The presumption of regularity can be rebutted, and one such rebuttal would be that the decision was *mala fides*. One specific example may be where a call-out order was made by a sole alternate Authorising Minister; such an action would not be unviable but may lead to questions.

A plea of *mala fides* would be difficult to establish, no less so than a less than consistent usage of the term.[91] Within the United Kingdom, Lord Somerville in 1956 noted that the term had 'never been precisely defined or its effects have happily remained in the region of hypothetical cases'.[92] In modern parlance, it can be submitted that mala fides relates to a concept of dishonesty which would require particularisation;[93] and thus would require proof of a subjective mental element of the Governor-General, Authorising Ministers or alternate Authorising Ministers. It is, however, unlikely to succeed.

A *mala fides* plea in the context of a call-out thus, from the outset, is difficult. Lee, in his seminal work, *Emergency Powers*, summarised the position as such (noting that, in this context, a call-out of the ADF would fall under the notion of an emergency power):

> Viewed from one angle a political crisis if unresolved through emergency rule may threaten the national security. Viewed from the angle of those who are directly affected by the emergency rule a proclamation of emergency is merely a colourable device to enable to government to achieve indirectly what it cannot constitutionally do directly … the insistence on a heavy burden of proof on those who seek to impugn it makes it extremely difficult for a successful invocation of the mala fides argument.[94]

Arising from the paucity of precedent, it follows that foreign authorities should be sought. Common law cases on the use of military in assisting law enforcement 'date from the period of empire when places such as Palestine, Australia, New Zealand, South Africa and India shared a greater formal legal affinity'.[95] As such, *obiter* and *ratio* from these cases are acknowledged to not be binding. It is unlikely, however, that in a scenario relating to the use of force by an ADF member under Pt IIIAAA that 'the UK experience would not feature strongly in the search for jurisprudential guidance — at least, as a minimum, with respect to the broader philosophical–legal issues at play'.[96]

90 (1987) 9 NSWLR 154, 164.
91 Hoong Phun Lee, *Emergency Powers* (Sweet & Maxwell Ltd, 1984) 270.
92 *Smith v East Elloe RDC* [1956] AC 736.
93 *Cannock Chase District Council v Kelly* [1978] 1 All ER 152.
94 Lee, above n 91, 271.
95 Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations — Is There a "Lawful Authority"?' (2009) 37(3) *Federal Law Review* 441, 446.
96 Ibid 447.

Accordingly, the Privy Court decision in *Stephen Kalong Ningkan v Government of Malaysia*[97] provide an interesting case study. The facts, although long, merit repeating to demonstrate a nearly successful argument of mala fides and the pitfalls for an application.

On 22 July 1963, Stephen Kalong Ningkan was appointed Chief Minister of Sarawak, one of the Malaysian states. He equally was leader of the majority party in the State Legislature of Sarawak (also known as the Council Negri). On 16 June 1966, the Governor of Sarawak, acting on representations made to him, requested Ningkan to resign due to a loss of confidence. Instead of complying with the request, Ningkan convened the Council Negri to request a formal no-confidence vote; consequentially, the Governor sacked Ningkan for noncompliance and appointed a new Chief Minister. Ningkan filed a suit, successfully claiming a formal no-confidence vote was required and that his dismissal was void, and was reinstated as Chief Minister.

This reappointment led to the passing of the *Emergency (Federal Constitution and Constitution of Sarawak) Act 1966*. Under this legislation, a signed statutory declaration containing 25 signatures of no confidence was delivered to the Governor, which created a constitutional impasse when the Governor invoked his discretion to refuse Ningkan's request for elections rather than dismissal. A state of emergency was declared after deteriorating public confidence to allow for emergency legislation enabling the Governor to dismiss a Chief Minister on a statutory declaration. This legislation was passed and Ningkan was sacked; the Privy Council upheld the validity of the emergency legislation.

In *Stephen Kalong Ningkan v Government of Malaysia* — the culminating litigation for Ningkan's reinstallation as Chief Minister — counsel for the applicant effectively argued that there was no emergency within the meaning of Art 150(1) of the Malaysian Constitution (being a grave emergency to the security or economic life of the Federation), as there had been no signs or symptoms of a grave emergency: 'no disturbances, riots or strikes had occurred; no extra troops or police had been placed on duty; no curfew or other restrictions on movement had been found necessary; and the hostile activities of Indonesia had already ended'.[98] The Privy Council thus found, in dealing with the *mala fides* argument arising from an improper use of emergency legislation, that, although the proclamation was justiciable, Ningkan had failed to discharge the heavy onus of proof placed on him.[99]

The Privy Council's broad interpretation of a state of emergency, which was purely constitutional in nature and failed to have any semblance of domestic violence, would suggest it well-nigh impossible to challenge a decision, even an expedited decision by a sole alternate Authorising Minister.

Potential non-justiciable nature of decision

It was traditionally an underlying principle of the common law that prerogative powers are non-justiciable, albeit that the notion of justiciability is not one with 'which the average lawyer

97 [1968] 1 MLJ 119.
98 Lee, above n 91, 272.
99 [1970] AC 369, 390.

is conversant'.[100] Although not binding, the House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service*[101] *(CCSU)* provides authority for the position that the exercise of prerogative power is not immune from judicial review for that reason alone. The subject matter, and not the source of the prerogative power, is the determining factor in determining justiciability.[102]

The House of Lords' approach in CCSU was followed by the Full Federal Court in *Minister for Arts, Heritage and Environment v Peko-Wallsend*[103] *(Peko-Wallsend)*, rejecting the principle that review was impossible purely because a prerogative power was involved and suggesting that justiciability instead turned on the nature and effect of the power exercised.[104] This was supported by the High Court in *R v Toohey; Ex parte Northern Land Council*[105] *(Toohey),* where Mason J considered reviewability of exercise of prerogative and executive powers, noting that:

> There is much to be said for the view … that the exercise of discretionary prerogative power can be examined by the courts just as any other discretionary power which is vested in the executive. The question would remain whether the exercise of a particular prerogative power is susceptible of review and on what grounds.[106]

Perhaps in order to check the alleged growing impunity of executive power, the law of justiciability has become increasingly fluid when considering this 'forbidden area'.[107] Justice Tamberlin, in considering the case of the incarcerated Australian David Hicks seeking a writ of habeas corpus, rejected the Commonwealth's application for a summary dismissal on the grounds that 'the concept of a "forbidden area" arguably states the position far too generally to be applied at face value'.[108]

But these developments relate to foreign policy. A more appropriate analogy is the judiciary's approach to review of national security matters. In this, the position is best summarised by the following quote:

> security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time; it is similar to the constitutional concept of defence.[109]

While the majority of the Court held in that instance that there was no area of the Commonwealth's exercise of power that could be outside potential review, in practice there were insurmountable difficulties in doing so for the litigant. In dissent, Brennan J still acknowledged the formidable task of seeking review of a national security matter, going as far as to comment that 'the public interest in national security will seldom yield to the public

100 Hersch Lauterpacht, 'The Doctrine of Non-Justicable Disputes in International Law' (1928) 23 *Economica* 277.
101 [1984] UKHL 9.
102 [1985] AC 374, 407. See Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14(4) *Sydney Law Review* 432, 449–50.
103 (1987) 75 ALR 218, 224, 253.
104 *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 75 ALR 218, 223–5 (Bowen CJ).
105 (1981) 151 CLR 170.
106 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 220–1 (Mason J).
107 *Abbasi v Secretary of State* [2002] EWCA Civ 1598.
108 *Hicks v Ruddock* (2007) 156 FCR 574.
109 *Church of Scientology v Woodward* (1982) 154 CLR 25, 60 (Mason J).

interest in the administration of civil justice'.[110] This would seem to confirm the position of the Privy Council as up to date. It declared in *The Zamora*:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.[111]

The American experience of federal injunctive relief against state governor decisions to utilise the National Guard as a law enforcement agency is somewhat analogous. In particular, the United States Supreme Court found that, while a governor's decision to call out the National Guard was unreviewable, the decision to use the National Guard for a certain purpose was subject to review.[112] This distinction is narrow but important, for the decision was grounded upon the absolute need in a system of government dedicated to the rule of law for an ability to review such a decision.[113] Pertinently, that Court held that 'what are the allowable limits of military discretion, and whether they have been overstepped in a particular case, are judicial questions'.[114]

Yet, despite the weakening of the traditional prerogative immunity in Australia, it has been suggested that there is no scope for reviewing prerogative powers, such as the 'appointment and dismissal of Prime Ministers, decisions relating to foreign policy, declarations of war, national security, and matters such as royal honours'.[115] If such a position were adopted, it would appear to immunise, from review, a decision made by the Governor-General to call out the ADF.[116] Despite this, it is the submission of this article that each of the Authorising Ministers would be found to be an 'officer of the Commonwealth' for the purpose of s 75(v) of the *Constitution* and s 39B(1) of the *Judiciary Act 1903*. It is therefore highly likely that the matter would be justiciable.

However, assuming justiciability could be established, it would be necessary, as noted above, for a person seeking to challenge a decision under s 75(v) of the *Constitution* or s 39B of the Judiciary Act to have grounds for challenge. In the absence of any statement of reasons of the Authorising Ministers, this is likely to be difficult in practice. Grounds of challenge could not simply be asserted without any factual basis, and the presumption of regularity would need to be rebutted by the available facts including reasonable inferences. It is possible that the call-out order may be of some assistance in this regard, although it would not be required to be made public until it has ceased to be in force. In this instance, review of a decision to make the call-out order would be a largely academic endeavour.

Sensitivity of evidence

Were a decision by an Authorising Minister or alternate Authorising Minister be found reviewable by a relevant jurisdiction, there would be additional barriers in accessing and

110 Ibid 76.
111 *The Zamora* [1916] 2 AC 77, 107 (Lord Parker).
112 *Sterling v Constatin* 287 US 378, 399 (1932) citing with approval *Martin v Mott* 25 US (12 Wheat) 19 (1827).
113 Ibid
114 Ibid 196.
115 Head, above n 50, 178.
116 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1); see further *Dean v Attorney-General of Queensland* [1971] Qd R 391, 404–5 (Sable J).

considering the national security, police and ADF intelligence relied upon in making that decision. The friction between national security and public interest is neither novel nor unique.[117] This was made clear in the case of *Leghaei v Director General of Security*[118] *(Leghaei)* before Madgwick J in the Federal Court.

This matter concerned an application for review under s 39B of the Judiciary Act 1903 (Cth) of an adverse security assessment furnished by Australian Security Intelligence Organisation (ASIO) pursuant to s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth), which determined that the applicant was 'directly or indirectly a risk to Australian national security'.[119] The furnishing of that assessment obliged the Minister for Immigration to cancel the applicant's bridging visa.[120] The applicant disputed the assessment on two primary grounds. First, the applicant claimed that the assessment was void for jurisdictional error due to a denial of procedural fairness, on the basis that the Director-General had failed to provide to the applicant:

> (i) any notice of particular grounds on which the first respondent proposed to make the assessment;
>
> (ii) any specific issues to address as to why the applicant is believed to be a risk to Australian national security; or
>
> (iii) any response to the applicants request for 'specific issues' to which the applicant might respond.[121]

Secondly, the applicant claimed that the assessment was void for jurisdictional error 'in that the Director-General of Security failed to consider and form an opinion on, or provide advice about, the essential question on which the assessment depended', namely whether:

> the applicant's alleged acts and conduct that were the subject of the Assessment (i) meant that it was consistent with the requirements of security for prescribed administrative action to be taken in respect of the applicant, and (ii) supported the making of an adverse security assessment in respect of the applicant.[122]

This raises interesting considerations, when viewed through the prism of Pt IIIAAA, and the ability to utilise evidence, because any consideration of such matters by a court would be largely reliant on the Governor-General's and the Authorising Ministers' subjective assessments as to whether the two broad criteria under the Defence Act are satisfied in the circumstances. It is a matter for judicial consideration.[123]

In considering first whether ASIO had a duty to afford procedural fairness to the applicant, Madgwick J rejected the respondent's submission that the *Australian Security Intelligence Act 1979* (Cth) or considerations of confidentiality and national security necessarily implied that procedural fairness should be excluded, noting that the *Migration Act 1958* (Cth) required

117 Caroline Bush, 'National Security and Natural Justice' (2007) 57 AIAL *Forum* 78, 84–6.
118 *Leghaei v Director-General of Security* [2005] FCA 1576 (*Leghaei*).
119 Ibid [6].
120 Ibid [9].
121 Ibid [26].
122 Ibid [27]
123 This tension of subjective or objective interpretation is also found with respect to the possible defence of superior orders, applicable to ADF members while called out under Pt IIIAAA (s 51Z). See Samuel C Duckett White, 'A Soldier By Any Other Name: A Reappraisal of the Citizen in Uniform Doctrine in Light of Part IIIAA' (2020) (2020) 57(2) *Military Law and Law of War Review*.

a person to be notified when their visa would be cancelled.[124] Accordingly, Madgwick J held that:

> It is my view that an obligation to positively consider what concerns and how much detail might be disclosed to the subject visa holder to permit him/her to respond, without unduly detracting from Australia's national security interests, is minimally necessary to ensure a fair decision-making process.
>
> Thus, in relation to a lawful non-citizen etc, such as the applicant, whose visa would be directly threatened by an adverse security assessment, there was, in my view, a duty to afford such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security …[125]

After determining that ASIO had a duty to afford procedural fairness to the applicant, Madgwick J considered whether this duty had been discharged. Ultimately, Madgwick J was satisfied on the confidential evidence before him that the Director-General had genuinely considered disclosure and had afforded procedural fairness to the applicant, noting, however, that the potential prejudice to the interests of national security involved in such disclosure reduced the content of procedural fairness, in practical terms, to nothingness.[126] In coming to this conclusion, his Honour reflected the positions maintained in *Peko-Wallsend*[127] and *Toohey*[128] in further stating that, without the benefit of countervailing expert evidence in the present case, he was not in a position to form an opinion contrary to those expressed in the confidential affidavit evidence in relation to disclosure as 'the Courts are ill equipped to evaluate intelligence'.[129]

It is significant that, while the applicant in *Leghaei* was unable to access information relied upon in making the negative security assessment, classified information and materials were made available to the Court, as well as counsel for the applicant and the applicants' instructing solicitor, after they had undergone the requisite security clearances and had given appropriate undertakings as to confidentiality.[130] In the event of a call-out under Pt IIIAAA, it may indeed be possible to disclose sufficient materials to the court to allow for a determination as to whether it was valid or invalid.[131]

Such a level of disclosure was enough for Madgwick J to consider the unchallenged materials before the Director-General, and determine that procedural fairness had been afforded to the extent possible in light of national security interests and that the adverse assessment decision was not affected by jurisdictional error.[132] But, as Madgwick J states, the amount of comfort that the applicant and interested members of the public can take from this process is 'regrettably limited'.[133]

124 *Leghaei* [2005] FCA 1576 [73].
125 Ibid [82]–[83].
126 Ibid [88].
127 (1987) 75 ALR 218, 224, 253
128 (1981) 151 CLR 170, 220–221 (Mason J).
129 *Leghaei* [2005] FCA 1576 [84].
130 Bush, above n 117, 85–86
131 This might include security situational report or redacted intelligence updates. Equally, it might include text messages — see *Thomas; Secretary, Department of Defence* [2018] AATA 604.
132 *Leghaei* [2005] FCA 1576 [88] and [97].
133 Ibid [90].

As noted above, it is foreseeable that members of TAG(E) or TAG(W) will be utilised for a call out order authorising Div 3. Their use increases the sensitivities around document release, especially with respect to their PID status and tactics, techniques, and procedures (TTPs). As a general proposition, there would be substantial scope for the Commonwealth to rely on a claim of public interest immunity to limit or prevent disclosure of information relied on by the Authorising Ministers to a coroner or tribunal that has required the information for the purposes of its inquiry.

Conclusion

It is the submission of this article that, with the exception of martial law, all public law areas are subject to some level of reviewability.[134] Practically speaking, however, it would appear that a decision by the Authorising Ministers or alternate Authorising Ministers to make an order or declaration with respect to the ADF under Pt IIIAAA is largely unreviewable, even in situations where a *mala fides* decision may have occurred.

Yet this article submits that a decision to call out the ADF is a decision that, from a public policy perspective, will not go without questions.[135] It is highly likely that, if a call-out order was made and the ADF utilised lethal force against a threat, a coroner or other tribunal (such as a royal commission) could occur. This was the case with the Lindt Café Siege, and ADF decisions on operations have been historically subject to detailed scrutiny.[136] In particular, it is possible that the Authorising Ministers' or alternate Authorising Ministers' consideration of the mandatory factors could be the subject of scrutiny and subsequent adverse comment or criticism by a coroner or tribunal. The involvement of a coroner or tribunal is likely, especially in situations where a death occurs. Nonetheless, consideration would be required of the particularities of state or territory coronials, a number of legal and constitutional issues, including the proper interpretation of the relevant state legislation,[137] and whether there is any Commonwealth legislation that would operate to override aspects of the relevant state legislation.[138] Should such issues be surmounted, the recommendations and comments arising out of a coronial or tribunal assessment of a call-out could be significant. Yet whether coronials and tribunals can be practical alternative methods of reviewing call-out decisions remains to be seen.

134 This is a position taken from the Hope Report: Commonwealth, above n 50, 174.

135 As occurred after the Bowral call-out — see, for example, Blackshield, above n 70, 36.

136 See the Queensland State Coroner, 'Inquest into the Deaths of James Thomas Martin, Robert Hugh Frederick Poate, Stjepan Rick Milosevic' (22 September 2015).

137 For example, there is a presumption that an Act does not bind the Crown or its servants or agents — see *Bropho v Western Australia* (1990) 173 CLR 426; *Commonwealth v Western Australia* (1999) 196 CLR 392.

138 Section 109 of the Constitution provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

Roles of the Commonwealth and ACT Ombudsman

*Michael Manthorpe PSM**

The Office of the Commonwealth Ombudsman takes complaints about the breadth of Australian Government administration, with the exception of matters pertaining to the Australian Taxation Office and the intelligence community. We also take complaints about several private sectors of the economy (such as private health insurance). Last financial year, we received the second largest number of complaints in the office's 40-plus year history (37 388 complaints that fell within our jurisdiction) — only slightly down from the previous year's record of 38 026.

Growth areas for complaints included the ongoing roll-out of the National Disability Insurance Scheme (NDIS) and student debts incurred under the now defunct VET Fee Help scheme. In absolute terms, we received more complaints about the Department of Human Services than any other agency, although these numbers fell from about 12 500 to about 11 600 compared with the previous year. Complaints about private health insurers and Australia Post also fell, while complaints from overseas students in our capacity as Overseas Students Ombudsman grew.

Complaints comprise the majority of, but not all, contacts made with the office. In the last calendar year we received a record number of contacts (50 237 compared with 47 557 last year) from members of the public. This number swelled towards the end of the year after our announcement that we would examine an aspect of the administration of the Defence Force Retirement and Death Benefits Scheme, which generated over 3000 submissions from veterans.

Over the years, as well as receiving complaints about a wide range of entities, we have also assumed a disparate array of other functions where there is a public interest in independent oversight.

As Defence Force Ombudsman we receive reports about alleged abuse in the Australian Defence Force (ADF), much of which is historical in nature, but each case requires careful, trauma-informed engagement. We make recommendations to the ADF about reparation payments and provide access to counselling or restorative engagement conferences to reportees. We have also commenced periodic 'health checks' of ADF policies and procedures that are aimed at preventing abuse within its ranks and contribute to cultural change. Some of this work is the successor to the Defence Abuse Response Taskforce (DART), which wrapped up some years ago, and some of it is new. I am tremendously proud of the casework that my people do in this space. It helps correct dreadful wrongs committed in the past, and I know that both the Chief of the Defence Force and the Secretary of the Department of Defence value the contribution we make to cultural change in the ADF.

As Immigration Ombudsman we inspect detention facilities, report regularly, make recommendations to the relevant minister about long-term detention cases, and take

* Michael Manthorpe is the Commonwealth Ombudsman. This is an edited version of a speech given at the AIAL Annual General Meeting on 27 November 2019.

complaints about matters such as delays in visa and citizenship decision-making. Sometimes we have an impact in that space; sometimes less so.

As Law Enforcement Ombudsman, we take complaints about the Australian Federal Police (AFP) and other federal law enforcement agencies. We also perform a growing portfolio of inspectorial and reporting roles about the way in which federal and (at times) state law enforcement bodies exercise covert or intrusive powers under Commonwealth legislation. Our work grew in this area in 2018–19 as a result of the passage of the Telecommunications and Other Legislation Amendment Act 2018 (Cth) (TOLA), which was often referred to as the encryption bill. In this general space we stand in the shoes of those who might be complainants but who cannot complain because they do not know about the covert activity to which they are subject. Fundamentally, our job is to examine whether law enforcement agencies are adhering to the detailed requirements of the array of laws that are in place which permit covert or intrusive activities. Increasingly, the Parliamentary Joint Committee on Intelligence and Security and committees that oversee the work of Australian Commission for Law Enforcement Integrity and the AFP are taking a close interest in our reports on such matters.

This year too we commenced work as the National Preventive Mechanism Coordinator, pursuant to Australia's ratification of the Optional Protocol to the *Convention Against Torture and Other Cruel*, *Inhuman or Degrading Treatment or Punishment* (OPCAT).[1] This work, for the first time, brings us into an area of Commonwealth–state relations under the auspices of the United Nations as we seek to progress Australia's implementation of OPCAT. Ratification of OPCAT requires Commonwealth, state and territory governments to put in place appropriate bodies to undertake independent inspections of places of detention. Building on our longstanding immigration detention inspection role, we began work to enhance our methodologies in that setting and to scope how we may undertake inspections of places of detention administered by Defence and the AFP. We have also undertaken extensive engagement with state and territory inspecting bodies and recently released a foundational report about Australia's readiness to implement this important international commitment. I have been engaging directly with attorneys-general and corrections ministers to encourage them to take OPCAT implementation seriously, although there is a long way to go. It is not enough to have merely signed up.

We continue to oversee the *Public Interest Disclosure Act* 2013 (Cth) (PID Act) and form part of a wider group of integrity agencies across the Commonwealth. This work connects in interesting ways to debates about the adequacy or otherwise of the Commonwealth's integrity system, media freedom and other topics. I am one of those who thinks that the PID Act, although well intentioned, needs reform to make it work better for agencies and whistleblowers alike and to improve the extent to which its operation provides assurance about the integrity of the overall system.

We play a small but important role in regional capability development in Indonesia, Papua New Guinea, Samoa and the Solomon Islands through programs, funded by the Department of Foreign Affairs, that aim to support the work of ombudsman-like institutions in those countries.

1 GA Res 57/199, 9 January 2003, 57th sess, UN Doc A/RES/57/199 (entered into force 22 June 2006).

As a result of a longstanding arrangement between the Commonwealth and ACT governments, my office also fulfils the role of ACT Ombudsman, which also brings with it a disparate set of functions. I report on these matters to the ACT Legislative Assembly — indeed, it is not widely known that I am an Officer of the Legislative Assembly, even though I am not an Officer of the federal Parliament. In any event, my functions include oversight of freedom of information; support to the ACT's Judicial Council (which takes complaints about the ACT judiciary); a new inspectorial role with respect to the new ACT Integrity Commission; a very active role in overseeing the reportable conduct scheme in Canberra, off the back of the Royal Commission into Institutional Responses to Child Sexual Abuse; a role at Canberra's only prison; as well as more traditional administrative complaint-handling processes. As you can see, the work we do just in the ACT jurisdiction is remarkably diverse, albeit that it consumes just 10 per cent or so of my office's resources.

It is a privilege to occupy the Office of Commonwealth Ombudsman. As an independent oversight agency, we are not subject to direction by ministers or the Parliament, except as stipulated by statute. We report regularly to, and appear before, various parliamentary committees about issues of mutual interest and we have considerable discretion to determine what individual cases or broader systemic issues we examine and report on.

However, being the Ombudsman also brings with it various challenges. Although the office has grown significantly in recent years as government or Parliament has vested more functions in us, the sheer volume of complaints means that we cannot investigate all of them. Even where we do, and although we have strong powers to access material and people to enable us to investigate, under the Ombudsman Act 1976 (Cth) we cannot direct agencies to change administrative decisions or investigate the actions of ministers. Our focus is more on maladministration than policy.

It is undoubtedly the case that in many instances we can achieve a positive outcome for individual complainants — a change in decision by an agency, the removal of a debt, a payment of compensation or reparation, a quick decision when there had been a delay, an apology or even just a plain English explanation of a decision. However, in many instances, a formal investigation may not be the best course of action. Many times, the best assistance we can realistically provide is to refer complainants back to the agency that is subject to their complaint so that the agency has the opportunity to deal with the issue. Even then, in some cases the relevant agency cannot change its decision in relation to a matter because it has in fact upheld the law.

Given all of these operating parameters, I spend a lot of my time contemplating these questions: what is the best we can do, how can we achieve meaningful systemic influence, what can we aspire to achieve for people who seek our help, how will we know when we get there and how might our work contribute in some way to arresting the much-reported slide in public trust in institutions?

In response to these questions, we have sought to take a more strategic approach to allocation of scarce resources to systemic investigations. While we cannot investigate every individual complaint, we can sometimes draw on individual matters to produce reports and recommendations that have systemic impact. During the last year we produced reports on

the administration of the Department of Veterans' Affairs, the Department of Human Services, the Australian Defence Force and the Department of Home Affairs on topics that illustrate this point, and more work is underway pertaining to the NDIS, Defence and others. The report about the Department of Veterans' Affairs, for example, highlighted a particular case of poor treatment of a veteran but in a way that also demonstrated the sort of systemic reform that is needed in that department's systems, legislation and culture. I was pleased that Secretary Cosson agreed with all of our recommendations and apologised to the veteran at the centre of the report.

In another space, we also worked hard with the then Department of Education and Training to identify a systemic remedy for many people who have incurred debts under the VET Fee Help program, and we are now working through the very large caseload of complaints — there are many thousands — to identify which cases are eligible for the remedy: a waiver or remittal of the debt.

Because we are unable to investigate every individual matter that comes to us, we are also stepping up our efforts to gain assurance about the way in which agencies deal with the complainants we refer to them. This has taken the form of increased education and training of complaint-handling areas of major agencies; the commencement of a 'complaint assurance project' where we work with agencies to assess the effectiveness of their complaint-handling activities; the development of 'feedback loops' so that, for certain cohorts of complainants, we seek feedback on the outcome of complaints from agencies when we refer complainants back to them; and we have commenced work to survey complainants and agencies of their experience of dealing with the office. We have instituted a process whereby recommendations we have made in our formal reports in the last two years are followed up to see whether agencies, who usually accept our recommendations, have actually implemented them.

We have also undertaken a re-examination of our performance measures. Among other things, that review concluded that, to be as effective as we can be, we need to build and maintain the confidence of people who contact us; the agencies we oversee; and the Parliament. Ideally, all three of these groups would perceive that we are independent and professional; that our interventions are timely and useful; and that our recommendations are balanced and evidence-based. From next year, we will seek to capture performance information against those broad goals and report accordingly. I can already tell you that by and large the major agencies we oversee recognise the value of our independent oversight; and to the extent we have data (in relation to private health insurance and Defence abuse areas) people who contact us think we do a good job. However, I do not want to overstate that: it is undoubtedly the case that some people who contact us, particularly where we are simply unable to change lawful decisions or government policies to which they might object, feel that we have not helped them.

As our role has expanded, we are also placing a renewed focus on our internal corporate capability to ensure that our internal technology, people, financial, security and property services and settings are supporting all that we do. This year, for example, we have introduced a new wellbeing program for our staff, whose work often requires difficult conversations about confronting subject matter. We have successfully increased the representation of Aboriginal and Torres Strait Islander people in our workforce and we have taken other steps to enhance inclusion. I am very pleased that our annual staff survey results have placed us

in the top quartile of Australian Public Service agencies on staff engagement and wellbeing. So, while our office started as a manifestation of administrative law reform, I am also now the CEO of an agency of 300 people.

For all that, however, the hardest part of the job is the ongoing exercise of judgment. There is no manual that tells an ombudsman how to do this. There are certain laws and policy parameters, but we also operate in a context of considerable ambiguity, discretion and contest.

Sometimes we grapple to find 'the truth' in an issue or about a complaint when there are competing arguments and incomplete evidence; or we search for the notion of 'fairness' and what it might mean in a given context. In some areas of our work we seek to establish the 'reasonable likelihood' of the truth upon which to base a judgment or recommendations. And then there is the matter of limited resources, the fact that we can but make recommendations rather than binding findings, and the implication that, to be as persuasive as possible, we need to maintain, as much as we reasonably can, respectful relationships with the agencies we oversee, yet also demonstrate to complainants that we are doing the best we reasonably can to help them. And we need to do this in an era of hyper-partisanship, where both sides of politics, advocates and commentators like to grab onto your work to push a particular line — it would be easy to take heroic public positions in this job and simultaneously decrease your influence.

External observers, and some complainants, can reach very harsh judgments about the extent to which we call out perceived wrongs; agencies we oversee can be very defensive about even mildly critical findings or recommendations. All I can do is the best I can, calling out issues within the parameters I have described where we see them, sometimes privately, sometimes publicly, in the interests of achieving positive systemic change and upholding the notion of fairness to individual citizens.

I also make the point that, like my predecessor Colin Neave, a modern ombudsman's office needs to be 'open for business'. Some commentators worry that we have taken on too many diverse functions and this has diluted or distracted us in some way from our traditional complaint-handling role. I take a different view. I think that as the office's functions have grown we have been able to secure some additional resourcing and additional rights to be present in a much wider range of debates and discussions than might once have been the case. Handled well, that increases our relevance and ability to exercise influence, often for vulnerable people or people who cannot protect themselves. Not only that, but many of the sorts of complaints that come to us in our traditional Ombudsman jurisdiction arise in parts of the system where merits review (internal or through bodies such as the Administrative Appeals Tribunal) are more likely to produce a positive result for people than anything that we can do.

I am now, in fact, past halfway through my five-year term as Ombudsman. In that time, I think that Jaala Hinchcliffe and I and our dedicated staff have made a wide array of useful contributions to public administration, but there is always more to do. My goal is to pass the office on to my successor, when the time comes, in a spirit of stewardship and in a state where we are well regarded as an active, relevant and useful contributor to systemic oversight in the interests of fairness and integrity.

In defence of unreasonableness:the reasonableness framework of judicial review

*Ariella Gordon**

On 8 August 2018, in *Minister for Immigration and Border Protection v SZVFW*[1] *(SZVFW)*, the High Court handed down a judgment that reconsidered the ground of unreasonableness. This is noteworthy due to the ongoing contentiousness of the unreasonableness ground — the 'black sheep' of judicial review. Commentators have joked that '*Wednesbury* unreasonableness is unloved', with 'vultures … circling the *Wednesbury* doctrine' in expectation of the 'Wednesburial'[2]. In SZVFW, the High Court confirmed in the joint judgment of Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li*[3] *(Li)* that the *Wednesbury* test was 'not the starting point for the standard of reasonableness, nor should it be considered the end point'.[4] However, although the test has now changed from the traditional Wednesbury principle, the High Court in SZVFW made it clear that unreasonableness was still a high threshold and a finding that an executive decision is legally unreasonable will not 'be lightly reached'.[5] In contrast to the Federal Circuit Court and the Full Federal Court decisions, the High Court unanimously found (in four separate judgments) that the executive decision in SZVFW did not meet the high threshold for legal unreasonableness.[6]

However, the unreasonableness ground still remains 'controversial and ill-defined' for the following two main reasons:[7] first, it challenges the traditional distinction between merits review and judicial review; and, secondly, even after SZVFW, there is limited guidance on what will make an executive decision legally unreasonable.[8]

In *SZVFW*, each of the separate judgments emphasised that a court cannot substitute its own view of 'reasonableness' for the view of the executive agency in the instance that the agency has genuinely free discretion.[9] However, there are no clear guidelines that separate a 'legally' unreasonable decision from a decision in which reasonable minds may differ.

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1 (2018) 92 ALJR 713 (*SZVFW*).

2 Michael Taggart, 'Proportionality, Defence, Wednesbury' (2008) *New Zealand Law Review* 423, 426.

3 (2013) 249 CLR 332 (Li).

4 Ibid 364 [64].

5 SZVFW (2018) 92 ALJR 713, 438 [135] (Edelman J). Justice Gageler held that the new unreasonableness test is as strict as *Wednesbury*, although Hayne, Kiefel and Bell JJ held that it was broader: see Grant Hooper, '*Minister for Immigration and Border Protection v SZVFW*: The High Court on Unreasonableness and The Role of the Judicial Review', *Australian Public Law: Gilbert + Tobin Centre of Public Law* (Blog post, 5 September 2018) <https://auspublaw.org/2018/09/minister-v-szvfw-the-high-court-on-unreasonableness-and-the-role-of-judicial-review/>.

6 Hooper, above n 5.

7 Ibid

9 Ibid; SZVFW (2018) 92 ALJR 713 [15]–[17] (Kiefel CJ); [67] (Gageler J); [118]–[122] (Nettle and Gordon JJ); [140] (Edelman J). See also *Minister for Aboriginal Affairs* v *Peko-Wallsend Ltd* (1986) 162 CLR 24, 40; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 599; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 266–7.

The unreasonableness ground also challenges the traditional view of administrative law because it allows courts to infer that the *outcome* is legally unreasonable.[10] The process of inferring breaches of law from the outcome seems to undermine the divide between merits review and judicial review, because it arguably allows courts to 'fix upon the quality of the decision-making and thus the merits of the outcome'.[11] Justices Hayne, Kiefel and Bell in Li considered case law that stated that executive decisions that are 'manifestly unjust' would be legally unreasonable.[12] This also clashes with the traditional view that courts have 'no jurisdiction simply to cure administrative injustice'.[13]

However, this article will argue that, quite contrary to the traditional view, assessing the reasonableness of a decision is pivotal to determining the proper role of judges in reviewing executive decisions. This is because an analysis based on reasonableness is required to delineate the boundary between merits review and judicial review. The second section of the article will consider the age-old argument that the unreasonableness ground allows courts to trespass onto the merits of the executive decision and is therefore inconsistent with the judiciary's proper role in reviewing administrative action. However, the third section will argue that the problems outlined in the second section are not unique to the unreasonableness ground but, rather, are always present when courts review executive decisions. The reason for this is that, regardless of the ground of review, the pivotal distinction between merits and law is, itself, determined by an assessment of the reasonableness of the decision, or what might be considered a 'common sense' analysis.

This article will argue that it is part of the judicial role to consider the reasonableness of the outcome or, in other words, how the facts of a case apply to the law (although judges do not express what they are doing in these terms). The article will conclude that the unreasonableness ground is consistent with the judicial task, despite historical aversion to the unreasonableness ground in Australian administrative law.

Problems with unreasonableness

This section of the article will first outline the principle in *Attorney-General (NSW) v Quin*[14] *(Quin)* that the proper scope of judicial review prohibits courts from trespassing on the merits of an executive decision. It will consider the relationship between the *Quin* dicta and the unreasonableness ground. Secondly, it will consider the current status of the unreasonableness test. Thirdly, it will outline why the test for legal unreasonableness is 'controversial and ill-defined'.[15]

10 Li (2013) 249 CLR 332, 369 [85]: 'It is not possible to say which of these errors was made, but *the result itself bespeaks error.*… Because error must be inferred, it follows that the Tribunal did not discharge its function (of deciding whether to adjourn the review) according to law'.

11 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23–4 [73], [76].

12 Li (2013) 249 CLR 332, 365 [70] (Hayne, Kiefel and Bell JJ) citing *Kruse v Johnson* [1898] 2 QB 91, 99–100 (Lord Russell of Killowen CJ): '[U]nreasonableness was found where delegated laws were "partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; [or] if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men".'

13 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J) (*Quin*).

14 (1990) 170 CLR 1.

15 Hooper, above n 5.

The distinction between merits review and judicial review

The general principles of Australian administrative law envisage a 'limited role of the courts in reviewing administrative error'.[16] The distinction between merits review and judicial review is critical in determining the judiciary's proper functions, because courts cannot trespass on the merits of a decision.[17] Justice Brennan outlined these limits in *Quin*, in dicta that has 'attained seminal status':[18]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law … The merits of administrative action … are for the repository of the relevant power and, subject to political control, for the repository alone.[19]

However, uncertainty exists when attempting to reconcile Brennan J's proposition and the unreasonableness ground. In *SZVFW*, Gageler J discusses the statements in Quin and its relationship to unreasonableness:

> Having expounded the … proposition that '[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law …', Brennan J in *Attorney-General (NSW) v Quin* immediately explained how '"*Wednesbury* unreasonableness" …' was consistent with that proposition: '… [W]ithin the bounds of legal reasonableness …' the repository has 'genuinely free discretion'; 'if it passes those bounds, [the repository] acts ultra vires'. [20]

Justice Gageler then states that 'the nature of legal unreasonableness should be taken to be settled by the explanation of it in *Quin*'.[21] However, Brennan J himself was unable to reconcile the unreasonableness ground with his definition of judicial review. Rather, Brennan J described *Wednesbury* unreasonableness as a 'limitation' on his definition of the proper scope of judicial review, that courts cannot undertake merits review, rather than consistent with it:

> There is *one limitation*, '*Wednesbury* unreasonableness' … which may appear to open the gate to judicial review of the merits of a decision … Properly applied, *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power. … *The limitation is extremely confined.*[22]

16 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174 [23].
17 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287 (Neaves, French and Cooper JJ); *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.
18 See, eg, *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 [43]–[44]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 29, 272; *NAIS v Minister for Immigration and Multicultural Affairs* (2005) 228 CLR 470, 477–88 (Gummow J); 510 (Hayne J); Li (2013) 249 CLR 332, 370 (Gageler J); Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 279–80; William Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) *Federal Law Review* 153, 168; Peter Cane, Leighton McDonald and Kristen Rundle, *Cases for Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 3; Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Texts, Cases & Commentary* (LexisNexis, 4th ed, 2015) 404–6.
19 *Quin* (1990) 170 CLR 1, 36 (Brennan J).
20 *SZVFW* (2018) 92 ALJR 713, 727–8 [51] (Gageler J) (emphasis added).
21 Ibid 728 [53] (Gageler J).
22 *Quin* (1990) 170 CLR 1, 36 (Brennan J) (emphasis added).

A response to this is that Brennan J did not define what constitutes 'law' and therefore 'begged the question of the character or content of the law'.[23] In this light, Gageler J's interpretation of Brennan J's statements seems sensible; 'declaring law' is *deemed* to include the unreasonableness ground, as an implied statutory inference.[24] However, conversely, it can be argued that Brennan J *did* provide guidance on what constitutes declaring law: that is, merits review is not declaring and enforcing law.

The conclusions that we can draw from this discussion about the relationship between unreasonableness and judicial power are, first, that the unreasonableness ground is deemed to be within the proper scope of judicial power. However, secondly, it may simultaneously be concluded that the unreasonableness ground is inconsistent with Brennan J's definition of the proper scope of judicial review. Rather, the ground of unreasonableness appears to be a limitation on Brennan J's clear distinction between merits review and judicial review.

The unreasonableness test

In *SZVFW*, Kiefel CJ found that a decision is legally unreasonable when 'the exercise of statutory power … lacks an evident and intelligible justification'.[25] She emphasised that this test is still 'necessarily stringent'.[26] Justice Gageler underscored that the boundary exists at the 'zone of discretion committed to the administrator'.[27] The court cannot trespass on the administrator's zone of discretion, as to do so exceeds the court's judicial review jurisdiction under Ch III of the Constitution. Despite attempts to clarify the test, *SZVFW* still left ambiguity in how the test is applied in practice or, in other words, where the 'zone of discretion' lies.

In *SZVFW*, Kiefel CJ and Gageler J both drew a distinction between what is 'rational' and what is 'reasonable', where rationality is a lower threshold to reasonableness.[28] A decision may concurrently be not rational and legally reasonable.[29] Conversely, Nettle and Gordon JJ used the term 'irrational' to describe legal unreasonableness.[30] As a result, there appears to be some uncertainty around distinguishing 'unreasonableness' from 'irrationality'. For clarity's sake, this article will not enter into a discussion about the difference in the meaning of these words and will use them interchangeably.

The ambiguity in the unreasonableness test

Haritos v Federal Commissioner of Taxation[31] *(Haritos)* may be used to show how the unreasonableness test is ambiguous and poses problems for the merits and law distinction.[32]

23 Bateman and McDonald, above n 18, 167; Matthew Groves 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 507: Brennan J in *Quin* 'did not provide guidance on what the law might be in any particular case'.
24 *SZVFW* (2018) 92 ALJR 713, 728 [53] (Gageler J).
25 Ibid 720 [10].
26 Ibid 720 [11].
27 Ibid 729 [58].
28 Ibid 720 [10] (Kiefel J); 729 [59] (Gageler J); French CJ has also found that the definition of 'reasonableness' and 'rationality' are different: see *Li* (2013) 249 CLR 332 [30].
29 Ibid.
30 *SZVFW* (2018) 92 ALJR 713, 733 [82] (Nettle and Gordon JJ).
31 (2015) 233 FCR 315 (*Haritos*).
32 Ibid [52].

Mr Haritos and Mr Kyritsis (the applicants) appealed on a 'question of law' against their income tax assessment.[33] Mr Adrian and Mr Dalla Costa were accountants called as expert witnesses by the applicants.[34] In its decision, the Tribunal chose to place no weight on Mr Dalla Costa's evidence because it found that his evidence was based on Mr Adrian's assertions, and Mr Adrian's assertions were based on the applicants' conclusions or on unverifiable material.[35] The primary judge dismissed the appeal, finding that the appellants sought merits review:[36]

> The taxpayers' case was, at best, that there must have been an error of law because they ought to have succeeded on the evidence. …The taxpayer may be unhappy about the weight given to the evidence … but *the weight which may be given to evidence is a matter within the Tribunal's domain*.[37]

Conversely, the Full Court of the Federal Court unanimously upheld the appeal. The Court characterised the question as one of law, finding that 'the drawing of a conclusion about the nature or character of Mr Dalla Costa's evidence … was irrational, illogical and not based on findings or inferences supported by logical grounds'.[38] The Federal Court found that the Tribunal's finding that Mr Dalla Costa's evidence did not take the matter any further was legally unreasonable, as the material did not lawfully allow the Tribunal to conclude that Mr Dalla Costa's evidence was based on the applicant's assertions or unverifiable material.[39] The Federal Court held that this process 'is not to enter into the field of merits review or fact finding. It is to supervise the legality of the fact-finding process of the Tribunal'.[40]

This example illustrates how 'legal unreasonableness' requires that courts distinguish between, on the one hand, decisions that are *legally* unreasonable and, on the other, courts having a 'mere preference for a different result, … [where] reasonable minds may come to different conclusions'.[41] The former is fit for judicial review, but the latter is not.[42] However, it is unclear when the weight that is given to the evidence is sufficiently modest for the question to be one of merits, and when the weight given to evidence is so irrational that it is 'legally unreasonable' and thereby a question of law. There is a logical argument that the Tribunal's finding that Mr Dalla Costa's evidence did not take the matter further was open to be made, the weight given to this evidence for the Tribunal's determination. There is large scope for judicial discretion regarding what constitutes 'reasonableness'. Therefore, it is difficult to know when judges have intruded on the 'zone of discretion committed to the administrator'. Consequently, the unreasonableness test is ambiguous and undermines the clear distinction between merits review and judicial review.

33 Ibid 311 [2]; *Administrative Appeals Tribunal Act 1975* (Cth), s 44: 'A party to a proceeding before the Tribunal may appeal … on a question of law'.
34 *Haritos* (2015) 233 FCR 315, 335 [36].
35 Ibid 388 [216].
36 Ibid 338 [52]; 339 [53].
37 Ibid [53]; *Haritos v Federal Commissioner of Taxation* (2014) 62 AAR 467 [27] (citations omitted) (emphasis added).
38 *Haritos* (2015) 233 FCR 315, 388 [217].
39 Ibid 388 [216].
40 Ibid 388 [218].
41 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 48, quoted with approval in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 [23]; *Minister for Immigration v Eshetu* (1999) 197 CLR 611, 626 [40] (Gleeson CJ and McHugh J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 [5].
42 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 [23].

Conclusion

The unreasonableness ground is problematic for two reasons. First, the test for legal unreasonableness is so ambiguous as to confuse the proper scope of judicial power. Secondly, the ground of unreasonableness requires the consideration of the quality of the executive decision, which seems to 'open the gate into the forbidden field of the merits' of the executive decision.[43] However, as will be seen, these problems are not unique to the ground of unreasonableness but pervade the task of judicial review.

The reasonableness framework

This section argues that the distinction between merits review and judicial review will always require consideration of the concept of reasonableness. This is because common sense or 'reasonableness' is the only means of determining the difference between question of fact and questions of law. As outlined, the proper scope of judicial review hinges on the distinction between merits review and judicial review. Therefore, in each review analysis, the judiciary are required to characterise an analysis as either arising from a question of fact (and, therefore, the question is for the administrative body to determine) or as a question of law (and therefore for the court to determine).

The idea that 'reasonableness' permeates all grounds of judicial review was suggested by French CJ in *Li*:[44]

> The rationality required by 'the rules of reason' is an essential element of lawfulness in decision-making. A decision made for a *purpose not authorised by statute*, or by reference to *considerations irrelevant* to the statutory purpose or beyond its scope, or in disregard of *mandatory relevant considerations*, is beyond power. It falls outside the framework of rationality provided by the statute.
>
> To that framework … [there] may be *express statutory conditions* or, in the case of the *requirements of procedural fairness*, implied conditions. Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review. A decision affected by actual bias may lead to a discretion being exercised for an improper purpose or by reference to *irrelevant considerations*. A failure to accord, to a person to be affected by a decision, a *reasonable opportunity to be heard* may contravene a statutory requirement to accord such a hearing. It may also have the consequence that *relevant material which the decision-maker is bound to take into account* is not taken into account.[45]

In the emphasised parts of this quotation, French CJ is seen listing the grounds of review and linking each one to 'vitiating unreasonableness'. In this way, he seems to suggest that all grounds of judicial review fall under the broader umbrella of reasonableness.

This section will first consider why questions of fact and questions of law are important to distinguishing judicial review from merits review. Secondly, it will consider the difficulties involved in determining the difference between questions of fact and question of law. Thirdly, it will discuss the attempts that have been made to create a test that distinguishes when a question is one of fact and when it is one of law. Finally, it will propose that the solution to the categorisation process, and therefore the test that defines the proper scope of judicial power, is found in the concept of reasonableness.

43 *Quin* (1990) 170 CLR 1, 38 (Brennan J).
44 *Li* (2013) 249 CLR 332, 350 [26].
45 Ibid (emphasis added).

Questions of fact and questions of law

The categorisation of an analysis process as either judicial review or merits review is vital, because it acts as a means of allocating decision-making power to the different arms of government.[46] Most importantly, this means that it is an underlying question of every analysis in judicial review, as required by *Quin*.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (Applicant S20/2002)*[47], there was some shift away from defining judicial review with reference to errors of fact and law.[48] Justices Gummow and McHugh found that jurisdictional errors under s 75(v) of the *Constitution* are not confined to errors of law.[49] They rejected the Minister's submissions that illogicality in finding primary facts was not an error of law, and that jurisdictional errors under s 75(v) are confined to errors of law.[50] Their Honours held that the distinction between errors of law and fact in the constitutional context does not 'supplant or exhaust the field of reference of jurisdictional error'.[51] They considered *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*,[52] a jurisdictional fact case, to demonstrate that courts can reach a conclusion under s 75(v) 'without recourse to distinctions between errors of law and those of fact'.[53] The rejection of the Minister's argument seems to undermine *Quin*, as *Quin* requires a workable boundary between merits and law. However, it is unclear how far *Applicant S20/2002* principles extend. Justices Gummow and McHugh did not suggest that these principles extended to grounds of review that do not usually involve judicial interference with errors of facts. These principles are likely to be limited to grounds where courts characterise interference with the facts as within judicial power, such as the no evidence ground, jurisdictional facts and unreasonableness, to avoid conflict with *Quin*.[54]

This article will proceed on the basis that the distinction between errors of law and errors of fact are important in judicial review in relation to those grounds that do not usually involve judicial interference with errors of fact (for example, simple ultra vires, failure to follow statutory procedure, irrelevant and relevant considerations and so on).

In this framework, if a question is one of fact then findings about that question are ordinarily determinations about the facts leading to the substantive decision. If courts make determinations about the facts underpinning the executive decision then they have assessed the merits of that decision and exercised non-judicial power, in breach of the separation of powers pursuant to Ch III of the *Constitution*. On the other hand, if the process is deemed to be an assessment of the law underlying the executive decision then the judiciary have not overstepped their constitutional role.

46 Stephen Gageler, 'What is a Question of Law?' (2014) 43 *AT Rev* 68, 68.
47 (2003) 77 ALJR 1165 [53]–[60] (*Applicant S20/2002*).
48 The Court contrasted this with the statutory appeals only for 'questions of law': see, eg, *Administrative Appeals Tribunal Act 1975* (Cth), s 44.
49 *Applicant* S20/2002 (2003) 77 ALJR 1165 [56].
50 Ibid 1175 [53].
51 Ibid 1175 [54].
52 (1953) 88 CLR 100; *Applicant S20/2002* (2003) 77 ALJR 1165, 1175 [54] (McHugh and Gummow JJ).
53 *Applicant S20/2002* (2003) 77 ALJR 1165, 1175 [54] (McHugh and Gummow JJ).
54 It has also been suggested that the procedural fairness ground is not an 'error of law': Aronson, Groves and Weeks, above n 9, 206.

Some commentators deem this critical distinction between questions of fact and law to be 'somewhat blurred'.[55] However, it is the contention of this article that the answer to defining the distinction between questions of fact and law is found in the notion of reasonableness.

Problems with the distinction

In principle, questions of fact and law are distinguished with reasonable ease. The former asks whether an event or thing occurred or will occur, while the latter requires consideration of the legal effect of this past or future occurrence.[56] However, these principles are difficult to apply in practice when the question requires application of the facts to the law.[57] Consider the following example: it was the eve of the 'Kevin 07' election[58] and Mr Horn brought an action in the Federal Court.[59] He argued that the federal election polling booths breached requirements of the *Commonwealth Electoral Act 1918* (Cth). He argued that they lacked a door, curtain or screen and therefore did not allow him to vote privately.[60] The analysis process may be broken down into three questions:

1. How are the polling booths constructed?
2. How does the legislation require the polling booths to be constructed?
3. Does the structure of the polling booths, in fact, adhere to the legislative requirements?

The first two questions are unlikely to cause problems. The first is a question of fact, as it asks whether a thing occurred: on these facts, it asks how the polling booths have been constructed. The answer will state whether or how the fact occurred: the booths lacked a door, screen or curtain covering their entrances but were separated on both sides by cardboard walls.[61] The second question is a question of law and can be answered by turning to the relevant statute — s 206 of the *Commonwealth Electoral Act 1918* (Cth): 'Polling booths shall have separate voting compartments, constructed so as to screen the voters from observation while they are marking their ballot papers'.[62]

However, it is the third question (the 'question of application') that raises difficulties: whether the polling booths' structure, in fact, adheres to the legislative requirements. This is not clearly a question of law or fact; Endicott queries whether such questions are 'some other animal'.[63] The question of application may be deemed to be either a question of law or a question of fact depending on how the question is characterised.

55 Gageler, above n 18, 280.
56 Aronson, Groves and Weeks, above n 9, 203.
57 The example in this paragraph borrows the discussion from *Brutus v Cozens* [1973] AC 854, the anti-apartheid activist, where the only question that was raised was whether Brutus' behaviour was insulting. This example was used in Timothy Endicott, 'Questions of Law' (1998) 114 LQR 292, 293 and discussed in *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439, 451 [25].
58 The 2007 federal parliamentary election.
59 Facts taken from *Australian Electoral Commission v Horn* (2007) 163 FCR 585.
60 Ibid 587.
61 Ibid 592 [29].
62 Ibid 587 [2].
63 Endicott, above n 57, 293; Aronson, Groves and Weeks, above n 9, 204.

On the one hand, if focus is placed on the legal components of the question, it could be described as a question of law. For example, the court may determine that 'screen' must be interpreted by the court, as it takes on particular meaning in the legislation:[64] there could be a question of whether the legislative meaning of the word 'screen' is its meaning as a verb, to screen, or its meaning as a noun, a physical screen (where Mr Horn may argue that a physical screen or curtain is required by law). It may be argued that, to screen '*voters* from observation', the actual voter must be concealed, therefore requiring a curtain or screen. In this way, the question may ask whether the legal effect of the facts 'fully found',[65] these facts being that the booths separated by walls but no curtain, is to screen the voter as required by law. When characterised in this way, it appears to be question of law under the definition above: 'consideration of the legal effect of this past or future occurrence'.[66]

On the other hand, the question of application may be characterised as one of fact if its factual components are emphasised. It may be held that the situation requires determination of whether the practical effect of this booth construction is that the booth, in fact, screens the voter, using the ordinary meaning of the word 'screen'. This appears to be a question of fact, as per the definition above: 'whether an event or thing occurred or will occur'[67] — that is, whether the polling booth screens the voter.

Ultimately, both ways of conceiving of the question ask whether the polling booths, separated by walls but without a door or curtain, screen the voter as required by the law. However, the first way may be considered a question of law and the second way a question of fact. As a result of this ambiguity, commentators and judges have remarked that the distinction between questions of fact and law are 'categories of meaningless reference';[68] or, in other words, the categorisation process does not have a logical bearing on the court's final decision.[69] However, in administrative law, this categorisation process is pivotal in determining whether courts have jurisdiction.

Attempts to categorise 'questions of application'

There are two approaches to categorising questions of application: the pragmatic approach and the analytical approach.[70] The pragmatic approach asks whether it is helpful to label a question of application as a question of law.[71] It argues that questions of application cannot be logically classified as either questions of law or fact, and the decision to classify questions

64 When statutory words take on further meaning beyond natural meaning, it has been held to be a 'question of law': see, eg, *Coles Myer Finance Ltd v Commissioner of State Revenue (*1998) 14 VAR 474; Jason Pizer, Pizer's Annotated VCAT Act (JNL Nominees, 3rd ed, 2007) 601.

65 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287; Gageler, above n 46, 69.

66 Aronson, Groves and Weeks, above n 9, 203.

67 Ibid.

68 Gageler, above n 46, 68; Da Costa v The Queen (1968) 118 CLR 186, 194–5 (Windeyer J) — Windeyer J finds that every question which arises for lawyers can be called either a question of fact or a question of law; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111]; see also *FCT v Roberts* (1992) 37 FCR 246, 252 (Hill J); *Nizich* v FCT (1991) 91 ATC 4747, 4752 (French J).

69 Gageler, above n 46, 68, 70: 'The need to introduce the qualification to the qualification might be thought to call into question not only the expression of the underlying principle but *also the utility of the overall exercise* of which the distillation of that principle forms part.'

70 Endicott, above n 57, 292; Mark Aronson 'Unreasonableness and Error of Law' (2001) 24 UNSW *Law Journal* 315, 327–8.

71 Ibid.

either way is a policy decision. Conversely, the analytical approach argues that there is a logical basis for categorising questions of application.[72]

The courts have tried to outline principles that analytically determine whether questions of application are to be deemed questions of law or fact. In *Collector of Customs v Pozzolanic*[73] *(Pozzolanic)*, the Federal Court provided five tests to this end:

1. 'whether a [statutory] word or phrase … is to be given its ordinary [or technical] meaning' is a *question of law.*
2. The ordinary or 'non-legal technical meaning' of words is a *question of fact.*
3. 'The meaning of a technical legal term is a *question of law.'*
4. 'The effect or construction of a term whose meaning or interpretation is established is a *question of law*.'
5. Whether 'facts fully found fall within' statute 'properly construed' is usually a question of law. However, this is qualified 'when a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words. Where it is reasonably open to hold that they do, then the question whether they do or not' is a *question of fact.*[74]

These tests were considered by the High Court in *Collector of Customs v Agfa-Gevaert Ltd*[75] *(Agfa-Gevaert)*, which held that 'such general expositions of the law are helpful in many circumstances'.[76] However, they were unhelpful in *Agfa-Gevaert*, as 'the term in issue [was] complex'.[77] After Agfa-Gevaert, the High Court considered the fact and law distinction in *Vetter v Lake Macquarie City Council*[78] *(Vetter)* but outlined the principles only to the extent necessary on the facts,[79] finding that questions are of law 'if, on the facts found, only one conclusion is open'.[80] The courts, in some instances, have also tried to reconceive the problem by developing the concept of 'mixed' questions of law and fact. However, 'mixed questions of fact and law' have been described as a 'baffling gadget' with no clear utility.[81] All questions of application involve a factual and legal component.[82]

More recently, in *Kostas v HIA Insurance Services Pty Ltd*[83] *(Kostas)*, the High Court held 'it is not useful to attempt to chart the metes and bounds [of questions of law] …[and] to do so is

72 Ibid.
73 (1993) 43 FCR 280, 287; Gageler, above n 46, 69.
74 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287 (emphasis added and citations omitted); *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126, 137–8; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 395 (Agfa-Gevaert); Aronson, above n 70, 332; Gageler, above n 46, 69.
75 (1996) 186 CLR 389.
76 Ibid 396.
77 Ibid.
78 (2001) 202 CLR 439.
79 Gageler, above n 46, 71.
80 Ibid; *Vetter v Macquarie Lake Council* (2001) 202 CLR 439 [27]; *Hope v Bathurst City Council* (1980) 144 CLR 1, 8.
81 Endicott, above n 57, 300; see also Gageler, above n 46, 72; *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 373–5 [164], [166]; Aronson, Groves and Weeks, above n 9, 203; John Laws, 'Law and Fact' (1999) *British Tax Review* 159.
82 Aronson, Groves and Weeks, above n 9, 211 [4.150].
83 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390.

dangerous'.[84] The High Court in Kostas rejected Basten JA's attempts in the Court of Appeal to create clear principles, finding that 'a taxonomy would lead to error'.[85] The High Court's current approach appears analytical, as it infers that there is a logical distinction but there is no 'universal' test because the distinction is context dependent.[86] Stephen Gageler, writing extra-judicially, notes that many of the tests formulated after *Pozzolanic* effectively fall into the *Pozzolanic* categories, notwithstanding that *Pozzolanic* is not expressly referenced.[87]

These tests indicate that whether a question of application is deemed to be a question of fact or law depends on the particular scenario.[88] However, contrary to the High Court's assertions in *Agfa-Gevaert, the Pozzolanic* tests are not 'helpful in many circumstances' because they are merely descriptive, not prescriptive.[89] The tests are conclusory in nature, because they leave questions like when do words hold 'ordinary' meaning or 'technical' meaning[90] and when does legislation leave one conclusion open.

For example, the first and second tests require that courts distinguish between the 'ordinary meaning' and the 'technical' meaning of words, the implication being that such a distinction is self-evident. Even with context, the task is vexed. This is seen in *Agfa-Gevaert* itself,[91] where the High Court was tasked with defining the phrase 'silver dye bleach reversal process'. The issue was whether the phrase held a technical meaning, or whether only 'silver dye bleach process' had a technical meaning and 'reversal' held its 'ordinary' meaning.[92] In such cases, the context of the legislation does not clearly point to either interpretation being clearly correct.

Similarly, the test confirmed in *Vetter*, that a question is one of law when 'only one conclusion is open', does not explain how to determine *when* only one conclusion is open. As a final example, the fifth test sheds no light on the difference between statutory words 'properly construed' (deemed a question of law) and statutory words which are to be read 'according to their ordinary meaning' (deemed a question of fact). The test merely states that these situations are different, without explaining how they are different: we are not told *when* courts are required to 'properly construe' statute. The fifth test is also described with another 'qualification': when it is the case that applying the facts requires 'a value judgment about the range of the act', this is a question of law.[93] Again, *when* will it be the case that the court will

84 Ibid 417 [88].

85 Ibid 418 [89]; see also *Agfa-Gevaert* (1996) 186 CLR 389, 394; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111].

86 Aronson, Groves and Weeks, above n 9, 203; *Agfa-Gevaert* (1996) 186 CLR 389, 394; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111]: 'no satisfactory test of universal application has yet been formulated'. Although, note that some construe the High Court's approach as partly analytical and pragmatic: see Aronson, above n 70, 332.

87 Gageler, above n 46, 70.

88 Aronson, Groves and Weeks, above n 9, 203.

89 Conversely, Stephen Gageler argues that the High Court in *Agfa-Gevaert* gave the *Pozzolanic* tests 'at best muted endorsement': Gageler, above n 46, 70. However, the High Court did not overturn the test and, as noted, described the tests as sometimes helpful but not helpful for the matter at hand: see *Agfa-Gevaert* (1996) 186 CLR 389, 396.

90 See examples of this problem in Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 161.

91 (1996) 186 CLR 389.

92 Ibid.

93 Gageler, above n 46, 70; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1980) 43 FCR 280, 288–9.

be required to make a 'value judgment about the range of the act'? The many qualifications and descriptive nature of the tests only creates confusion in differentiating questions of law from those of fact. To this end, Stephen Gageler muses that 'a qualification to a qualification to the fifth of five principles is enough to make even a tax lawyer blush'.[94] Similarly, Professor Endicott commences his article titled 'Questions of Law' by comparing statements of Katherine in *The Taming of the Shrew*[95] to Lord Denning's approach to identifying a question of law:

> And be it moon, or sun, or what you please: And if you please to call it a rush-candle, Henceforth I vow it shall be so for me — Katharine to Petruchio.
>
> Lord Denning did not take an analytical approach to identifying questions of law, any more than Katharine took an analytical approach to identifying the moon.[96]

It has been often quoted that 'no satisfactory test of universal application has yet been formulated' to determine the distinction between questions of fact and law.[97] This is because all questions of application involve a factual and legal component.[98]

The answer: reasonableness

The boundary between questions of fact and questions of law exists in the concept of reasonableness. Consider the following example: the law states that 'the Council must grant accommodation to people who do not have any accommodation'.[99] The Council rejects an application for accommodation, as the applicant lives on the street in a barrel and, according to the Council, the barrel constitutes 'accommodation', making him or her ineligible for a grant of accommodation (the Barrel Case).[100]

The Barrel Case appears to give rise to a question of law. The court may find that the facts 'fully found', that the applicant lives in the barrel, do not fall under the meaning of 'accommodation' under the statute. The court may find that 'accommodation' has a statutory meaning of the right to privately use land. However, why does this test apply? Why is this not a question of fact? The current principles alone would validly allow a court to find that 'accommodation' is to be given its ordinary meaning, being a room or space where a person may live or stay. If this is the case, it is therefore a question of fact for the Council to determine. A large variety of different spaces may constitute 'accommodation' and it is for the Council to decide whether any given space constitutes accommodation.

The distinction between 'ordinary meaning' and 'statutory meaning' is found in the concept of common sense. The reason that 'accommodation' is not a question of fact in this instance is because of 'reasonableness' informed by societal values. It is due to a shared understanding

94 Gageler, above n 46, 70.
95 William Shakespeare (1564–1616), *The Taming of the Shrew*.
96 Endicott, above n 57, 292.
97 *Agfa-Gevaert* (1996) 186 CLR 389, 394; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315, 355 [111].
98 Aronson, Groves and Weeks, above n 9, 211.
99 This example is loosely based on the facts and examples in *R v Hillingdon London Borough Council*; *Ex Parte Puhlhofer* [1986] AC 484; Endicott, above n 57, 298–9.
100 Endicott, above n 57, 298–9.

that accommodation, in the context of legislation that seeks to provide housing for homeless people, means an apartment or a house, but not a barrel. It is not the principles themselves that provide direction in relation to when they are applied. It is common sense and the notion of reasonableness that provides direction — or, in other words, it is the ludicrous outcome that the Council would be denying housing to a person living in a barrel that seems to direct when a question is one of fact or law. The word 'accommodation' takes on a 'legal' meaning because reasonableness dictates that a barrel does not constitute accommodation.

The grounds of review, statutory interpretation and reasonableness

The Barrel Case may be conceptualised under two grounds of review — namely, under the simple ultra vires ground or under the irrelevant consideration ground. First, under the simple ultra vires ground, a proper interpretation of 'accommodation' does not include a barrel. Therefore, it is beyond power for the Council to deny the applicant's claim because he or she had accommodation, because a barrel does not fall under the statutory meaning of the word 'accommodation'. Secondly, the Barrel Case may be understood in the context of irrelevant considerations: the consideration, that the applicant lives in a barrel, is impliedly irrelevant to the Council's decision to grant accommodation because this consideration has no bearing on whether the person has current accommodation pursuant to the statute.

Every ground of review is grounded in statutory interpretation, with 'common sense' at the heart of statutory interpretation. A trend can now be seen in the tests that judges have used to distinguish questions of fact and questions of law. The tests that describe the statutory interpretation process are considered 'questions of law' (for example, whether the facts fully found fall under the statute 'properly construed', the meaning of a technical legal term, and so on); and the tests that describe a process that requires no particular judicial skill to interpret statute (for example, words construed according to their 'ordinary meaning') are questions of fact.

To this end, French CJ explains how each ground of review is underpinned by the statutory interpretation process and therefore the concept of reasonableness:

> To that framework … [there] may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions. Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review.[101]

The 'reasonableness' framework and the statutory interpretation process underlying judicial review are evident when reconsidering *Quin. Quin* concerned the abolition of the Courts of Petty Sessions (the old Courts), which were replaced by Local Courts.[102] All magistrates from the old Courts who applied were appointed to the new Local Courts, except for Mr Quin and four others.[103] Initially, the Attorney-General recommended appointment on the basis that a magistrate from the old Courts was 'not unfit' for office. This was determined without competition from other applicants (the old policy).[104] In an earlier case, the Attorney-General's initial decision to not recommend Mr Quin for appointment under the old

101 *Li* (2013) 249 CLR 332, 350 [26] (French CJ).
102 *Quin* (1990) 170 CLR 3, 2.
103 Ibid 2, 8.
104 Ibid 5, 12.

policy was declared void, as it was held to be procedurally unfair.[105] After this judgment, the Attorney-General adopted a new policy that 'the most suitable persons to fill any vacancies' would be appointed and therefore Mr Quin would have to compete against other applicants.[106] Mr Quin issued new proceedings, asking the Court to issue a declaration that the Attorney-General must consider Mr Quin's application on the basis of the old policy.[107]

The majority judges, Mason CJ, Brennan and Dawson JJ, held in separate judgments that the Attorney-General was not required to consider Mr Quin's application under the old policy.[108] Justice Brennan found that:

> the court must stop short of compelling the fulfilment of the promise … *unless the statute so requires* or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power.[109]

The Court did not have the power to compel the executive to decide Mr Quin's application pursuant to the old policy, as it was held that the old policy was not law.[110] If the Court compelled the executive to make the decision on the basis of the old policy, the Court would be dictating that the executive must consider factors beyond conditions found in law: the court would be making determinations about the merits of the decision.

However, if, hypothetically speaking, the old policy were a fetter on power *founded in law*[111] — for example, a statutory implication — then it would be Parliament that is dictating the fetters on the power to appoint magistrates. The Court would be declaring the law. The executive would be bound to decide Mr Quin's application using the old policy, because Parliament's law (the statute), as declared by the courts through statutory interpretation, requires it.

This shows that it is ultimately the statutory interpretation process that determines the boundary between merits and law. It was open for the courts to find that there were legal fetters on the power to appoint and, in fact, the dissenting judges did find that there was an implied legal fetter on the power to appoint.[112] It may be held that s 12(1) of the *Local Courts Act 1982* (NSW) must be interpreted in light of the pivotal rule in our legal system concerning security of judicial tenure: 'a member of the judiciary should not be compulsorily removed from office during the term of his or her appointment otherwise than on the ground of proved misbehaviour'[113] — or it may be found, as Toohey J held, that the fetter found in law was a

'legitimate expectation that [Mr Quin's] application would be dealt with as the applications of other former stipendiary magistrates had been dealt with'.[114]

105 *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.
106 *Quin* (1990) 170 CLR 3.
107 Ibid 2.
108 Ibid.
109 Ibid 40; *Lam* (2003) 214 CLR 1, 9 [27] (emphasis added).
110 *Quin* (1990) 170 CLR 1, 39 (emphasis added).
111 This is what the dissenting judges found: *Quin* (1990) 170 CLR 1, 47–9 (Deane J); 68–9 (Toohey JJ); Groves, above n 23, 498.
112 Ibid.
113 *Quin* (1990) 170 CLR 1, 48–9 (Deane J).
114 Ibid 68 (Toohey J).

Ultimately, the principle that courts cannot trespass on the merits of the decision is only a label. It is the statutory interpretation process, which is informed by 'common sense' and shared values, that is where the substance of judicial decision-making lies.

Conclusion

The ground of unreasonableness is often characterised as undermining the distinction between merits review and judicial review. This article has shown the contrary — that the concept of unreasonableness is, in fact, integral to determining the distinction between merits review and judicial review and therefore integral to determining the scope of the judiciary's power under the *Constitution*. This is because the distinction between merits and law is determined by statutory interpretation, which requires that courts apply standards of common sense or 'reasonableness' when interpreting words in statute. In the Barrel Case, it was the ludicrous outcome that determined the point at which the judiciary was able to interfere. Although the Barrel Case could be characterised as simple ultra vires or as an irrelevant consideration, the underlying reason for vitiating the decision was on the basis of unreasonableness. The ambiguity of the unreasonableness test is due to the ambiguity of language — an unavoidable part of statutory interpretation.

This article has argued that determining what is 'unreasonable' is essential in judicial review. As a result, judicial enforcement of a statutory presumption that an executive decision-maker cannot exercise his or her powers unreasonably is consistent with the judicial task.