AIAL FORUM

ISSUE 105 SEPTEMBER 2022

Australian Institute of
Administrative Law

AIAL FORUM

ISSUE 105 SEPTEMBER 2022

The *AIAL Forum* is published by:

Australian Institute of Administrative Law Incorporated
ABN 97 054 164 064

PO Box 83, Deakin West ACT 2600
Ph: (02) 6290 1505; Fax: (02) 6290 1580
Email: aial@commercemgt.com.au
www.aial.org.au

Publishing in the *AIAL Forum*

The Institute is always pleased to receive papers on administrative law from writers who are interested in publication in the *AIAL Forum*. It is recommended that the style guide published by the *Australian Guide to Legal Citation* be used in preparing manuscripts. Manuscripts should be sent to the Editor, *AIAL Forum*, at the above address.

Articles marked # have been refereed by an independent academic assessor. The refereeing process complies with the requirements of the Department of Education and the *AIAL Forum* is included in the 2018 Submission Journal list (ERA Journal id 35396). Refereeing articles is a service the Institute offers contributors to its publications including the *AIAL Forum*.

CAL payments

The Institute regularly receives payments from the Copyright Agency Limited (CAL) in respect of articles published in the *AIAL Forum*. These CAL payments are applied to the costs of publishing the *AIAL Forum* and make a significant contribution to the ongoing viability of the journal.

Please direct any inquiries about these policies to the National Treasurer of the AIAL, Peter Sutherland, at email: peter.sutherland@anu.edu.au.

This issue of the *AIAL Forum* should be cited as (2022) 105 *AIAL Forum*.

Printed by Instant Colour Press

ISSN 1 322-9869

Printed on Certified Paper

AIAL FORUM

CONTENTS

Recent developments

Anne Thomas

Commonwealth Ombudsman appointment

The Attorney-General, the Hon Mark Dreyfus, has announced the appointment of Mr Iain Anderson as the Commonwealth Ombudsman. The role of the Commonwealth Ombudsman is integral to ensuring Australian government entities act with integrity.

Mr Anderson replaces Mr Michael Manthorpe, who retired from the role last year, and will commence his appointment as Ombudsman on 1 August 2022.

Mr Anderson is a highly experienced public servant with 31 years of service. His experience extends across a variety of Commonwealth departments and agencies and across a wide range of legal and social policy areas. Mr Anderson is currently a Deputy Secretary at the Attorney-General's Department.

We congratulate Mr Anderson on his appointment.

<www.ag.gov.au>

Extension for the Royal Commission into Defence and Veteran Suicide

The Morrison Government has announced an extension for the final report of the Royal Commission into Defence and Veteran Suicide until 17 June 2024. The additional 12 months is in recognition of the broad scope of the Royal Commission's inquiries and to account for the ongoing impact of COVID 19.

'We recognise the important work the Royal Commission is doing to look at systemic issues of defence and veteran suicide, and the need to provide the Royal Commission with the time to do so in a trauma-informed way,' the Attorney-General, Senator the Hon Michaelia Cash, said.

'This extension will allow more individuals to come forward and share their experience with the Royal Commission. I thank all those who have already come forward,' she said.

The Royal Commission has so far heard evidence from witnesses with lived experience of defence and veteran suicide, witnesses with specialist expertise, veteran ex-service organisations, support organisations and the Commonwealth.

A national legal advisory service and legal financial assistance scheme has been set up and is available for people or entities giving evidence or engaging in other ways with the Royal Commission.

Further information on the Royal Commission, including the Terms of Reference and information on how to make a submission, is available at the Royal Commission into Defence and Veteran Suicide website.

<www.ag.gov.au>

Fair Work Commission appointment — Mr Paul Schneider

The Attorney-General, Senator the Hon Michaelia Cash, has announced the appointment of Mr Paul Schneider to the Fair Work Commission.

Mr Schneider has been appointed as a Commissioner and will commence in the role on 2 May 2022.

Fair Work Commission members are appointed until the age of 65.

Mr Schneider is the Industrial Relations Manager of OSM Australia Pty Ltd. Mr Schneider has undertaken senior human resource roles with Seven West Media, Svitzer Australia, Upstream Production Solutions, Downer EDI Mining and McDermott Australia.

Mr Schneider has a Bachelor of Business and a Master of Business (Human Resource Management and Industrial Relations) from Victoria University.

We congratulate Mr Schneider on his appointment.

<www.ag.gov.au>

Reappointment of Aboriginal and Torres Strait Islander Social Justice Commissioner

Ms June Oscar AO has been reappointed as the Aboriginal and Torres Strait Islander Social Justice Commissioner in the Australian Human Rights Commission. Ms Oscar's reappointment will be for a period of two years and commenced on 3 April 2022.

Ms Oscar is a Bunuba woman from Fitzroy Crossing. She has long been a champion for Indigenous social justice, women's issues, addressing Fetal Alcohol Spectrum Disorder, and the preservation of Indigenous language. Ms Oscar was appointed as an Officer of the Order of Australia in 2013 and was awarded the Desmond Tutu Reconciliation Fellowship for significant achievements in contributing to acts of Global Reconciliation in 2016.

Since her appointment in 2017, Ms Oscar has led the Wiyi Yani U Thangani (Women's Voices) multi-year initiative, which has focused on what Aboriginal and Torres Strait Islander women and girls consider to be their strengths, challenges and aspirations.

We congratulate Ms Oscar on her reappointment.

<www.ag.gov.au>

Australia ratifies International Forced Labour Protocol

The Federal Executive Council has approved the ratification of the International Labour Organization (ILO) *Protocol of 2014 to Forced Labour Convention 1930 (No. 29)* (the Protocol). Australia has communicated formal ratification to the Director-General of the ILO in Geneva for registration. The Protocol is the most contemporary international labour

standard to address forced labour and cements the international community's longstanding commitment to combatting modern slavery in all of its forms.

The Attorney-General, Senator the Hon Michaelia Cash, said that Australia highly values our cooperation with other ILO members and has long committed to ratifying the Protocol.

In December 2021, the Western Australian Government passed legislation which brought its laws into line with the Protocol, and the other state and territories, allowing the government to progress ratification of the Protocol.

The Protocol adds new elements to the ILO *Forced Labour Convention 1930 (No. 29)*, aimed at tackling the complexities of modern slavery and addressing the root causes of forced labour, with obligations to:

- prevent and suppress forced labour;
- protect victims and provide access to appropriate and effective remedies; and
- penalise the perpetrators of forced labour and end their impunity.

Ratifying the Protocol builds on Australia's comprehensive response to modern slavery in all its forms, including through the National Action Plan to Combat Modern Slavery 2020–25, the *Modern Slavery Act 2018* (Cth), and Australia's international engagement to eradicate forced labour from societies around the world under Australia's International Engagement Strategy on Human Trafficking and Modern Slavery, launched by the Minister for Foreign Affairs, Senator the Hon Marise Payne.

'Australia's leadership on combatting forced labour, and other forms of modern slavery, including as co-Chair with Indonesia of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, is a key priority within Australia's foreign policy to uphold the international rules-based order, promote human rights, advance gender equality, counter security threats and strengthen economic growth and resilience, particularly to ensure a free and prosperous Indo-Pacific region' Minister Payne said.

'We are committed to working with all stakeholders to shine a light on these insidious crimes. We want to ensure that states are not ignorant of, or ignoring, such activity occurring within their borders, and that Australian businesses are undertaking appropriate due diligence on the risks of modern slavery existing within their supply chains,' Minister Payne said.

On 31 March 2022, Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP, announced the commencement of the government's statutory review of the Commonwealth *Modern Slavery Act 2018*. The review is to be conducted by Emeritus Professor John McMillan AO.

<https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/review-of-the-commonwealth-modern-slavery-act-2018>

Appointments to the Administrative Appeals Tribunal

The Australian Government has announced the appointment of members to the Administrative Appeals Tribunal.

The following new appointments are:

Deputy President:

- The Hon Michael Mischin.

Senior Members:

- Ms Joanne Collins;
- Mr Graham Connolly;
- Ms Ann Duffield;
- The Hon Pru Goward;
- Ms Dominique Grigg;
- Ms Katherine Harvey;
- Mr David James;
- Mr Wayne Pennell; and
- Ms Karen Vernon.

Members:

- Mr Lee Benjamin;
- Ms Cheryl Cartwright;
- Ms Kate Chapple;
- Mr David Cosgrave;
- Ms Tegen Downes;
- Mr Edward Howard;
- Mr Peter Katsambanis;
- Ms Brygyda Maiden; and
- Mr Peter Papadopoulos.

Further to the new appointments the Government has promoted and/or extended the terms of the following members:

- Dr Denis Dragovic;
- Mr Bernard McCabe;
- Mr Justin Owen;
- Ms Antoinette Younes;
- Mr Mark Bishop;
- Mr Andrew George;
- Ms Linda Kirk;
- Ms Gina Lazanas;
- Ms Karen Synon;
- Ms Rebecca Bellamy;
- Mr John Cipolla;
- Ms Susan De Bono;
- Ms Kruna Dordevic;
- Ms Fiona Hewson;
- Mr Marten Kennedy;
- Mr Giovanni Longo;
- Mr Donald Morris;
- Ms Susan Trotter;
- Ms Rachel Westaway;
- Ms Donna Petrovich;
- Ms Jennifer Cripps Watts;
- Dr Bridget Cullen;
- Ms Kate Buxton;
- Ms Denise Connolly;
- Ms Kim Parker; and
- Ms Lana Gallagher.

All of the appointees are highly qualified to undertake the important task of conducting merits review of government decisions.

We congratulate all appointees on their appointments.

<www.ag.gov.au>

Appointment of the President of the Administrative Appeals Tribunal and a Federal Court of Australia judge

The Hon Justice Fiona Meagher has been appointed as President of the Administrative Appeals Tribunal (AAT) and as a Judge of the Federal Court of Australia, fulfilling the statutory requirement for appointment as President of the AAT.

Justice Meagher's appointment as President of the AAT will commence on 1 April 2022, for a period of seven years.

Justice Meagher brings to the role extensive experience in legal practice and the work of the AAT, having served at the AAT since her appointment as a Member in 2015. She was promoted to Senior Member in 2018, and then Deputy President and Division Head of the National Disability Insurance Scheme Division in 2020.

Justice Meagher became a Member of the Mental Health Review Tribunal Queensland in 2014 and was the Presidential Delegate for the period June 2017 to November 2018.

We congratulate Justice Meagher on her appointment.

<www.ag.gov.au>

Appointment to the Federal Court of Australia

On 18 March 2022 and 1 April 2022, the Australian Government announced the appointments of Ms Lisa Hespe SC and Ms Elizabeth Raper SC, respectively, as judges of the Federal Court of Australia.

Ms Hespe has been appointed to the Victorian Registry to replace Justice Paul Anastassiou following his resignation taking effect on 29 April 2022. Ms Hespe will commence on 27 April 2022. Ms Hespe was admitted as a solicitor and barrister in the Supreme Court of Victoria in 1995 and was appointed as Senior Counsel in 2021. In 2017, Ms Hespe was appointed as a part-time Senior Member of the Administrative Appeals Tribunal.

Ms Raper has been appointed to the Sydney Registry to fill the vacancy as a result of the retirement of the Hon Justice Geoffrey Flick on 18 October 2021. She will commence on 2 May 2022. Ms Raper was admitted as a solicitor in the Supreme Court of New South Wales in 1999. She was appointed Senior Counsel in 2019.

We congratulate Ms Hespe and Ms Raper on their appointments.

<www.ag.gov.au>

Appointment of Freedom of Information Commissioner

Mr Leo Hardiman PSM QC has been appointed the Freedom of Information Commissioner. His term will commence on 19 April 2022.

Mr Hardiman brings a wealth of experience to the role. For more than 30 years, Mr Hardiman has advised the Commonwealth in many areas. He was previously Deputy Chief General Counsel and National Leader of the Office of General Counsel with the Australian Government Solicitor and has held a variety of other counsel roles within the Australian Taxation Office and the Department of Employment and Workplace Relations.

We congratulate Mr Hardiman on his appointment.

<www.ag.gov.au>

New leadership for the National Archives of Australia

The Australian Government has appointed Mr Simon Froude as the Director-General of the National Archives of Australia.

The Director-General is the accountable authority of the National Archives, responsible for its supervision and management. The National Archives carries out valuable work, overseeing the management of government records and ensuring that Australian Government information of enduring significance is secured, preserved and available to government agencies, researchers and the community.

Mr Froude is currently Director of State Records of South Australia. In this role he is responsible for overseeing records and archival management, freedom of information and privacy across the South Australian public sector.

Mr Froude's considerable knowledge and experience in archives and records management, teamed with his change management, strategic and leadership capabilities, will enable him to lead the National Archives through the next phase of its transformation.

Mr Froude's appointment is for five years commencing on 23 May 2022.

The Government also announced the appointment of five members to the National Archives of Australia Advisory Council.

The Council provides advice on matters relating to the functions of the National Archives with each member providing guidance and support which is integral to the work of the National Archives.

The five members include reappointed Ms Suzanne Hampel and new appointees Ms Rachel Connors, Dr Anthony Dillon, Ms Alice Spalding and Ms Amy Low. All members have been appointed for a three-year term.

We congratulate Mr Froude and the five Council members on their appointments.

<www.ag.gov.au>

Senate Standing Committees on Legal and Constitutional Affairs report on the performance and integrity of Australia's administrative review system

On 30 June 2022, the Senate Standing Committee on Legal and Constitutional Affairs handed down its report on the performance and integrity of Australia's administrative review system.

On 20 October 2021, the Senate referred an inquiry into the performance and integrity of Australia's administrative review system to the Committee for inquiry and report, with particular reference to:

a. the Administrative Appeals Tribunal, including the selection process for members;

b. the importance of transparency and parliamentary accountability in the context of Australia's administrative review system;

c. whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established; and

d. any related matter.

The Committee's report noted that the work in its substantive interim report, tabled on 31 March 2022, was sufficient and set out in full the issues raised which had enabled the Committee to conclude its examination of the terms of reference and make appropriate recommendations.

The interim report set out 3 recommendations:

a. as a matter of urgency, the Commonwealth Government re-fund the Administrative Review Council and allow it to fulfil its statutory duties in accordance with Part V of the *Administrative Appeals Tribunal Act 1975*;

b. the Attorney-General develop and legislate a process for the appointment of members to the Administrative Appeals Tribunal; and

c. the Attorney-General disassemble the current Administrative Appeals Tribunal (AAT) and re-establish a new, federal administrative review system.

On 30 June 2022, the Senate Committee noted that re-referral of the inquiry in the 47th Parliament is not necessary.

The interim report can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/Interim_Report>

<www.aph.gov.au>

New politics: a better process for public appointments

On 17 July 2022, the Grattan Institute released a report titled *New politics: A better process for public appointments*, by Daniel Wood, Kate Griffiths and Anika Stobart.

The report looks at the politicisation of public appointments and the effect of which can compromise the performance of government agencies, promote a corrupt culture and undermine public trust in the institutions of government. The report recommends among other things that the federal and state governments establish a transparent, merit-based selection process for all public appointments, overseen by a new Public Appointments Commissioner.

This report is the first of Grattan Institute's *New politics* series, examining misuse of public office for political gain. Subsequent reports will investigate pork-barrelling and the politicisation of taxpayer-funded advertising.

<https://grattan.edu.au/report/new-politics-public-appointments/>

Former chief justice to lead Law Reform Commission

Former Chief Justice of NSW, the Hon Tom Bathurst AC QC, has been appointed to lead the State's independent law reform advisory body, the NSW Law Reform Commission, from 1 June 2022.

The NSW Law Reform Commission is an independent statutory body constituted under the *Law Reform Commission Act 1967* (NSW). It provides legal policy advice to Government on issues referred by the Attorney-General, including comprehensive analytical reports and recommendations for legislative reform.

Mr Bathurst is replacing outgoing Chairperson Alan Cameron AO, who has led the NSW Law Reform Commission over the past seven years.

Mr Bathurst's appointment will run until 31 May 2025.

Mr Bathurst said he was honoured to take on the role, which will provide an opportunity to look at the law from a different perspective.

'The NSW Law Reform Commission undertakes significant work in researching, interrogating the law and advising on reform,' Mr Bathurst said.

We congratulate Mr Bathurst on his appointment.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2022/former-chief-justice-to-lead-law-reform-commission.html>

New police oversight commissioner

On 28 April 2022, the NSW Attorney-General, Mark Speakman, announced the appointment of Justice Peter Johnson, as Chief Commissioner and Anina Johnson as Commissioner of the State's Law Enforcement Conduct Commission (LECC).

The LECC is an independent integrity body that provides oversight of the NSW Police Force and NSW Crime Commission. Its primary role is to detect, investigate and expose misconduct and maladministration in these bodies.

Mr Johnson will commence a five-year appointment as Chief Commissioner on 4 July 2022, while Ms Johnson will commence her five-year term as Commissioner on 16 May 2022.

Mr Speakman said the new appointments bring a significant body of experience and knowledge to the LECC.

Mr Johnson is a current serving NSW Supreme Court judge with an outstanding knowledge and experience in criminal law. He brings to the role 17 years of experience of decision-making in criminal cases on the Supreme Court, as well as extensive experience in grappling with the issues related to police misconduct.

Ms Johnson is the current Deputy President of the NSW Mental Health Review Tribunal — a role which requires significant decision-making capacity and the ability to use oversight and investigatory power judiciously.

The appointments replace the outgoing Chief Commissioner, Reginald Blanch QC, and the former Commissioner, Lea Drake.

Mr Blanch will continue as Chief Commissioner until Mr Johnson commences his appointment.

We congratulate Mr Johnson and Ms Johnson on their appointments.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2022/new-police-oversight-commissioner.html>

Three new judges for the Supreme Court

On 30 March 2022, the NSW Attorney-General, Mark Speakman, announced the appointment of Dr Elisabeth Peden SC and Mr Mark Richmond SC to the NSW Supreme Court, and Mr Jeremy Kirk SC to the NSW Court of Appeal.

Dr Peden is currently a barrister at Third Floor Wentworth Chambers, where she specialises in contract, property and equity law. She commenced her new role on 6 April.

Mr Richmond practises at Eleven Wentworth Chambers, where he specialises in taxation, commercial and administrative law. He commenced in the Supreme Court on 19 April, filling a vacancy following the retirement of Justice Nigel Rein on 18 March.

Mr Kirk also practises at Eleven Wentworth Chambers, where he specialises in administrative, commercial and constitutional law. He commenced on the Court of Appeal bench on 21 April and filled a vacancy left following the retirement of Justice John Basten on 16 April.

We congratulate Dr Peden, Mr Richmond and Mr Kirk on their appointments.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2022/three-new-judges-for-the-supreme-court.html>

Independent Review of the Public Trustee Tasmania — report

On 25 May 2022, the Tasmanian Government released their response to the Independent Review of the Public Trustee Tasmania.

The government and the Trustee support, or support in principle, all 28 recommendations of the review.

The implementation of the actions and reform program to respond to the review recommendations is being carried out as a matter of priority within government and the Public Trustee, with a clear focus on delivering the following key elements:

- progressing a clear cultural and policy shift of the Public Trustee towards a human rights and supported decision-making approach, to be embedded in the guardianship and administration legislative framework through the next tranche of significant legislative reforms;
- funding arrangements that support the implementation of the review recommendations;
- increasing and strengthening oversight of the Public Trustee, through a revised and updated Ministerial Charter that clarifies the government's policy expectations and service delivery requirements for the Public Trustee; and
- supporting the Public Trustee in the significant work underway to progress improvements to its internal operational and administrative practices, reflecting the clear shift in focus to an improved and revised client and customer-centric service delivery model.

The response can be found at Government Response to the Independent Review of the Public Trustee Tasmania (justice.tas.gov.au)

The independent review into the administrative and operational practices of the Public Trustee can be found on the Tasmanian Government Department of Justice website.

<https://www.justice.tas.gov.au/news_and_events/review-of-the-public-trustee>

Recent decisions

The existence of jurisdiction versus the exercise of jurisdiction

Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16

The circumstances leading to the High Court appeal involved a complaint of discrimination by Mr Cawthorn, the respondent that was made in the Anti-Discrimination Tribunal, a body constituted under the *Anti-Discrimination Act 1998* (Tas) (the 'State Act'). The complaint was brought against the appellants, the developer and owner of the land for the Parliament Square development in Hobart. The respondent complained that the appellants had discriminated on the basis of disability, both direct and indirect, under ss 14, 15 and 16(k) of the State Act, in the provision of a facility which did not have adequate wheelchair access. Before the Tribunal, the appellants argued that, among other things, the *Disability Discrimination Act 1992* (Cth) (the 'Commonwealth Act') covered the field in relation to disability discrimination standards so that s 109 of the *Constitution* rendered the State Act inoperative to the extent that it imposed any additional duties on the appellants.

The Tribunal dismissed the respondent's complaint on the basis that the existence of the s 109 issue meant that the dispute arose in federal jurisdiction because there was a matter arising under the *Constitution*, for which it did not have authority to decide. The Full Court of the Supreme Court of Tasmania assessed the s 109 issue and concluded that the argument that the State Act is inconsistent with the Commonwealth Act was 'misconceived'. The Supreme Court set aside the order of the Tribunal and remitted the complaint to the Tribunal for hearing and determination.

The central question in this appeal was whether the Tribunal was denied jurisdiction to exercise judicial power due to the appellants' allegation which raised a 'matter' under the *Constitution*. On 4 May 2022, Kiefel CJ and Gageler, Keane, Gordon, Steward and Gleeson JJ, and Edelman J in a separate judgment, handed down their decision, allowing the appeal and setting aside the orders of the Full Court.

Before turning to the main question, the plurality first considered the threshold issue raised by the Australian Human Rights Commission intervening on the appeal, whether the jurisdiction conferred on the Tribunal by the State Act to hear and determine a complaint of discrimination referred to it involved the exercise of judicial power.

In considering this aspect, the plurality noted that the limits of power conferred by statute are those expressed in or implied into the statue and construed in light of the *Constitution*, irrespective of whether the repository of the power is a court or non-court tribunal, and whether the power conferred is judicial or non-judicial. Moreover, a failure to observe the legislated limits of jurisdiction conferred on a court or non-court tribunal established by state legislation is subject to compulsion or restraint under an appropriate judicial remedy granted within the supervisory jurisdiction of the Supreme Court of that state ([20]), just as a court or non-court tribunal established by Commonwealth legislation is subject to compulsion or restrain by mandamus or prohibition under the original jurisdiction of the High Court.

Thus, having a judicially enforceable duty to comply with the limits of its own jurisdiction, a court or non-court tribunal must therefore have power to take steps needed to ensure compliance, which is implied, if it is not otherwise expressed in legislation. Whether this power to ensure that it remains within the limits of its jurisdiction can be characterised as either judicial or non-judicial depends on the nature of the power which it is being required to exercise to determine the claim or complain before it. Determining when that claim or complaint in respect of which a state tribunal's jurisdiction is sought to be invoked is or is not a 'matter', described in s 75 or s 76 of the *Constitution*, is an exercise of judicial power.

The Court concluded that here the opinion of the Tribunal that the complaint referred to it was beyond its jurisdiction to hear and determine was a judicial opinion and the order by the Tribunal dismissing the complaint for want of jurisdiction was an order made in the exercise of state judicial power.

Edelman J determined on the other hand that, in deciding whether federal jurisdiction exists, a court, or tribunal, is not exercising federal jurisdiction. It is merely taking a step anterior to the exercise of any judicial power by reaching an opinion as to its own jurisdiction. Its determination is anterior to but is not an exercise of judicial power ([63]).

The plurality subsequently turned to consider the limits of the Tribunal's jurisdiction. It held that the limit on the Tribunal's jurisdiction, conferred by the State Act, is to be construed in accordance with the state interpretation legislation to exclude jurisdiction with respect to any 'matter' that falls within s 75 or s 76 of the *Constitution*.

A 'matter' within s 75 and s 76 of the *Constitution* has been held to be a justiciable controversy about a legal right or legal duty having an existence that is not dependent on the commencement of a proceeding in a forum in which that controversy might come to be adjudicated ([31]). The plurality held that this could include where a Commonwealth law is relied on as the course of a claim or a defence that is asserted in the court (*Constitution* s 76 (ii)) or where the invalidity or inoperability of a Commonwealth or state law is asserted in the course of the controversy in reliance on the *Constitution* (*Constitution* s76(i)), as in this case. Consequently, the plurality found that the subject matter of the complaint and the defence of the appellants under s 109 of the *Constitution* was a single justiciable controversy, as the determination of the constitutional defence was essential to the determination of the claim, and thus a 'matter' under s 75 and s 76 of the *Constitution*.

The plurality went on to reject the appellant's assertion that there still needed to be a degree of 'arguability' to meet the description of a matter under s 76 (i) or 76(ii). However, taking time to note this did not suggest that an incomprehensible or nonsensical claim or defence incapable of giving rise to a 'matter' would not equally be struck out or summarily dismissed where asserted in a proceeding where federal jurisdiction was otherwise attracted under s 75 or s 76 of the *Constitution.*

Edelman J added that it is not necessary in order to identify the existence of a 'matter' under the *Constitution* for a court or tribunal to resolve the issue. It is sufficient that the court or tribunal considers that the dispute arises, albeit it must properly be raised or otherwise involve a real question. If not it will be an abuse of process ([67]).

In conclusion, the plurality found that, because the claim of the respondent and the defence of the appellant was a single justiciable controversy comprising a matter under s 76(i) and s 76(ii) of the *Constitution*, the hearing and determination of that claim and defence was beyond the jurisdiction conferred on the Tribunal by the State Act and the Tribunal was correct so to decide. The Tribunal thus had the power to determine its jurisdiction but not the jurisdiction to determine the complaint.

Misunderstanding is not the same as being unresponsive

Plaintiff S183/2021 v Minister for Home Affairs [2022] HCA 15

The decision of Gordon J was handed down on 21 April 2022, upholding the plaintiff's application on the ground the delegate unreasonably exercised its discretion, and made orders for writs of certiorari and mandamus.

The plaintiff is a citizen of Turkey who was granted a Student (Subclass 572) visa on 8 January 2015. On 3 August 2016, the plaintiff made a valid application for a Protection (Subclass 866) visa. In the visa application the plaintiff claimed to be a lesbian and that if she was returned to Turkey she would be killed or forced to marry a man, which she said would be worse than death. Between August 2016 and 3 March 2020, the plaintiff engaged in sporadic correspondence in broken but intelligible English with the Department of Home Affairs about her application. During this period her father died, her mental health declined, she become homeless, she attempted to take her own life and was hospitalised. This information was known to the department.

On several occasions the department emailed the plaintiff inviting her to attend a visa interview. The email of the 6 January 2020 invited the plaintiff to an interview in Melbourne, despite the fact the plaintiff was in New South Wales. On 14 February 2020, the plaintiff received a further two letters requesting further information pursuant to the application and on 17 February 2020 a further email rescheduling an interview to be held in Sydney. The plaintiff's response to the correspondence reaffirmed that she was homeless with no money and with no means to make it to Melbourne.

On 17 March 2020, the delegate refused to grant the plaintiff a protection visa. The delegate's reasons referred to the plaintiff's failure to attend her protection visa interview in Melbourne and her failure to contact the department to explain why she did not attend or to request that the interview be rescheduled, which was a 'further reason for concern about the credibility of [the plaintiff's] protection visa claims'. Consequently, because the delegate had not been able to interview the plaintiff and having considered the information before her, she could not be satisfied that the plaintiff's claims were credible, she rejected them in their entirety.

The plaintiff's application for writs of certiorari and mandamus were based on four grounds that the delegate's decision was affected by jurisdictional error.

Ground 2 concerned the delegate's decision to exercise the discretion under s 62 of the *Migration Act 1958* to refuse to grant the plaintiff a protection visa without taking any further action to obtain additional information from the plaintiff was unreasonable.

The information before the delegate indicated that the plaintiff was homeless, had no money, struggled to communicate in English and had been experiencing serious mental health issues requiring hospitalisation. Moreover, it was clear from the face of the plaintiff's correspondence that she did not realise the department was offering her an interview in Sydney as opposed to Melbourne.

Gordon J noted that the question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been abused by the decision-maker and is a question concerned with both outcome and process. This could occur where, for example, a decision is 'so unreasonable that no reasonable person could have arrived at it' ([31]).

Gordon J held that no reasonable decision-maker could have ignored the plaintiff's misunderstanding, particularly having regard to her circumstances:

> It must be accepted that, if a visa applicant is unresponsive, there may come a point where it is reasonable for a decision-maker to exercise the discretion…and make a decision to refuse to grant a visa. But no reasonable decision-maker could have decided that that point had been reached when the plaintiff had obviously misunderstood what was being offered to her and no one attempted to correct her misunderstanding. ([37])

In finding for Ground 2, Gordon J held it unnecessary to consider the remaining grounds. However, he did note in relation to Ground 3, which contended that the Minister had failed to provide certain information to the visa application as required under s 57 of the Migration Act, that 'relevant information' under s 57(2)(a) does not include a failure to respond to a letter seeking further information.

The Court provided a writ of certiorari should issue to quash the impugned decision and the Minister be compelled to determine the visa application by a writ of mandamus.

The implied entitlement disclosure condition and the specificity required under a notice

Mosaic Brands Ltd v Australian Communications and Media Authority [2022] FCAFC 79

On 13 May 2022, the Full Court of the Federal Court of Australia handed down its judgment in this matter, dismissing the appeal.

The case concerned a notice issued on 13 August 2020 by the Australian Communications and Media Authority (ACMA) to Mosaic Brands Limited (Mosaic) pursuant to s 522 of the *Telecommunications Act 1997* (Cth). The notice required Mosaic to provide to ACMA certain information and produce specified documents relevant to the performance of ACMA's telecommunications functions — specifically, those conferred under the *Spam Act 2003* (Cth) to investigate potential contraventions.

At first instance, the primary judge dismissed Mosaic's application, which challenged the validity of the notice on the ground that it did not specify in detail what information or documents Mosaic was required to provide. The primary judge held that there was an implied entitlement disclosure condition in s 522(2) of the Telecommunications Act which

requires that the notice specify, with reasonable clarity, that the information required to be give and/or the documents required to be produced relate to the performance or exercise of one or more of ACMA's functions, and in this case the notice complied with that implied entitlement disclosure condition.

On appeal, the issues for consideration were, first, whether a notice issued pursuant to s 522 of the Telecommunications Act is subject, as a condition of validity, to an implied entitlement disclosure condition; second, if it is, the content of that condition; and, third, whether the notice satisfied that condition.

The Court held the primary judge was correct in finding the entitlement disclosure condition was implied in s 522 of the Act based on the text of that provision in its context and given its purpose for the following reasons:

1. Section 522(1) imposes a limit on the power to issue the notice (that is, information and/or documentation that is relevant to the performance/exercise of ACMA's functions).

2. The breadth of the range of functions and powers in relation to which a s 522 notice can be issued necessitates the identification of the relevant function or power on the face of the notice.

3. Potential consequences flow from a failure of the recipient to comply with the notice (that is, s 522(4), which makes it an offence for noncompliance).

Consequently, these features combine to warrant disclosure of the entitlement to issue a notice and that the recipient should be informed of such matters. Absent this condition, a recipient of a notice could not properly assess the notice issued to determine whether the ACMA has the power to require the production of the documents, or the information sought ([78]).

Mosaic accepted the existence of the condition but submitted that, for that notice to be valid, it must convey with reasonable clarity the information/documents that must be provided and state that ACMA is entitled to require the specific information/document as described. The Court distinguished the authorities relied on by Mosaic in its submissions, holding that where such a condition is implied the content of the notice turns on the particular statutory scheme under consideration, as there is no universal rule. The matter cannot be resolved by 'simply transposing the reasoning from one statutory scheme into another' ([61]).

The Court made several observations of the present statutory scheme which, it held, dictated the content of the notice. Entitlement under s 522 of the Act for the ACMA to obtain information and documents from other persons is drafted in very broad terms while the use of the power in s 522 is directed to the performance of ACMA's functions or the exercise of its powers, which, in the *Australian Communications and Media Authority Act 2005* (Cth), are very broad. The exercise of the condition must, consequently, be considered in the context of the breadth of the functions and powers to which s 522 applies. Additionally, s 522(5) is the only provision which identifies what must be contained on the face of a notice issued under s 522 — namely, the notice must set out that the recipient commits a criminal offence if they contravene a requirement of the notice.

Consequently, the Court held that to be valid, a notice issued pursuant to s 522 does not require the level of detail contended by Mosiac. Rather, all the notice requires is sufficient detail to enable a relationship to be discerned between the information and documents sought and the functions and powers being exercised by the ACMA, which will necessarily vary depending on the nature of the power or functions to which the information or document is sought ([99]). Here, it was an investigative function of the ACMA under the Spam Act, which, as correctly held by the primary judge, was readily apparent on the face of the notice.

Act of Grace payments: can a delegated power be split?

Ashby v Commonwealth of Australia [2022] FCAFC 77

On 12 May 2022, the Full Court of the Federal Court of Australia handed down a joint judgment dismissing the appeal.

The appellant, James Ashby, was employed as a media advisor to the Speaker of the House of Representatives, Peter Slipper, between December 2011 and October 2012. In 2012, the applicant sued the Commonwealth of Australia and Mr Slipper, alleging sexual harassment and misuse of parliamentary entitlements. Before the trial, the appellant reached a settlement with the Commonwealth and discontinued proceedings altogether. Six years later, the applicant applied to the Minister for Finance for an act of grace payment under s 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('PGPA Act') to cover the legal costs of the proceedings, a sum of $4,537,000. In considering act of grace payments, the Minster had delegated to the Secretary of the Department of Finance the power 'to consider all applications for act of grace payment' but not the power to 'authorise act of grace payments for amounts in excess of $100,000'. The Secretary had in turn delegated this power under the *Public Governance, Performance and Accountability (Finance Secretary to Finance Officials) Delegation 2020 (No 1)* (the 'Delegation').

The appellant's application was considered by a delegate of the Secretary and refused. The delegate who considered the application had power to authorise an act of grace payment capped at $50,000 under the Delegation.

The appellant sought judicial review of the delegate's decision, alleging that s 65 of the PGPA Act could not bestow a power on a delegate only to refuse an application for an act of grace payment and not to grant it. He contended that the power to refuse an application could only be exercised by the person who had the power to grant it — the Minister in this case.

The primary judge dismissed the appellant's construction of the Delegation as 'impracticable' and 'improbable', noting that consideration of whether it was appropriate to make the payment and, if so, deciding whether to authorise the payment did not need to be performed by the same delegate.

The appellant also sought relief under the *Fair Work Act 2009* (Cth) on the basis that the decision contravened s 340(1) of the Act because it was an 'adverse action' taken for a prohibited reason — namely, that the appellant had not exercised his 'workplace right'

to use non-litigious means to seek redress for his grievances against Mr Slipper and the Commonwealth.

The present appeal raised two questions: first, did the primary judge err in his interpretation of the scope of the delegate's authority; and, second, did the primary judge err in concluding that the act of grace payment under s 65 of the PGPA Act was authorised by that Act notwithstanding that the appellant had exercised or failed to exercise a workplace right.

In relation to the first question, the Court held that the appellant had failed to establish any error in the primary judge's reasoning or conclusion such that the appellant's submission on the construction of s 65 of the PGPA Act could not be accepted. The Court took the opportunity to make a several observations — namely, in light of the appellant's submission that statutory functions are indivisible such that it is not possible to delegate the power to refuse an administrative application without also delegating the power to grant an application of the same type, the Court distinguished the cases relied on, noting that those authorities 'concern very different statutory regimes that provide for powers cast in terms that do not permit the binary nature of grant or refusal to be split' ([37]).

The Court, also agreeing with the primary judge, noted that it is permissible, and routine, to delegate steps within a decision-making process, such as an evaluative function, and to separate that function from the ultimate decision-making power. Such as in this case under s 65(1), when considering whether an application for an act of grace payment should result in a payment being authorised, it will first and separately be determined whether any such payment first meets the test of being appropriate by reason of special circumstances having been established. If the delegate forms the view that a payment is appropriate because special circumstances have been established then, if the amount in contemplation is above that delegate's cap, the appropriate delegate to consider approval of a payment would be revealed by that amount.

Regarding the second question, the Court agreed with the primary judge, accepting the respondent's submission that in accordance with s 342(3)(a) of the Fair Work Act, an 'adverse action' does not include an action that is authorised by or under a law of the Commonwealth, of which s 65 of the PGPA Act is such a law. The Court noted that there 'is nothing within the jurisdiction conferred by s 65(1) that requires the Minister's discretion to be subject to constraints under the Fair Work Act.

Where a consideration is mandatory it need not go further than what is put before the decision-maker

Savaiinea v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 56

The joint decision of Collier, Perry and Anastassiou JJ of the Full Court of the Federal Court of Australia was handed down on 7 April 2022, dismissing the appeal.

The appellant, Mr Savaiinea, is a New Zealand citizen who had been granted a Class TY Subclass 444 Special Category (Temporary) visa on arrival to Australia on 16 October 2005. On 18 April 2019, the appellant was convicted of six offences by the Beenleigh District Court relating to a domestic violence incident that occurred on 4 November 2017. For these offences, the appellant was sentenced to a term of imprisonment of three and a half years.

On 6 June 2019, the appellant's visa was cancelled by the Minister, pursuant to s 501(3A) of the *Migration Act 1958* (Cth), on the basis that he did not pass the character test under s 501(6) of the Act (the 'cancellation decision'). The appellant sought revocation of the cancellation decision under s 501CA of the Migration Act. On 17 June 2020, a delegate of the Minister decided not to revoke the cancellation decision (the 'revocation decision').

On 10 September 2020, the Administrative Appeals Tribunal affirmed the revocation decision made by the delegate. In coming to its decision, the Tribunal, amongst other things, took into consideration the protection of the Australian community from criminal or other serious conduct and the best interests of minor children in Australia. The Tribunal concluded that the appellant's domestic violence offending was serious and weighed heavily in favour of non-revocation of the cancellation decision, which even outweighed the best interests of the appellant's daughter that was otherwise moderately in favour of revocation of the cancellation decision.

The appellant applied to the Federal Court for review of the Tribunal's decision. On 30 November 2020, the primary judge dismissed the application. Central to the appellant's case was that the Tribunal had committed jurisdictional error by failing, or at least failing in any meaningful way, to address and make findings in respect of the best interests of the appellant's minor niece and nephews, resident in Australia. The primary judge observed that there were two relevant aspects to the Tribunal's consideration. The first, in light of the observations of French CJ and Kiefel, Bell and Keane JJ in *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 [62]–[64] (*Uelese*) and s 499(2A) of the Migration Act, was that, even if a particular minor resident in Australia was not expressly mentioned in submissions before the Tribunal, that did not relieve the Tribunal of an obligation to consider the interests of those minors in the review of the cancellation decision. The second, in light of *Re Easton v Repatriation Commission* (1987) 6 AAR 558 at 561, was that the ambit of the Tribunal's review is influenced by the steps and procedures that have taken place prior to the review. In this case, the primary judge did not find the Tribunal failed to comply with its obligation as described under *Uelese*. It had considered the interests of the appellant's niece and nephews; however, the attention given to those interests reflected the prominence given to them by the appellant in its case before the Tribunal, which was minimal.

Before the Full Court, the key issue was whether the Tribunal's reasons demonstrated an active intellectual engagement with the material concerning the appellant's niece and four nephews. The Court acknowledged the requirement in *Uelese*, noting O'Bryan J's observations in *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 [181], that the Tribunal is required to assess the

best interests of the child based on evidence and submissions before it and is not under a general duty to inquire about matters not raised. In this case, there was limited material and submissions before the Tribunal and no evidence that the role of the appellant in the lives of his minor niece and nephews was anything other than non-parental, with engagement limited to family-related events and gatherings. Moreover, the appellant's statement of facts, issues and contentions to the Tribunal did not suggest that the best interests of his minor niece and nephews were relevant. The Court found that the Tribunal had regard to the interests of the appellant's minor niece and nephews to the extent that it could by reference to the material and submissions before it, such that the reasoning and finding of the Tribunal was not affected by jurisdictional error.

The more it changes, the more it stays the same: reflections from two decades of judicial review in the Federal Circuit and Family Court and its predecessors

*Judge Rolf Driver and Giovanni Frischman**

In Australia, there has been controversy and debate over migration law and policy for over 30 years. That debate on most levels has been largely uninformed. For instance, public perceptions of asylum seekers and refugees are generally negative. Those perceptions are greatly influenced by a misunderstanding of basic issues and by the spreading of misinformation, sometimes for political or media purposes. Our political leaders like to be seen to be 'tough' on asylum seekers who arrive undocumented by sea but, at the same time, they feel the need to take a humane approach to the treatment of refugees. This Janus-faced approach reflects the bifurcation of policy and administration in migration, which has led to major structural inefficiencies and disconnections.

In particular, it has led to a struggle between the executive and judicial branches of government to determine the degree to which decisions of the executive can be subjected to judicial scrutiny. This article analyses that contest over time — in particular, the past two decades, and the role played by the Federal Magistrates Court and, latterly, the Federal Circuit Court and Federal Circuit and Family Court.

Policies — past and present

Immigration law became a federal responsibility in 1901, but between then and 1989 the power of primary decision-makers was generally expressed and largely discretionary. During the 1980s, there was a growing concern about the arbitrary and inconsistent nature of migration decisions. In 1989 the *Migration Act 1958* (Cth) was amended to codify the criteria for the various Australian visas and entry permits. The legislation also provided for merits review by a tribunal of primary decisions on a semi-independent basis within the structure of the executive government.

The Migration Act and *Migration Regulations 1994* set out the criteria for a protection visa (subclass 866). Subsection 36(2) of the Migration Act provides that 'a criterion for a Protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister for Immigration and Citizenship (the Minister) is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.[1] That basic criterion was modified by s 91R of the Migration Act.

The most controversial part of the humanitarian program has been that relating to asylum seekers arriving in the offshore excised territories. The controversy has centred upon the steps taken by Parliament and the executive government to contain and deter irregular maritime arrivals and to attempt to exclude judicial scrutiny.[2] In the aftermath of the *Tampa*

* Judge Driver retired as a judge of the Federal Circuit and Family Court of Australia in August 2022. He was appointed to the then Federal Magistrates Court of Australia with effect from 31 July 2000. Giovanni Frischman is the associate to Judge Given at the Federal Circuit and Family Court. The authors gratefully acknowledge the research assistance of Aimée Bolt.

1 *Migration Act 1958* (Cth), s 36(2)(a).

2 Mary Crock and Daniel Ghezelbash, 'Due Process and Rule of Law as Human Rights: The High Court and the 'Offshore' Processing of Asylum Seekers' (2011) 18 *Australian Journal of Administrative Law* 101.

affair, six Acts[3] were enacted to limit the access of future unauthorised boat arrivals to mainland refugee status determination procedures. Four strategies were adopted to achieve the government's objective of deterring irregular maritime arrivals:

- The Minister was empowered to declare certain territories to be excised offshore places, and as such not part of Australia's 'migration zone'.
- A new category of 'offshore entry person' was created to catch all asylum seekers landing on an excised territory without a valid visa or other authority.
- The Migration Act was amended to enable the transfer of offshore entry persons to a declared country.
- Section 46A(1) was introduced to explicitly bar offshore entry persons from making an application for a visa to enter Australia, unless the Minister exercises the public interest discretion under s 46A(2) to lift the bar.[4]

Under the legislative changes made, asylum seekers who entered Australia at an excised offshore place were deemed not to have entered the Australian migration zone for the purpose of applying for a visa. They were barred from applying for any visa by s 46A of the Migration Act. Although asylum seekers arriving in an excised offshore territory were unable to lodge visa applications under Australian law, they were able to seek asylum and have their claims processed under an ostensibly non-statutory refugee status assessment. If the person was found to be a refugee, the case was referred to the Minister, who decided whether it was in the public interest to allow the person to apply for an onshore protection visa.

The peculiarities of this process were subjected to judicial scrutiny by the High Court in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth*.[5] Each applicant alleged that they were not afforded procedural fairness during either the original refugee status assessment or the subsequent independent merits review. Each claimed further that errors of law were made by the assessors by not applying relevant provisions of the Migration Act in determining their claims.[6] The plaintiffs argued that the primary decision-makers and the independent reviewers were officers of the Commonwealth for the purpose of s 75(v) of the *Constitution*:[7]

> The Court accepted that the power being exercised was statutory, through the Minister's consideration of whether to exercise his power under s 46A(2) or s 195A(2) of the Migration Act. The Court found that the Minister's practice and the published policies governing the RSA and IMR processes indicate that the Minister had made a decision to tie the nonreviewable, non-compellable discretions conferred by ss 46A and 195A to the assessment and review outcomes.[8]

3 Ibid 104. These acts were *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Amendment Act (No 6) 2001* (Cth).
4 Crock and Ghezelbash (n 2) 104.
5 (2010) 243 CLR 319.
6 Ibid 106.
7 *Australian Constitution* s 75(v).
8 Crock and Ghezelbash (n 2) 107.

The High Court did not just declare the processes in the two cases to have been flawed by reason of a failure to observe the rules of procedural fairness. The Court also made it clear that the decision-makers were bound by other aspects of Australian law. Crock and Ghezelbash, in 'Due Process and Rule of Law as Human Rights', argue that the outcome of this decision could see offshore entry applicants having an easier avenue for a court to declare unlawful the ruling made on their case and that legislative attempts by the government to undermine various elements of the rule of law have provided a judicial opportunity to affirm the rights of the people to whom the legislation is directed.[9]

Aspects of judicial review — the privative clause

What then, of the rights of asylum seekers entering Australia regularly? They too have been the subject of the struggle between the executive and the judiciary to confine or expand the role of the courts. As explained in detail below, during the 1990s the Migration Act was amended to confine the grounds upon which judicial review could be sought. In particular, the legislation attempted to exclude the common law principles of procedural fairness. The courts — in particular, the Federal Court — responded by inventively creating new grounds of review — in particular, the now discarded principle of 'legitimate expectations'. This struggle between the executive and the judiciary culminated in the enactment of a privative clause (s 474) in 2001.

The inherent contradiction of the privative clause

The essential paradox which makes privative clauses so challenging to public lawyers was expressed by Griffith CJ more than a century ago: 'A grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms.'[10] It appears inimical, in the light of the essential role of s 75(v) in the maintenance of the rule of law, for Parliament to enact powers which are intrinsically limited and conditional and yet prevent the courts from ensuring that those conditions are fulfilled and limits are not transgressed. One would imagine that courts would invalidate many such provisions. Indeed, that was the approach taken in *Bodruddaza v Minister for Immigration and Multicultural Affairs*[11] ('*Bodruddaza*'), where the High Court found invalid a provision of the Migration Act which, by imposing time limits upon applications for relief in the High Court's original s 75(v) jurisdiction, would have rendered late applications incompetent. However, for most of the time since federation, Australian administrative law before *Plaintiff S157 v Commonwealth*[12] ('*Plaintiff S157*') took a different approach to privative clauses, which rendered their construction and application a difficult and technical exercise for courts at the 'coalface' of judicial review.

9 Ibid 112.
10 *Baxter v NSW Clickers' Association* (1909) 10 CLR 114, 131, quoted by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484 [10].
11 (2007) 228 CLR 651.
12 (2003) 211 CLR 476.

The Hickman *approach*

Dixon J (as his Honour then was) in *R v Hickman; Ex parte Fox*[13] ('*Hickman*') considered a privative clause, reg 17 of the *National Security (Coal Mining Industry) Employment Regulations*, which provided that the decision of a local reference board (a body constituted under the Regulations) 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever'. Dixon J adopted an approach which strove to allow some operation to the privative clause through a process later described by Gleeson CJ as 'attempted reconciliation':[14]

> In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them.[15]

Significantly, Dixon J quoted Starke J in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd*[16] that '[t]o confine the meaning of those words to acts done lawfully and within the jurisdiction of the tribunal ignores the clear, distinct and unmistakable intent of the regulation'.[17] Dixon J's construction, giving a qualified effect to the privative clause, became known as the '*Hickman* formula' or '*Hickman* provisos':

> Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, *provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body*.[18]

This process of statutory interpretation was later expanded upon by Dixon J in *R v Murray; Ex parte Proctor*[19] ('*Murray*') as involving a 'second step' which requires consideration of 'whether particular limitations on power and specific requirements as to the manner in which the tribunal … shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action'.[20] This later concept, alternatively expressed as breach of an 'inviolable requirement', would particularly bedevil the Federal Magistrates Court as it later picked its way through the legal consequences of a purported privative clause. The orthodox understanding of this approach to privative clauses was confirmed by the High Court in *Darling Casino Ltd v NSW Casino Control Authority*[21] as operating to expand the validity of purported exercises of power by its repository, subject to the qualifications expressed in *Hickman*.

13 (1945) 70 CLR 598.
14 *Plaintiff S157* (n 10) 487 [17].
15 *Hickman* (n 13) 616.
16 (1942) 66 CLR 161.
17 Ibid 615. This approach seems impossible to reconcile with the majority's construction of the privative clause in issue.
18 Ibid 615 (emphasis added).
19 (1949) 77 CLR 387, 399.
20 See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2021) 1146–1147.
21 (1997) 191 CLR 602, 630, per Gaudron and Gummow JJ, quoting with approval Brennan J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 194.

Restricting judicial review: Part 8 of the Migration Act

As noted above, this was the legal context in which the government waged its campaign to restrict judicial review of migration decisions. It was a bipartisan campaign. The former Part 8 of the Migration Act, introduced through the *Migration Reform Act 1992* (Cth), had attempted to do this by purporting to remove the availability of certain grounds of review. For instance, s 476(2) provided that 'a breach of the rules of natural justice occurred in the making of the decision' or 'the decision involved an exercise of power that is so unreasonable that no reasonable person could have so exercised the power' were 'not grounds upon which [a judicial review] application may be made' under s 476(1). The effectiveness of the attempted ousting of procedural fairness and *Wednesbury* unreasonableness was the subject of controversy and is beyond the scope of this article. The Full Federal Court decision in *Eshetu v Minister for Immigration and Multicultural Affairs*[22] held that other provisions of the Migration Act were 'sufficient to confer enforceable statutory rights equivalent to those provided at common law by the principle of natural justice'.[23] Although this decision was later overturned by the High Court,[24] it prompted an escalatory reform of the Migration Act.

Restricting judicial review: the 2001 reforms

The then Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Senator Patterson, in the second reading speech for the Migration Legislation Amendment (Judicial Review) Bill 1998, stated that Part 8 of the Migration Act had failed to achieve its objective of 'reduc[ing] the volume of cases before the courts'.[25] She outlined that there had been nearly 800 applications for judicial review of migration decisions in the Federal Court in 1997–98 and that, in the same financial year, the cost of migration litigation for the department had amounted to nearly $9.5 million. Ministerial successors would come to envy that volume, as some 6,555 applications were filed in the Federal Circuit Court[26] and there were 746 appellate filings in the Federal Court (inclusive of appeals both from the Federal Circuit Court and from the Federal Court's original jurisdiction) in the 2019–20 financial year alone.[27] The second reading speech in the Senate provides a good summary of multiple governments' view that the volume of judicial review applications was 'unacceptable given the extensive merits review rights in the migration legislation and the cost of that amount of litigation which is ultimately born by the Australian taxpayer', that litigation was being used as a means of extending applicants' stay in Australia, and that it led, 'for those in detention, to a significantly longer period of detention'.[28] As a result, the government proposed to introduce a new privative clause to restrict access to judicial review, noting, however, that it should not do so by 'closing off' the Federal Court's jurisdiction, as that would overwhelm the High Court with applications under its s 75(v) jurisdiction, as was already occurring, and prevent the High Court from performing its functions. Significantly, the government acknowledged the constitutional impossibility of closing off this s 75(v) jurisdiction and explicitly intended

22 (1997) 71 FCR 300.
23 Ibid 320 (Burchett J).
24 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.
25 Commonwealth, *Parliamentary Debates*, Senate, 2 December 1998, 1026 (Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs).
26 Federal Circuit Court of Australia, *Annual report 2019–20*, 2.
27 Ibid 23.
28 Commonwealth (n 25).

the new privative clause to be interpreted subject to the *Hickman* principle. The Bills Digest noted some constitutional difficulties with the bill, raising concerns about proposed time limits for judicial review, which were ultimately vindicated by the decision in *Bodruddaza*.[29] However, the proposed privative clause (s 474) was ultimately passed into law by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) and came into force on 2 October 2001 as follows:

> ***474 Decisions under Act are final***
>
> 1. A privative clause decision:
>
> (a) is final and conclusive; and
>
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
>
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
>
> …
>
> 2. In this section:
>
> privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

In *Plaintiff S157*, the High Court turned its attention to s 474 and, in the result, decisively reframed Australian administrative law's assessment of privative clauses. The majority held that 'an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all".' Therefore, administrative decisions which are infected by jurisdictional error 'because, for example, of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints"' are not properly understood as decisions made 'under this Act', and are therefore not privative clause decisions for the purpose of s 474.[30] However, *Plaintiff S157* was handed down on 4 February 2003, and the 16 months between the commencement of the 2001 reforms and this decision caused considerable ferment as the Federal Magistrates Court and Federal Court worked through the ramifications of the privative clause.

Attempts to construe the new privative clause

This process of statutory interpretation unsurprisingly yielded divergent results. In *Boakye-Danquah v Minister for Immigration and Multicultural and Indigenous Affairs*,[31] Wilcox J concluded that the privative clause was ineffective to protect decisions affected by jurisdictional error (prefiguring the result of *Plaintiff S157*).[32] However, the bulk of decisions followed the then-prevailing approach of construing the privative clause as subject to the *Hickman* formula, as per the express intention indicated in the second reading speeches and explanatory memorandum. For example, in *Lachmi v Minister for Immigration and*

29 Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 90 of 1998–99, 27 January 1999).
30 *Plaintiff S157* (n 10) 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).
31 (2002) 116 FCR 557.
32 Ibid 573 [63]–[64].

Multicultural Affairs,[33] Driver FM accepted that the reforms 'imposed far reaching limitations on the power of the Federal Magistrates' Court and the Federal Court to review decisions, while at the same time repealing pre existing restrictions on grounds of review'[34] and that judicial review was only open on one of the bases identified in *Hickman*, discussed above.[35]

In the face of centrifugal divergence of authorities, in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[36] ('*NAAV*') the Full Federal Court attempted to provide clarity as to the proper interpretation of s 474. However, that decision, consisting of five separate opinions running to 676 paragraphs — although on its face confirming the orthodox *Hickman* approach — necessitated difficult parsing in the Federal Magistrates Court to distil the operating ratio in the face of fact-specific review applications. Consistently with the courts' instincts to preserve the maximum possible scope of judicial review, in decisions such as *NAIN v Minister for Immigration*[37] Driver FM referred to French J's list in *NAAV* of seven grounds of review available in the face of the privative clause and found that although only grounds 1–4, 'clearly founded upon' the *Hickman* principle, were approved by all judges in *NAAV*, French J's ground 5 was available in the light of Black CJ and Wilcox J's reasoning in other decisions — namely, that the decision 'was made in breach of an express statutory limit or condition upon a power which, as a matter of construction, notwithstanding s 474, must be observed for the effective exercise of the power'. Driver FM left open the availability of French J's ground 6: namely, that the decision breaches a limitation or condition implied by statute or the common law which must be observed for the effective exercise of the power.[38]

Practical effect of the reforms

The practical effect of the 2001 reforms was to require litigants to reformulate their grounds of attack to fit within the *Hickman* exceptions. During this period, good faith or bona fides — which had been an underdeveloped concept in Australian administrative law — suddenly assumed outsized importance in recognition of Dixon J's statement that a decision which was 'not a *bona fide* attempt to exercise its power' could not be protected by a privative clause. Similarly, various provisions of the Migration Act were now subject to close analysis to determine whether they constituted a requirement 'essential to valid action' as expressed by Dixon J in *Murray*. The following examples serve to illustrate that, faced with procedurally unfair, unreasonable or illogical administrative decisions on one hand, and a restrictive statutory regime of review on the other, the Federal Magistrates Court did not hesitate to create new law by developing and arguably expanding the '*Hickman* exceptions' such that previous grounds of review, such as procedural unfairness or errors in the fact-finding process, could be reframed and brought within the concept of 'lack of good faith'.

33 [2002] FMCA 19.
34 Ibid [9].
35 Ibid [11].
36 (2002) 123 FCR 298.
37 [2002] FMCA 177.
38 Ibid [11]–[12].

NASS: *cumulative factual errors as recklessness*

NASS v Minister for Immigration[39] ('*NASS*'), a decision of Raphael FM, involved a review of a decision to refuse an Iranian citizen protection in Australia. The applicant claimed to have converted to Christianity in Iran and been subjected to arrest, detention, interrogation and torture. The Refugee Review Tribunal made adverse credibility findings against the applicant and was not satisfied that he had converted to Christianity prior to arriving in Australia. Raphael FM noted the applicant counsel's argument on review that the decision was not a bona fide attempt to exercise power, on two bases: 'the actions of the Tribunal in its review of the evidence and findings and the conclusions contained in its reasons for decision amounted to "a concerted, blatant and dishonest attempt to find against the applicant on the basis of lack of credit". Alternatively the applicant submits that "The Tribunal has been so recklessly indifferent to the accuracy or otherwise of its statements that it cannot be said to have made a *bona fide* attempt to exercise its power"'.[40] The federal magistrate proceeded to consider a table prepared by the applicant's representatives of 15 factual errors said to have been made by the Tribunal (by reference to the transcript of the hearing, which was tendered). Raphael FM considered the alleged errors *in seriatim*, accepting that many of them were made, and identifying on his own account two additional errors. For example, error 3 asserted by the applicant was the statement of the Tribunal's reasons that '[the applicant] had never tried to do anything publicly, that he evangelised on his own family'.[41] The transcript revealed that the applicant had said 'what I've learned through experience from my own country is that they never try to do something so publicly, they never … publicise about it and I have evangelised many people including my own father, my family, my friends'.[42] In relation to this error, Raphael FM accepted that the applicant's 'claim to have evangelised was more extensive than that allowed by the Tribunal'.[43]

There was no evidence that the Tribunal had regard to the transcript of the hearing. Raphael FM concluded that, as the Tribunal had made numerous factual errors, which 'contributed to the decision which it made not to accept the applicant's story … by not (at the very least) playing the tape which is always available, it was acting with reckless indifference to the effect of its forgetfulness upon the decision'.[44] This reckless indifference was sufficient to satisfy the federal magistrate that the Tribunal had not 'entered upon its task in a *bona fide* manner' and as such had fallen within the first *Hickman* exception.[45]

This decision sits uncomfortably with a strict notion of a lack of good faith as necessitating some element of dishonesty or personal impropriety on the part of a decision-maker. The granular analysis of cumulative factual errors embarked upon by the applicant's representatives and the court is more suggestive of a ground of review that a decision-maker has failed to give 'proper, genuine and realistic consideration' and thus constructively failed to exercise jurisdiction; or alternatively, that factual findings are not open on the evidence (having regard to the transcript). However, the same underlying defect was here reframed

39 [2002] FMCA 350.
40 Ibid [4].
41 Ibid [35].
42 Ibid [5] (table).
43 Ibid [6].
44 Ibid [12].
45 Ibid [13].

as recklessness. In effect, the decision was brought within the *Hickman* exceptions and thus vitiated, while the circumstances in which a lack of good faith might be asserted and substantiated were significantly broadened. This reasoning was endorsed on appeal by Wilcox J, who found that 'if a material misstatement of evidence is sufficiently egregious, or the number of significant errors is sufficiently great, a reviewing court may be compelled to infer that the decision-maker has set out deliberately to distort the evidence or (more likely) has carried out his or her duties in a reckless manner'.[46]

Horodynska: *inviolable limitations and lack of good faith through prejudgment in the exercise of a discretion*

Horodynska v Minister for Immigration[47] ('*Horodynska*') illustrates the hostility of courts to administrative decisions and procedures which are administratively unfair, and the willingness to allow procedural fairness concerns to inform the development of other administrative law concepts such as good faith. In this regard, a parallel can be drawn with the development of unreasonableness in recent years (in particular, the seminal case of *Minister for Immigration and Citizenship v Li*[48] also involved, like *Horodynska*, a refusal to adjourn). *Horodynska* involved the refusal of a temporary business entry visa on the grounds that the nomination from the sponsor, Campari Restaurant, had been refused. A hearing on 22 April 2002 had been adjourned to 29 April 2002 because the applicant had been in detention. In the intervening period, the applicant's adviser sought a further adjournment because the applicant had been traumatised by her detention. A letter from a psychiatrist was provided on 29 April 2002 stating that, in the author's opinion, the applicant was unfit to participate in the hearing. However, the hearing was not adjourned and, as the applicant did not attend, the Tribunal proceeded to make a decision on the papers.

On review, the applicant's representative argued that the decision was 'not a *bona fide* attempt to exercise the powers conferred on the MRT' due to the refusal of the adjournment request.[49] Driver FM considered the circumstances of the request and its refusal. The Minister did not dispute the applicant's assertion on judicial review that the applicant had been detained because of a case of mistaken identity,[50] rendering it 'unsurprising' that she would have been traumatised by the experience.[51] The Tribunal was on notice by letter sent on 24 April 2002 that the applicant would seek an adjournment. A Migration Review Tribunal file note records a telephone conversation early on 29 April 2002 in which the applicant's representative told a Tribunal officer that the psychiatrist's letter would be faxed, but the officer replied that the member had already decided to go ahead with the hearing. The psychiatrist's letter stated:

> I assessed [Ms Horodynska] on 27 April 2002. In my opinion she is unable to present herself before the Migration Review Tribunal on 29 April 2002 due to her current frame of mind. She was detained at the Villawood Centre from 4 April 2002 until 22 April 2002. I will review her condition in two weeks.

46 *Minister for Immigration and Multicultural and Indigenous Affairs v NASS* [2003] FCA 477 [34].
47 [2002] FMCA 240.
48 (2013) 249 CLR 332.
49 *Horodynska* (n 47) [6].
50 Ibid [19].
51 Ibid [22].

At 12.10 pm, the Tribunal replied by fax, stating that the medical report had been reviewed but the member was not satisfied that the hearing should be vacated. The following day, a further letter from the applicant's representative stated that he was unable to obtain instructions from her because of her mental state but that she would attend a hearing when she was fit to do so. The member did not change her position regarding an adjourned hearing and stated as follows the reasons for the decision:

> The Tribunal notes the medical report of [the psychiatrist]. The Tribunal places no weight on this report. The report does not indicate the primary visa applicant suffers from any psychiatric illness or that she is currently receiving any ongoing treatment. The Tribunal is satisfied on balance the primary visa applicant has not provided the Tribunal with satisfactory medical evidence that she suffers from a medical illness rendering her unable to attend the scheduled hearing.[52]

Driver FM found that the Tribunal mistook the terms of the medical report as it indicated on its face that the applicant *would* receive further medical treatment. Furthermore, 'in the face of the clear terms of [the psychiatrist]'s opinion, it is hard to imagine what evidence would have satisfied the presiding member that the applicant was suffering from a medical condition rendering her unable to attend the scheduled hearing' and that, unless explicitly disbelieved, the letter should have been accepted as a proper medical opinion that the applicant was unfit to attend.[53] The treatment of the adjournment request established that the presiding member had a closed mind on that issue by the time the medical opinion was received.[54]

Procedural unfairness alone was not enough to provide a ground of review in the face of the privative clause. In order to determine whether the member made a bona fide attempt to exercise the power, Driver FM considered the statutory context. This included s 353(2)(b), which provided that the Tribunal, in reviewing a decision, 'shall act according to substantial justice and the merits of the case'. In a previous decision also considering the privative clause, Driver FM had referred to s 420(2)(b) (the equivalent provision dealing with Refugee Review Tribunal reviews) as an inviolable limitation on the decision-making power.[55] Driver FM followed the same reasoning in *Horodynska*. The opportunity to attend the hearing was a 'basic right'.[56] The s 353 obligation to act in accordance with natural justice and the merits of the case was 'more than a mere motherhood statement' — it was an 'overarching principle'.[57]

In the event, the same underlying mistake by the Tribunal member — namely, the predetermined view not to adjourn the hearing — provided two conceptual routes through which the privative clause was overcome. First, the consequent breach of s 353(2)(b) was a breach of an inviolable requirement for the valid exercise of power. Second, the prejudgment and failure to act in accordance with natural justice established a lack of good faith in the decision-maker.[58]

52 Ibid [15]
53 Ibid [32].
54 Ibid [34].
55 *WADK v Minister for Immigration* [2002] FMCA 175 [34]–[35].
56 *Horodynska* (n 47) [36].
57 Ibid [40].
58 Ibid [40].

WAFJ: ***a further case study of procedural unfairness, inviolable limitations and lack of good faith***

WAFJ v Minister for Immigration[59] (‘*WAFJ*’) illustrates similar reasoning in which Driver FM invalidated a decision of the Refugee Review Tribunal notwithstanding the privative clause. That case involved an Iranian asylum seeker whose protection visa was refused. He claimed that he was persecuted in Iran because of his occupation as a singer. The Tribunal member found that the applicant was not a credible witness and would not be subject to persecution on return to Iran. At issue on review was whether the conduct of the hearing was such as to support a claim of a lack of good faith. After the hearing of the matter, Driver FM approved pro bono representation for the applicant, whose appointed counsel listened to the audio recording of the hearing and subsequently filed submissions and an amended application. This contended that, as well as breaching the hearing rule and displaying apprehended or actual bias, the Tribunal failed to comply with statutory requirements to act in accordance with substantial justice and the merits of the case (s 420(2)(b)) or permit the applicant to give evidence and present arguments (s 425).[60]

Driver FM identified several issues of concern with the conduct of the hearing. First, it was held by video link between Sydney and the Port Hedland Immigration Detention Centre in Western Australia and required the applicant to attend at 7.40 am. It was ‘highly unusual’ to expect a litigant to attend a court at such an hour, and the administrative proceedings were no less significant. Second, there was construction noise which initially disrupted the proceedings. Third, the applicant was agitated. More significant, however, was the member’s behaviour throughout the hearing. He repeatedly interrupted the applicant’s answers, telling him to answer questions put rather than reciting prepared material. The applicant ‘was questioned in rather laborious detail, more akin to cross-examination in adversarial proceedings’ and at one point was told to simply answer ‘yes’ or ‘no’.[61] The member repeatedly expressed disbelief. For instance, in relation to the applicant’s statement that he kept to himself when detained, the member stated: ‘You are making it unbelievable that you sat for one and a half months without talking, because it seems to me that you love to talk, all the time. I find it impossible to believe.’ In the result, Driver FM ‘formed the view from the audio record of the proceedings that the presiding member had a pre-determined view of the enquiries that he needed to make’.[62]

Driver FM accepted that the general law grounds of procedural unfairness were unavailable in the light of the privative clause as construed by *NAAV*. However, as in previous decisions, he construed s 420(2)(b) as ‘a jurisdictional prerequisite because it establishes a fundamental and overarching principle to guide the RRT in all cases’.[63] Driver FM left open the possibility that s 425 was a similar inviolable precondition to the exercise of power. The manner of the hearing contributed to the agitation of the applicant and, collectively, the defects of the hearing established that it was procedurally unfair. A fair-minded lay observer listening to the audio recording would derive a reasonable apprehension that the member would not bring

59 [2002] FMCA 249.
60 Ibid [8]–[9].
61 Ibid [12].
62 Ibid [18].
63 Ibid [29].

an unprejudiced mind to the matter. This reasonable apprehension of bias was sufficient to establish a breach of s 420(2)(b). In relation to a lack of bona fides, this could 'be established by proof of the breach of a statutory requirement for the conduct of proceedings … whether that requirement be mandatory or merely directory'.[64] As with *Horodynska*, the failure to afford substantial justice established lack of good faith.

The extent to which *Plaintiff S157* simplified the law can be seen on the appeal of this decision.[65] The Full Federal Court was not required to scrutinise the reasoning below to decide whether Driver FM had correctly construed s 474, s 420(2)(b) and the surrounding case law concerning the privative clause and good faith. The presence of jurisdictional error had again become the lodestone. *WAFJ* was therefore affirmed by the majority on the basis that the proceedings had been procedurally unfair and thus the decision was affected by jurisdictional error.

NAIN: *conceptual difficulties in assessing error arising from the privative clause*

NAIN v Minister for Immigration[66] ('*NAIN*') provides a final example of the complexity of statutory interpretation and reasoning forced on the Federal Magistrates Court prior to *Plaintiff S157* by the presence of the privative clause. The applicant was an Indonesian citizen of Chinese extraction who had been refused a protection visa. He contended on review that the Tribunal had applied the wrong test of 'persecution'. The Refugee Review Tribunal had agreed that the applicant had suffered harm during anti-Chinese riots in Indonesia. However, the Tribunal was not satisfied that the applicant's fear of harm was objectively well founded. Taking into account Indonesian Government statements, it found that the government was able to provide effective protection. It was submitted that, by taking into account the *official* position of the Indonesian Government, the member had applied the wrong test. Driver FM considered s 65, which requires a decision-maker to achieve satisfaction on certain criteria before making a decision to grant or refuse a visa and construed this 'satisfaction requirement' as 'an inviolable requirement of the Migration Act that is a condition precedent to a valid exercise of the decision making power'. Therefore, relief may be available notwithstanding the privative clause if error is made in assessing the criteria for the grant of a visa. However, not all jurisdictional errors would be sufficient. What is needed is an error in the nature of 'the application of a part of the Migration Act or Regulations which does not apply, or no longer applies, or a failure to apply a part of the legislative regime which must apply'. For instance, the Tribunal must apply the then statutory test of 'persecution' in s 91R and then, as required by s 36(2), assess protection visa applications by reference to the Refugees Convention and Protocol as clarified by ss 91R and 91S. Misapplying those provisions may be reviewable.[67]

Driver FM concluded that the Tribunal identified the correct test but misunderstood it by misconstruing the Indonesian Government's assurances of security as an ability to provide state protection.[68] In so doing, the Tribunal committed jurisdictional error which would have invalidated the decision but for the privative clause. However, a jurisdictional error

64 Ibid [34].
65 *Minister for Immigration and Multicultural and Indigenous Affairs v WAFJ* (2004) 137 FCR 30.
66 [2002] FMCA 177.
67 Ibid [16].
68 Ibid [23].

of this nature was insufficient in the light of *NAAV* because the Tribunal had applied the necessary elements of the legislative regime which were essential for it to arrive at its s 65 state of satisfaction. Australian administrative law already contained a complex distinction between jurisdictional error and non-jurisdictional error of law on the face of the record.

Decisions such as *NAIN*, brought about by the presence of the privative clause, were pointing to a further embryonic distinction between different species of jurisdictional error.

The uncertain and dynamic evolution of the law in response to the 2001 reforms

It is by no means a foregone conclusion that the expansion of the concept of 'good faith' (or the Federal Magistrates Court's construction of provisions such as s 420(2)(b)) would have continued and solidified. Increasingly, the Federal Court displayed signs of disapproval of the treatment of this concept by practitioners. In *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs*,[69] Heerey, Moore and Kiefel JJ stressed the seriousness of an allegation of a lack of good faith, which 'implies a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision maker'. They explicitly acknowledged the role of s 474 in creating a 'temptation to attach that label to a wide range of alleged errors of fact and law'. However, practitioners were clearly warned that improperly made allegations of bad faith raised 'serious questions of professional ethics'.[70] Furthermore, a number of Federal Magistrates Court decisions (and single-judge decisions of the Federal Court) which had found a lack of good faith were overturned on appeal. In one case, the Full Federal Court concluded that the tribunal member's questioning did not go beyond 'matters of personal style, which are a matter for the individual member' and was not an attempt to trap the applicant.[71] Heard in the same appeal decision, Driver FM was held in another case to have 'misunderstood the fact-finding process' arising from a tribunal member's examination of lashes on an applicant's body and to have wrongly concluded that the member approached the issue of the applicant's credibility with a closed mind.[72] The Full Court stressed that bad faith could manifest itself in actual bias but that this was distinct from the concept of apprehended bias. There was no such concept as constructive bad faith. It is interesting to speculate whether, had the *Hickman* principle endured, this would have led to deeper changes in the bias rule by means of an erosion of the well-established high threshold for actual bias (contrasted with apprehended bias) as litigants sought to use actual bias as a means to establish a lack of good faith and thus circumvent the privative clause.

The tumult of litigation following s 474 demonstrates the critical role which the Federal Magistrates Court has played in the 'first line' of statutory interpretation and the development of administrative law. It is also an illustration of the way in which the common law of judicial review was forced into new and strained channels of development in the shadow of the legislative attempts to restrict judicial review. Those attempts did not end with the decision

69 [2002] FCAFC 397.

70 Ibid [19].

71 *Minister for Immigration and Multicultural And Indigenous Affairs v SBAN* [2002] FCAFC 431, overturning *WAAG v Minister for Immigration* [2002] FMCA 191 (Raphael FM), although special leave was subsequently granted (*WAAG v Minister for Immigration* [2004] HCATrans 475) and the matter was ultimately remitted to the Refugee Review Tribunal by consent: *WAAG v Minister for Immigration* [2004] HCATrans 655.

72 [2002] FCAFC 431 [46], overturning *WAAK v Minister for Immigration* [2002] FMCA 86.

of the High Court in *Plaintiff S157*. The process of constrictions of rights of judicial review legislatively, and then expansion of them by the courts, has continued.

The continued expansion of migration litigation

The *Migration Litigation Reform Act 2005* enhanced the role of the Federal Circuit Court[73] as a response to reduce 'unmeritorious litigation'. This legislation enforced strict time limits and gave the Federal Circuit Court power to summarily dismiss proceedings where it is satisfied that there are no reasonable prospects of success. The long-term trend in migration litigation was for some years thereafter consistently downward as a consequence of effective case management in the Federal Circuit Court. Over that period, any perceived 'migration benefit' from seeking judicial review was very much reduced. The number of lodgements in the Court went from 1,549 (2007–08) to 1,288 (2008–09) and to a mere 880 (2009–10). There was a small increase in the filings in 2010–11, when 959 applications were filed. In more recent years, the Court's migration applications have increased dramatically. This reflects the addition of offshore entry persons' applications. Professor John McMillan advised the former government on options to improve the efficiency of the judicial review process for irregular maritime arrivals, but no substantial change has resulted.

Judicial review of migration decisions takes up a very large proportion of the Federal Circuit Court's resources. As noted above, some 6,555 judicial review applications were filed in 2019–20 (a 17% increase on the previous year) and most applicants are unrepresented.[74] Case management approaches differ as judicial officers strive to balance the competing demands of justice. Therefore, just as this area of jurisprudence has fleshed out the content of administrative law, it is also generating increasing appellate court analysis of the operation of procedural fairness and the judicial function in inferior courts.

Offshore processing

In March 2012, the then government decided to permit offshore entry persons to apply for protection visas in the same way as those who arrive legally by air. There was a pool of offshore entry persons already in the former system who remained subject to it, but they did not need to be. As Driver FM highlighted in the case of *SZQPA v Minister for Immigration & Anor*:

> [T]he Minister is entitled to exercise his powers under s 46A of the Migration Act without regard to anything in a Reviewer's report and recommendation. The orders made by the [Federal Magistrates] Court prevent the Minister from relying upon the present report and recommendation in considering whether to exercise his power … the [Federal Magistrates] Court's orders do not prevent the Minister from exercising his powers without regard to that report or recommendation.[75]

Unfortunately, between March 2012 and August 2013, many thousands of asylum seekers arrived irregularly by boat, which created a political and policy (but not a practical) crisis. The former Howard government's 'Pacific solution' of processing offshore was reinstated and the legislative provisions supporting it were reinforced. The Migration Act was further amended

73 As the Federal Magistrates Court became in 2013.
74 Federal Circuit Court (n 26) 2, 13.
75 [2012] FMCA 123.

in order to attempt to exclude administrative steps taken in support of that policy from judicial scrutiny, except in the High Court. The then government imposed an entirely new policy in July 2013 which denied protection in Australia to any new irregular maritime arrivals, who would henceforth be sent to Nauru and Manus Island in Papua New Guinea (PNG) to be processed (and, if necessary, resettled) according to Nauru and PNG law. Meanwhile, in August 2012, all onshore processing of refugee claims by irregular maritime arrivals ceased, and by September 2013 there were estimated to be about 30,000 unprocessed asylum seekers in a state of legal limbo in Australia.

Policy developments between 2013 and 2019

In September 2013, the new Coalition government led by Tony Abbott was elected on a platform of change to asylum seeker and refugee policy. Prior to the election, Abbott vowed to 'stop the boats' and viewed people arriving in boats seeking asylum as a direct threat to Australia's sovereignty. There was already little separating the policies of the previous Labor government and the Coalition (both favoured mandatory detention and offshore processing); however, now Abbott wanted to go a few steps further. Within a week of gaining power, he set up Operation Sovereign Borders, which was intended to, and did, deter irregular maritime arrivals. The government sought to introduce new measures designed to deter people from seeking asylum in Australia. Those included a return to temporary protection visas (TPVs), which work on the basis that those who are successful in their claims for protection will only be eligible for temporary protection and will never be allowed to settle permanently in Australia or bring out their families. Those visas last for three years and then must be reassessed on the basis that the refugee continues to fear persecution in their country of origin.

The government was determined to take direct action to stop the boats by turning back boats towards Indonesia and Sri Lanka when it is safe to do so. This 'turn-back' policy has been continued by the newly elected Labor government, demonstrating again the substantial continuity in migration policy approaches over time.

Offshore processing continues to be politically controversial. In February 2019, the Morrison government suffered a defeat on the floor of Parliament with the passing of the so-called 'Medevac Bill', which was proposed by former independent MP Kerryn Phelps. This legislation required the urgent medical transfer to Australia of an asylum seeker in a regional processing country if two independent doctors, having assessed the person remotely or face to face, formed the view that the person required removal to Australia in order to receive appropriate medical or psychiatric treatment. The Minister for Home Affairs was required to make a decision within 72 hours to confirm or refuse transfer. Any refusal on the basis that the Minister reasonably believed that removal was not necessary for appropriate treatment would be reviewed by the Independent Health Advice Panel. If the panel recommended transfer, that must then be approved by the Minister except in limited circumstances relating to security concerns or a substantial criminal record. In December 2019, the re-elected Morrison government secured the repeal of the 'Medevac' transfer provisions. Nearly 200

people had been transferred from offshore processing under those provisions.[76] More than 100 judicial review applications lodged by those transferees were recently before the Federal Circuit Court.

Establishment of the 'fast track review process'

The Migration Act was amended with effect from April 2015 to create a new domestic system for dealing with the protection claims of persons who arrived by boat (that is, the 30,000 people left in legal limbo in 2013). More than 15,000 applications for protection were made in 2016–17 by people who had arrived by boat in preceding years, prior to the imposition by the Minister for Home Affairs of a deadline of 1 October 2017 for the lodgement of a protection application by people in this so-called 'legacy caseload'.

The 'fast track review process' was introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The aim of the process is to provide a limited, efficient and quick form of review of certain decisions refusing protection visas for some applicants, including those who arrived in Australia as unauthorised maritime arrivals on or after 13 August 2012 and before 1 January 2014. Such a reviewable decision is known as a 'fast track reviewable decision'. Part 7AA of the Migration Act establishes a comprehensive scheme of review of fast track reviewable decisions. Division 8 of Part 7AA establishes the Immigration Assessment Authority (IAA) — the body conducting reviews of fast track reviewable decisions.

Division 2 of Part 7AA sets out the procedure for referring fast track reviewable decisions to the IAA. Under s 473CA, the Minister must refer such a decision to the IAA as soon as is reasonably practicable after the decision is made.

Once the Minister has referred a fast track reviewable decision to the IAA, s 473CB requires the Secretary of the department to give to the authority certain material in respect of that decision at the same time as, or as soon as is reasonably practicable after, the referral.

Section 473CC(1) requires the IAA to review a fast track reviewable decision referred to it. Section 473CC(2) provides that the IAA may either affirm the decision or remit the decision for reconsideration in accordance with such directions or recommendations as are permitted by regulation.

Division 3 of Part 7AA deals with the manner in which reviews are to be conducted by the IAA. Section 473DA(1) provides that Division 3 of Part 7AA, together with ss 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule 'in relation to reviews conducted by the Authority'. This provision is couched in broader terms than ss 357A(1) and 422B(1) (which bind the Administrative Appeals Tribunal) and has been found to operate to exclude the common law natural justice hearing rule from conditioning the conduct of reviews before the IAA. The success of the drafters of this provision in removing the common law of procedural fairness can be contrasted with the

76 'Medical transfers from offshore processing to Australia', 15 December 2020, Andrew and Renata Kaldor Centre for International Refugee Law, University of New South Wales <https://www.kaldorcentre.unsw.edu.au/publication/medevac-law-medical-transfers-offshore-detention-australia>.

earlier attempts to oust judicial review for procedural fairness by means of former Part 8 and the privative clause introduced in 2001.

Section 473DB(1) compels the IAA, subject to Part 7AA, to review a fast track reviewable decision referred to it on the papers; that is, by considering the review material provided to the IAA under s 473CB 'without accepting or requesting new information' and 'without interviewing the referred applicant'.

However, s 473DC(1) permits the IAA, subject to Part 7AA, to 'get any documents or information (new information)' that 'were not before the Minister when the Minister made the decision under section 65' and 'the Authority considers may be relevant'. Subsection (2) confirms the discretionary nature of the power in s 473DC(1) by providing that the IAA 'does not have a duty to get, request or accept any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances'.

Further, new information can be considered by the IAA only if the requirements of s 473DD are satisfied. Section 473DD provides that, for the purposes of making a decision in relation to a fast track reviewable decision, the authority must not consider any new information unless:

a. the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

b. the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:

    i. was not, and could not have been, provided to the Minister before the Minister made the decision under s 65; or

    ii. is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

Division 5 of Part 7AA contains provisions relating to the exercise of powers and functions by the IAA. Section 473FA(1) provides that the IAA, in carrying out its functions under the Migration Act, is to pursue the objective of 'providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)'. This reinforces the legislature's aim of establishing a form of review that is limited in scope and efficient. Section 473FA(2) provides that, in reviewing a decision, the IAA 'is not bound by technicalities, legal forms or rules of evidence'.

Application of the 'fast track' process

In 2019–20, 1,745 referrals were made to the IAA and 1,731 decisions were made, mostly confirming the decision being reviewed. The vast majority of those decisions have been challenged in the FCC.

Numerous issues have arisen on judicial review concerning IAA decisions, largely because the legislation under which it operates was new and untested, and because the procedural code under which it operates is more restrictive than that binding the Administrative Appeals Tribunal. Critical differences are that the IAA is generally not able to conduct oral hearings and that it is generally not able to receive new information from applicants. Court decisions to date have established that the IAA does not have to observe the common law fair hearing rule but that it must act reasonably. Further, the legislative scheme under which the IAA considers the possible receipt of new information is fraught with difficulty.

As noted above, section 473DA excludes common law procedural fairness in relation to reviews by the IAA under Part 7AA. Unlike other provisions in the Migration Act, this has been held to be effective. However, the powers of the IAA, including the powers to get and accept 'new information' under s 473DC and s 473DD, are subject to the implied condition that they be exercised reasonably, as was affirmed by the High Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection.*[77] The High Court explained that s 437DC and s 473DD are to be understood in the context of Part 7AA as a whole and, in particular, s 473FA, which provides that the IAA is to 'pursue the objective of providing a mechanism of limited review that is efficient, quick [and] free of bias'.[78] The extent to which any of those objectives are being met is an open question and beyond the scope of this article.

The requirements of s 473DD are cumulative and thus, as a matter of ordinary statutory interpretation, the IAA is prohibited from considering new information unless *both* limbs are satisfied. This provision has become the source of an ever-expanding wave of case law in the Federal Court and Federal Circuit Court.

The saga of s 473DD perhaps began with the decision of White J in *BVZ16 v Minister for Immigration and Border Protection*,[79] which found that the IAA erred in its finding under s 473DD(a) that there were no 'exceptional circumstances' to accept new information from the applicant, in the form of a statement and a GP's letter. The IAA's reasons for doing so focused upon a rejection of the applicant's explanation for the late provision of the information. The decision-maker unduly confined its consideration of 'exceptional circumstances', rather than considering all the relevant circumstances, and thus constructively failed to exercise jurisdiction.

Subsequent decisions of the Full Federal Court, including *Minister for Immigration and Border Protection v CQW17*[80] and *AQU17 v Minister for Immigration*,[81] have confirmed the 'overlapping' nature of ss 473DD(a) and (b): a decision-maker will under most circumstances need to turn his or her mind to the s 473DD(b) factors (and particularly whether the information is credible and its relation to the applicant's claims) in order to properly consider whether the 'exceptional circumstances' limb is satisfied.

77 (2018) 264 CLR 217 [21].
78 Ibid [36].
79 (2017) 254 FCR 221.
80 (2018) 264 FCR 249.
81 [2018] FCAFC 111.

There are different species of jurisdictional error arising from decisions under s 473DD. For instance, just as a failure to consider (b)(i) or (b)(ii) factors can sound in error, an explicit consideration of those factors can reveal error of a different nature, as was evident in *CSR16 v Minister for Immigration and Border Protection*.[82] The IAA rejected new information because it stated, in relation to a new claim to fear harm, 'I am not satisfied that the applicant does have a genuine fear of this kind and I am therefore not satisfied that it is credible personal information'.[83] Bromberg J held that it was only later, at the 'deliberative stage' of the review, that such a finding should have been made. The word 'credible' in s 473DD(b)(ii) refers to information *capable* of being believed, rather than information actually believed by the IAA. Thus, the IAA misconstrued the provision and 'misconceived what the exercise of its statutory power entailed'.[84]

Driver J delved at first instance into the swirling and turbulent waters of s 473DC and s 473DD. For instance, in *ABJ17 v Minister for Immigration & Anor*,[85] the applicant provided to the IAA a translation of a document which had previously been before the primary decision-maker in Farsi. The IAA considered that it was not new information and thus accepted it without applying the statutory test in s 473DD. That decision was attacked by the applicant on judicial review. Driver J held that the IAA was correct, and he posited the view that 'a faithful English translation of a document that was before the delegate in a foreign language is not new information for the purposes of s 473DC(1)'.[86]

An additional layer of complexity has been added by s 473FB, which empowers the IAA to make practice directions in relation to the operations of the IAA and the conduct of reviews by it.[87] Section 473FB(2)(b) permits those directions to set out procedures for the giving of information to the authority, and s 473FB(5) provides that the IAA 'is not required to accept new information or documents from a person … if the person fails to comply with a relevant direction that applies to the person'.

The IAA's Practice Direction No 1, in its May 2016 iteration, provided as follows:

> If you want to give us new information, you must also provide an explanation as to why:
>
> - the information could not have been given to the Department before the decision was made, or
> - the information is credible personal information which was not previously known and may have affected consideration of your claims, had it been known.
>
> Your explanation should be no longer than 5 pages and must accompany any new information you give to us.[88]

The interaction of s 473FB and the IAA's practice direction with the 'new information' test in s 473DD discussed above has been a source of difficulty. In *DHV16 v Minister for*

82 [2018] FCA 474.
83 Ibid [35].
84 Ibid [43].
85 [2017] FCCA 1240.
86 Ibid [36].
87 Section 473FB(1).
88 At [23]–[24].

Immigration and Border Protection,[89] Driver J characterised s 473FB(5) as creating an 'antecedent discretion' which the IAA, in cases where new information does not conform with the requirements of the practice direction, may exercise to refuse to accept that information — 'In other words, the [IAA] has a discretion, enlivened by a failure to comply with a relevant direction, whether to embark upon the consideration of s 473DD at all.'[90] However, he found that the IAA had fallen into error by 'conflating the requirements of s 473DD(b) with the requirements of the Practice Direction made under s 473FB of the Migration Act'.[91] The IAA's reasons identified the purported noncompliance with the practice direction as 'the principal and (perhaps the only) reason why it was not satisfied as to the matters set out in s 473DD(b)' and had thereby rejected the new information. By embarking on the s 473DD analysis, the IAA had 'moved beyond the exercise of [the] antecedent and non-compellable discretion' and misconstrued its statutory task.

By contrast, the IAA's reasoning in *BTQ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[92] was subtly but significantly different. The IAA found that the applicant's representative 'had failed to comply with the Practice Direction … by failing to attach a copy or extract of the parts of the new information upon which he relied and, in some instances, by failing fully to source the information or merely to provide hyperlinks'.[93] It therefore refused to accept the new information. It went on to consider in the alternative the requirements of s 473DD in relation to the new information and found that those requirements were in any event not satisfied. Driver J held that the IAA had not fallen into error, as it had not misconstrued its statutory task. It could be 'comfortably inferred' that the IAA had exercised its anterior discretion under s 473FB(5) to refuse the new information, as was open to it, and had gone on to make an alternative finding in relation to the s 473DD(b) test, without conflating the requirements of those provisions.[94] '[U]nlike DHV16, the Authority did not reason that, because the applicant had failed to comply with the Practice Direction, it was not satisfied of the matters in s 473DD(b).'[95]

It is likely that the operation of this antecedent discretion, alongside the already intricate new information test, will continue to be subject to challenge. For instance, in *BDR19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[96] Driver J found that the IAA had misconstrued the practice direction and thereby fallen into jurisdictional error. Paragraph 30 of the practice direction requires that, if any new information is provided, the applicant must 'attach a copy of that information or an extract of the part(s) of the information' on which the applicant relies.[97] The IAA declined to receive the new information, as it found that the proffered information did not comply with this requirement of the practice direction. It was common ground between the parties that the IAA had misconstrued this aspect of the practice direction, which 'does not require that proposed new information such as country

89 (2018) 331 FLR 204 [96]–[97].
90 Ibid [96]–[97].
91 Ibid [96].
92 [2020] FCCA 1539.
93 Ibid [51].
94 Ibid [53].
95 Ibid [56].
96 [2021] FCCA 501.
97 Ibid [28].

information be extracted as a document that is separate from a written submission'.[98] The extracts in question had been included within the applicant's representative submissions and therefore the practice direction had not been breached. Driver J found that the IAA's error was material, as — had the IAA not wrongly exercised its antecedent discretion under s 473FB(5) — it may have been satisfied that there were 'exceptional circumstances' to accept the new information pursuant to s 473DD. Furthermore, it was 'at least possible that the … information, if added to the other information before the Authority, could have made a difference' to its finding that there was more than a remote possibility that the applicant could be impacted by politically motivated violence. The error was therefore material.[99]

Part 7AA of the Migration Act is an instructive example of the risks inherent in introducing a complex statutory code, characterised by curtailed procedural rights, with the objective of speeding up a review process and eliminating a 'backlog'. As the operation of the new provisions was tested in litigation and the dynamic process of statutory interpretation unfolded, many unintended legal consequences emerged. The IAA, despite its best efforts to grasp its statutory function, has often fallen into error as a consequence.

Conclusion

Australia has reacted to the pressure upon it in relation to migration with many twists and turns of law and policy, which add layer upon layer of structure and complexity. Those layers of structure and complexity have generated many legal challenges which have bedevilled the administration of the Migration Act in relation to visa applicants. The jurisprudence of the Federal Circuit and Family Court and its predecessors has often provided the 'first word' in the difficult task of statutory interpretation following legislative reforms, as can be seen through the new law created in response to the 2001 privative clause reform and the later creation of the fast track review process. The decisions of the Federal Circuit and Family Court of Australia, as clarified or modified by the Federal Court and the High Court, will continue to play a critical role in the dialogue between Parliament and the judiciary and in the preservation of judicial review in its essential function of promoting the rule of law.

98 Ibid [62].
99 Ibid [73]–[79].

Six unexplored aspects of proportionality under human rights legislation in Australia

*Kent Blore**

Over the past decade, proportionality has been the subject of fierce debate in the High Court in the context of the implied freedom of political communication, and, more recently, the freedom of interstate trade, commerce and intercourse under s 92 of the *Constitution*.[1] Structured proportionality is now routinely used by a majority of the High Court as the test for determining whether a burden on a constitutional freedom is justified,[2] with Gageler and Gordon JJ still refusing to come to the party,[3] and Steward J still unsure of the need for justification at all (whether using a test of proportionality or some other test).[4] We have learned a great deal about proportionality from this debate. As Gageler J said, the judges of the High Court have engaged in the kind of 'abstracted debate about methodology' one might expect to see in 'the pages of a law review'.[5]

That rigour of debate has not been replicated in other areas of the law where justification and proportionality are relevant. In particular, the human rights case law in the Australian Capital Territory, Victoria and Queensland appears to be largely unaffected by the debate about proportionality in the High Court. That is curious, given that limits on human rights are required to be justified using the proportionality test set out in the general limitation clauses in s 28 of the *Human Rights Act 2004* (ACT), s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and s 13 of the *Human Rights Act 2019* (Qld).

In this article, I raise six questions to generate debate about the role of proportionality under human rights legislation in Australia. Drawing upon the debate in the High Court in the constitutional context, but embellishing a little, the six questions I pose are as follows:

1. Do the general limitation clauses import a structured proportionality analysis like the High Court applies in the implied freedom context, or do they call for a 'global judgment' of the kind applied by the South African Constitutional Court?

2. If we apply structured proportionality, should we apply the Canadian version, which focuses most of the attention on the necessity limb, or the German version, which

* Kent Blore is Senior Principal Lawyer, Crown Law, Queensland. The views expressed in this article are the author's own and not those of Crown Law. The author thanks Felicity Nagorcka for her comments on an earlier version of this paper. This is an edited version of a paper given at an AIAL seminar held on 23 June 2022 at the Supreme Court Library in Brisbane.

1 *Palmer v Western Australia* (2021) 95 ALJR 229, 244–5 [61]–[62] (Kiefel CJ and Keane J), 284 [264] (Edelman J). Cf at 249 [94] (Gageler J), 254–5 [198] (Gordon J).

2 *McCloy v New South Wales* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 368–9 [123]–[127] (Kiefel CJ, Bell and Keane JJ), 416–7 [278] (Nettle J); *Unions NSW v New South Wales [No 2]* (2019) 264 CLR 595, 615 [42] (Kiefel CJ, Bell and Keane JJ), 638 [110] (Nettle J); *Clubb v Edwards* (2019) 267 CLR 171, 186 [6] (Kiefel CJ, Bell and Keane JJ), 264–5 [266] (Nettle J), 311 [408], 330–1 [462]–[463] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373, 400–3 [32]–[33], [35], [38] (Kiefel CJ, Bell, Keane and Nettle JJ), 451 [188] (Edelman J).

3 Though Gageler J has recently made attempts to express his conclusions in the language of structured proportionality: *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 517 [119] (Gageler J).

4 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 554–6 [298]–[304] (Steward J); *Ruddick v Commonwealth* (2022) 96 ALJR 367, 403 [174] (Steward J).

5 *Palmer v Western Australia* (2021) 95 ALJR 229, 258 [140] (Gageler J).

focuses most of the attention on the fair balance limb? Is there an intermediate position, in the form of 'proportional alternatives', put forward by Israeli theorist Aharon Barak?

3. How do we identify the weight of the human right on one side of the scales? Are we concerned with the value of the human right in the abstract, or the 'incremental burden' (or 'marginal social importance')? Can the 'incremental burden' be reduced to nothing if another measure is also responsible for burdening the human right? On the other side of the scales, do we take into account existing measures that help to achieve the policy objective at the necessity stage (when considering alternative measures) or at the fair balance stage (when considering the 'marginal social importance' of the policy objective)?

4. A number of human rights have an internal limitation of 'arbitrariness'. For example, the right to privacy is a right not to have one's privacy 'arbitrarily' interfered with. In *Thompson v Minogue*, the Victorian Court of Appeal recently held that, in a human rights context, 'arbitrary' means, among other things, 'disproportionate'. If arbitrariness and the general limitation clause are both about proportionality, how do they interact?

5. The paradigm example of proportionality is where it is used to test the justification for a limit on a negative right (such as the right *not* to be deprived of life). But what about positive rights, such as the right of access to education or health services? On one view, difficult questions about the allocation of resources go to the duty of progressive realisation and whether the right has been limited, rather than whether a limit on the right is justified. When considering positive rights, should we eschew proportionality altogether, like the majority of the High Court did in *Murphy v Electoral Commissioner*, or should we apply proportionality using the concept of 'alternativity' developed by the German theorist Robert Alexy?

6. With courts increasingly grappling with issues of intergenerational equity, can a temporal dimension be incorporated into the proportionality analysis, in the way the German Constitutional Court recently did in the climate change case of *Neibauer v Germany* (discussed later)?

Structured proportionality or global judgment?

In considering whether a measure breaches a human right, the analysis proceeds in two stages: first, identifying a limit on a human right; and, second, considering whether that limit is justified.[6] For the second stage, the test of justification is set out in the general limitation clause in s 28 of the ACT Human Rights Act, s 7(2) of the Victorian Charter and s 13 of the Queensland Human Rights Act.

6 See Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 19–21, 26–7. See the international position set out exhaustively in *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 27–33 [67]–[97] (Bell J).

They provide the limitations shown in Table 1.

Table 1: The test of justification

ACT	Vic	Qld
28 Human rights may be limited (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following: (a) the nature of the right affected; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.	7 Human rights — what they are and when they may be limited (1) … (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including — (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. (3) …	13 Human rights may be limited (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant — (a) the nature of the human right; (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom; (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; (d) whether there are any less restrictive and reasonably available ways to achieve the purpose; (e) the importance of the purpose of the limitation; (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; (g) the balance between the matters mentioned in paragraphs (e) and (f).

Elsewhere,[7] I have traced the text of these general limitation clauses to the overall test in s 1 of the Canadian Charter,[8] as well as the list of factors in s 36 of the South African Constitution.[9] The factors derived from South Africa help to answer the overall test of justification derived from Canada.

Each of the general limitation clauses in Australia has been held to embody a test of proportionality.[10] That is true of all general limitation clauses.[11] But there is more than one way to apply proportionality. In Canada[12] (and most other human rights jurisdictions, including the United Kingdom[13] and New Zealand[14]), the courts apply a 'structured' form of proportionality. Structured proportionality can be traced back to Prussian administrative law in the 1800s.[15] The German Constitutional Court began applying the test of *Verhältnismäßigkeit* to human rights in the wake of World War II, which in turn influenced the European Court of Human Rights. Structured proportionality has since spread so widely that it has assumed a global constitutional status.[16]

According to the test of 'structured proportionality', a limit on a human right will be justified if it meets four requirements:

- the measure must have a proper purpose or legitimate aim;[17]
- the measure must be rationally connected to that purpose, or a suitable way of achieving the purpose, meaning it actually helps to achieve that purpose;[18]

7 Kent Blore, 'Proportionality under the *Human Rights Act 2019* (Qld): When are the factors in s 13(2) necessary and sufficient, and when are they not?' (2022) 45 *Melbourne University Law Review* (advance).
8 *Canada Act 1982* (UK) c 11, sch B, pt I s 1 ('*Canadian Charter of Rights and Freedoms*').
9 *Constitution of the Republic of South Africa Act 1996* (South Africa).
10 *Re Application under Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449 [148]–[149] Warren CJ); *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 40 [134] (Bell J); *Re Application for bail by Islam* (2010) 175 ACTR 30, 78–9 [242]–[243], [247(d)] (Penfold J); *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 505 [205] (Dixon J); *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, [104] (Martin J).
11 Barak (n 6) 142–3.
12 *R v Oakes* [1986] 1 SCR 103, 138–40 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ); *Carter v Canada (A-G)* [2015] 1 SCR 331, 378–9 [94] (The Court); *R v KRJ* [2016] 1 SCR 906, 938 [58] (Karakatsanis J for McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ).
13 *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde for the Judicial Committee); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 187 [19] (Lord Bingham for the Judicial Committee); *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700, 790–1 [73]–[74] (Lord Reed JSC); *R (Nicklinson) v Ministry of Justice* [2015] AC 657, 807–9 [167]–[168] (Lord Mance JSC).
14 *R v Hansen* [2007] 3 NZLR 1, 28 [64] (Blanchard J), 40–1 [103]–[104] (Tipping J), 69 [203]–[204] (McGrath J).
15 Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 384–5.
16 See, eg, Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus* 51, 51; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 74; Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 *International Journal of Constitutional Law* 263, 263–4; Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 63–4.
17 ACT s 28(2)(b), Vic s 7(2)(b), Qld s 13(2)(b).
18 ACT s 28(2)(d), Vic s 7(2)(d), Qld s 13(2)(c).

- the measure must be necessary or minimally impairing, meaning the purpose cannot be achieved in some other way that has a lesser impact on human rights;[19] and
- the measure must strike a fair balance between its purpose and the impact on human rights.[20]

According to the logic of structured proportionality, each step builds on the last, so that it makes sense to work through the steps sequentially. Further, if a measure falls down at one stage of the analysis, it cannot be saved by any of the steps that come afterwards.[21] For example, if a measure imposes a limit on human rights that is not necessary, it is impossible to conclude that the impact on human rights is outweighed by the policy objective. How can the need to limit a human right be more important than the human right if the limit is completely unnecessary?

South Africa stands apart from this approach. Early in its case law, the Constitutional Court of South Africa determined that it would apply proportionality as a form of intuitive synthesis of all relevant factors. In the early case of *S v Manamela*, the court said: 'In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'.[22] For me, the image of a cauldron comes to mind. You throw all the factors in, stir the pot and see what emerges.

In the early stages of Victoria's Charter case law, Bell J endorsed the South African approach. In *Re Kracke and Mental Health Review Tribunal*, he said:

> … the test is whether the limitation is reasonable and demonstrably justified in a free and democratic society based on the values of the Charter. This requires a global judgment and not a mechanical, check-list approach. The specific factors are given to help in making that judgment.[23]

Since then, the debate about how to apply proportionality under the Charter petered out, even while debate began to heat up in the High Court in the context of the implied freedom. From 2015, a majority of the High Court has consistently applied the more structured form of proportionality.

Elsewhere, I have argued that s 13 of the Queensland Human Rights Act imports a structured proportionality test.[24] In my view, the factors in s 13(2) have been moulded to align more closely with the structured form of the test.

For present purposes, in order to stimulate debate, I will offer three reasons for and against applying structured proportionality under human rights legislation in Australia.

19 ACT s 28(2)(e), Vic s 7(2)(e), Qld s 13(2)(d).
20 ACT s 28(2)(b), (c), Vic s 7(2)(b), (c), Qld s 13(2)(e), (f), (g).
21 *Clubb v Edwards* (2019) 267 CLR 171, 331 [463] (Edelman J); *Palmer v Western Australia* (2021) 95 ALJR 229, 285 [266] (Edelman J)
22 *S v Manamela* [2000] 3 SA 1, 19–20 [32] (Madala, Sachs and Yacoob JJ).
23 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 40 [133] (Bell J).
24 Blore (n 7).

As to the case against structured proportionality:

- First, as a matter of text, the factors in s 28 of the ACT Human Rights Act and s 7(2) of the Victorian Charter are inclusive. The factors in s 13 of the Queensland Human Rights Act 'may' be relevant. The inclusive and permissive nature of the factors points against a form of proportionality in which *all* of the factors will *always* be relevant.

- Second, the South African origins of the factors in each of the general limitation clauses might point to an intention to adopt the South African case law on proportionality.[25]

- Third, as Gageler J recently said in *Palmer v Western Australia*, the rigid formula of structured proportionality may result in some factors receiving 'unwarranted analytical prominence'.[26] Conversely, factors that do not readily fit in any of the steps 'get ignored or suppressed or downplayed', or worse still, are 'pushed down to be swept up in the residual inquiry into "adequacy of balance"'.[27]

As to the case in favour of structured proportionality:

- First, as to the text, the word 'including' in the ACT and Victorian general limitation clauses has other work to do, as does the word 'may' in the Queensland general limitation clause. The factors in the ACT and Victoria need to be inclusive because the final balancing exercise is not explicitly included. In Queensland, 'may' allows for the possibility that not all of the factors will be relevant; for example, because the right is absolute or because an internal limitation in a particular human right modifies the test of justification.

- Second, the South African approach stands apart from the more structured approach applied in almost all other human rights jurisdictions. Moreover, applying the South African approach would also now depart from the approach of a majority of the High Court in the context of the implied freedom and s 92 of the *Constitution*.

- Third, a 'global judgment'[28] would 'invite little more from the Court than an impression' and would 'not address the need for transparency in reasoning'.[29] Whereas a global judgment is 'pronounced as a conclusion, absent reasoning',[30] structured proportionality 'help[s] control intuitive assessments, [and] make[s] value judgments explicit'.[31]

25 Where the Parliament of one jurisdiction adopts the law of another jurisdiction, it generally also intends to adopt the interpretation that has been given to that law: *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 233–4 [19] (Kiefel CJ), 244–5 [52] (Bell, Keane, Nettle and Edelman JJ).

26 *Palmer v Western Australia* (2021) 95 ALJR 229, 259 [146] (Gageler J).

27 Ibid 258 [143], 259 [146]. See also at 269–70 [198] (Gordon J). See also Marcus Teo, 'Proportionality as Epistemic Independence' [2022] (April) *Public Law Review* 245, 261 ('[I]f this "channelling effect" is all that proportionality achieves, then it is hard to see why proportionality is a good thing at all. The fact that parties and courts are channeled away from some enquiries and toward others is, in the abstract, a neutral fact — and in the context of the regulation of public administration, a negative fact.').

28 *S v Manamela* [2000] 3 SA 1, 19–20 [32] (Madala, Sachs and Yacoob JJ).

29 *Brown v Tasmania* (2017) 261 CLR 328, 369 [125] (Kiefel CJ, Bell and Keane JJ). See also Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 87, referring to the risk of 'an unconstrained value judgment' if an unstructured approach is taken.

30 *McCloy v New South Wales* (2015) 257 CLR 178, 216 [75] (French CJ, Kiefel, Bell and Keane JJ). See also *Brown v Tasmania* (2017) 261 CLR 328, 369 [125], 369 [125] n 93 (Kiefel CJ, Bell and Keane JJ); *Palmer v Western Australia* (2021) 95 ALJR 229, 242 [51], 243 [55] (Kiefel CJ and Keane J), 273 [217], 284–5 [262]–[266] (Edelman J).

31 Gertrude Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) 34(1–6) *Human Rights Law Journal* 12, 16, quoted with approval in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, 1622 [96] (Lord Mance JSC, Lord Neuberger PSC, Baroness Hale DPSC and Lord Wilson JSC agreeing); *McCloy v New South Wales* (2015) 257 CLR 178, 216 [77] (French CJ, Kiefel, Bell and Keane JJ).

For what it is worth, I am a structured proportionality convert. But there is a debate to be had here.

The Canadian or German approach to necessity testing?

The third step of structured proportionality is necessity testing. It involves looking at alternative ways of achieving the legitimate aim. Are there other ways of achieving the legitimate aim, but in a way that limits human rights to a lesser degree? As the general limitation clauses in the ACT, Victoria and Queensland put it, are there 'any less restrictive and reasonably available ways to achieve the purpose'?[32] If such an alternative exists, then it cannot be said that the limit on human rights is necessary. The same result could have been achieved without harming human rights (or by harming them to a lesser extent).

After retiring from the Federal Constitutional Court of Germany, Dieter Grimm wrote an influential article in 2007 titled 'Proportionality in Canadian and German Constitutional Jurisprudence'.[33] He pointed out that, in Canada, laws that are found to impose disproportionate limits on rights tend to fall down at the third stage of the analysis (necessity or minimal impairment), whereas, in Germany, cases tended to be decided at the final stage (fair balance).[34] One key explanation is that Canadians are more relaxed about what qualifies as a hypothetical alternative, whereas the Germans are far more strict.

In Canada, a measure that is 'nearly as effective' will qualify as an alternative for the purposes of the necessity test (which is there known as the minimum impairment test). As McLachlin CJ said in *R v Hutterian Brethren of Wilson Colony*:

> the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunise the law from scrutiny at the minimal impairment stage.[35]

That is how Australian courts applied necessity testing in early cases. *Betfair Pty Ltd v Western Australia* is often held up as the paragon of necessity testing in Australian constitutional law. In that case, Western Australia had banned betting exchanges in order to protect the integrity of the racing industry and prevent fraud. The High Court found that the incursion on free interstate trade and commerce under s 92 of the *Constitution* was not necessary to prevent fraud when it was considered that Tasmania managed to tackle the same problems by regulating, rather than banning, betting exchanges.[36] Of course, the simple comparison of the Western Australian and Tasmanian models overlooks that an outright ban will always

32 ACT s 28(2)(e), Vic s 7(2)(e), Qld s 13(2)(d).
33 Grimm (n 15).
34 Ibid 384, 389.
35 *R v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, 597 [55] (McLachlin CJ, Binnie, Deschamps and Rothstein JJ concurring). Cf R v KRJ [2016] 1 SCR 906, 945–6 [79] (Karakatsanis J, McLachlin CJ, Cromwell, Moldaver, Wagner, Gascon and Côté JJ concurring), where the Canadian Supreme Court may have shown signs of a retreat to an 'as effective' test, in order to accord 'appropriate deference to Parliament's choice of means, as well as its full legislative objective.'
36 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479–80 [110]–[112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

be more effective in reducing the risk of fraud.[37] That is, the two legislative models did not satisfy the anti-fraud objective to *exactly* the same extent.

For the Germans, the alternative must achieve the same objective to the same extent. The logical value of the necessity test is that it tells us whether the limit on human rights is truly necessary to achieve the objective. In the comparison, the objective needs to stay constant. If you are comparing different alternatives that have different objectives, really you are comparing apples and oranges (which is fine to do, but should be reserved for the final balancing exercise in the next step).

After retiring as President of the Supreme Court of Israel, Aharon Barak wrote a book in 2012 titled *Proportionality: Constitutional Rights and their Limitations*.[38] It has proven to be highly influential around the world, including with our own High Court. In his book, Barak advocates for the German approach to necessity testing. Justices Crennan, Kiefel and Bell picked up that reasoning in *Tajjour v New South Wales*. Quoting Barak, they said:[39]

> To qualify as a true alternative for the purposes of the comparison between the impugned legislative provision and a hypothetical provision, the latter must be *as practicable* as the impugned provision.[40] That is, the hypothetical measure must be as effective in achieving the legislative purpose. It must be as capable of fulfilling that purpose as the means employed by the impugned provision, 'quantitatively, qualitatively, and probability-wise'.[41]

That is now the orthodox approach of a majority of the High Court to necessity testing.[42]

That may be a win for logic, but is it a win for the protection of human rights? In Canada, the courts have been comfortable with striking down laws at the necessity stage, but far less comfortable with striking down laws at the fair balance stage, where value judgments loom large.[43] By contrast, courts in Germany and Israel are also very comfortable engaging with competing values in the final balancing exercise.[44] A perverse combination in the Australian context would be German adherence to the logic of the necessity test, but a reluctance to engage in balancing because of our anxiety not to undermine the separation of powers. The result would be that measures that should be found to breach human rights will pass necessity testing on a technicality, and then go on to pass the final balancing test because the court has been scared away from the value judgment required.

37 Arguably, the Court was actually engaged in comparing proportional alternatives, explored below. 'Even though [regulation] was less effective than the total ban, given that the public interest aim did not seem to be particularly significant, the drop in effectiveness was outweighed by the increment in trade': Csongor István Nagy, 'Justifying Trade Restrictions under s 92 of the Australian Constitution: A Comparative Law-Based Proposal for a Coherent Doctrine' (2020) 94 *Australian Law Journal* 874, 878. For other examples of close comparisons for the purposes of the necessity test, see at 883–4.

38 Barak (n 6).

39 *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ).

40 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 134–5 [438]–[439].

41 Barak (n 6) 324.

42 *Comcare v Banerji* (2019) 267 CLR 373, 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

43 Grimm (n 15) 394–5.

44 See Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 47.

Barak might offer an intermediate position with his concept of 'proportional alternatives'. At the final balancing stage, Barak reintroduces alternatives that were excluded at the necessity stage because they were not equally as effective in achieving the policy aim. There may be an alternative measure that only achieves the purpose to a slightly lesser extent, but which entirely avoids (or mostly avoids) impacts on human rights. An alternative measure that strikes a *fairer* balance between the policy objective and the impact on human rights tends to show that the way you have decided to do things might not strike a fair balance between those two things. Effectively, you need to carry out a proportionality analysis on the impugned measure, then carry out another proportionality analysis on an alternative measure, and finally weigh up those two proportionality analyses. An image of two sets of scales on either side of a set of scales comes to mind.

Barak offers the example of the decision to build a security wall across farmers' land in the case of *Beit Sourik Village Council v Israel*.[45] There was an alternative route for the wall *around* the farmers' property, but that would have cost more money. Because the alternative would not have been as effective in achieving the security and efficiency purposes, it could be ruled out at the necessity stage. However, the alternative route avoided impacts on the human rights of the farmers, whereas the chosen route had a devastating impact on the farmers. The alternative route showed that the decision to build the wall across the farmers' land was disproportionate.

Proportional alternatives require a level of sophistication we have not yet seen in Australian cases. It might be a very nice logical way of reasoning, but why overcomplicate things with proportional alternatives when necessity testing can be applied in a way that accords with commonsense comparisons of alternative measures (just as the High Court did in *Betfair*)? Maybe the Germans are right, logically speaking, but the Canadians are right, practically speaking.

Incremental burdens? (And incremental legitimate aims?)

In the context of the *implied* freedom, the burden on the freedom is 'gauged by nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law'.[46]

Identifying the burden using a simple 'but for' test helps to home in on the impact that can be attributed to the measure being impugned. The impact that comes from other measures in the background can be put to one side. Take, for example, a law that criminalises political protests on private land. In assessing the impact of that law on free political communication, you need to take into account that, quite apart from the impugned law, it was already unlawful to trespass on private property under other laws. The burden that requires justification is not the burden imposed by the anti-protest law, considered in the abstract; rather, 'it is any *incremental* burden that needs justification.'[47]

45 [2004] IsrSC 58 807, summarised in Barak (n 6) 341–2, 353–4.

46 *Brown v Tasmania* (2017) 261 CLR 328, 383 [181] (Gageler J). See also at 365 [109] (Kiefel CJ, Bell and Keane JJ).

47 *Brown v Tasmania* (2017) 261 CLR 328, 456 [397] (Gordon J) (emphasis added). See also at 386 [188] (Gageler J). See also *Ruddick v Commonwealth* (2022) 96 ALJR 367, 399 [155]–[156] (Gordon, Edelman and Gleeson JJ).

The idea of 'incremental' limitations has not yet featured in human rights cases in Australia. However, there are good reasons to import the idea. First, each of the general limitation clauses requires identification of the 'extent' of the limitation on human rights.[48] Second, in his influential book, Barak clarifies that the relevant value of the human right on one side of the scales is not the value of the human right considered in the abstract, but rather the 'marginal social importance' of the human right. For Barak, the same is true of the value of the policy objective on the other side of the scales.[49] He explains it in this way:

> In determining the balancing we compare the weight of the social importance of the benefit gained by fulfilling the proper purpose and the weight of the social importance of preventing the harm that this fulfillment may cause to the constitutional right. This comparison focuses on the state of affairs prior to the law's enactment and the changes caused by the law. Accordingly, the issue is not the comparison of the general social importance of the purpose (security, public safety, etc) on the one hand and the general social importance of preventing harm to the constitutional right (equality, freedom of expression, etc) on the other. Rather, the issue is much more limited. It refers to the comparison between the state of the purpose prior to the law's enactment, compared with the state afterwards, and the state of the constitutional right prior to the law's enactment compared with its state after enactment. Accordingly, we are comparing the marginal social importance of the benefit gained by the limiting law and the marginal social importance of preventing harm to the constitutional right caused by the limiting law. The question is whether the weight of the marginal social importance of the benefits is heavier than the weight of the marginal social importance of preventing the harm[50]

In my mind, I envisage a subtraction equation on either side of the scales: the overall burden minus the burden of other measures.

However, there may be reason for caution in applying the idea of incremental burdens to the human rights context. I will offer three notes of caution.

First, requiring precise identification of the incremental burden might overly complicate the analysis, especially if it requires a detailed comparison with the entire edifice of the general law, trawling through overlapping statutes, common law and equity.

Second, is the simple subtraction equation really as accurate as it seems? We might be lulled into thinking we can subtract and subtract until there is no limitation on human rights left, such that there is nothing left requiring justification. Take, for example, the law challenged in *Brown v Tasmania*, which prohibited protests on forestry land. There was already separate forestry-management legislation in place which regulated movement on forestry land for safety purposes, not to mention trespass at common law. That is, there were already other reasons why people could not protest in the forest. For Edelman J, this reduced the burden on the implied freedom of political communication to zero: 'If the conduct about which legislation is concerned is independently unlawful, so that there was no legal freedom to communicate about government or political matters, then there can be no "burden" on the freedom.'[51] Perversely, we might come to the same conclusion about the forestry-management legislation: according to the logic of incremental burdens, that

48 ACT s 28(2)(c), Vic s 7(2)(c), Qld s 13(2)(f).
49 ACT s 28(2)(b), Vic s 7(2)(b), Qld s 13(2)(e).
50 Barak (n 6) 350–1.
51 *Brown v Tasmania* (2017) 261 CLR 328, 502–3 [557] (Edelman J). See, similarly, *Ruddick v Commonwealth* (2022) 96 ALJR 367, 399 [155]–[156], 401–2 [161]–[172] (Gordon, Edelman and Gleeson JJ).

legislation would also not limit human rights, because the anti-protest law independently prohibits protests on forestry land in any event. The absurd result would be that if two pieces of legislation burden the implied freedom, then somehow neither of them will burden the implied freedom. Of course, that would come as a surprise to Bob Brown, who was unable freely to communicate through protest about the political issue of logging.

Third, on the other side of the scales, should the incremental legitimate aim be factored in at the necessity stage or the fair balance stage of structured proportionality? *Brown v Tasmania* provides an example of both approaches. Kiefel CJ, Bell and Keane JJ found that the anti-protest law fell down at the necessity hurdle. For them, it was enough to point out that the forestry-management legislation achieved the same purposes as the anti-protest law, but in a less draconian way.[52] In a sense, at the necessity stage, the extent of the legitimate aim can be reduced to zero by subtracting the extent to which the legitimate aim is already served by other measures.[53]

By contrast, Nettle J found that the impugned law passed necessity testing. This was because the alternatives (including the forestry-management legislation on the books) did not target the detrimental effect of protests on business activities and did not achieve deterrence to the same extent.[54] However, his Honour reintroduced alternatives at the balancing stage.[55] Because the forestry-management legislation was already on the books and went most of the way to achieving the purposes of the anti-protest law, Nettle J noted that 'the importance of the [anti-protest law] is considerably lessened. When that lessened level of importance is weighed in the balance against the extent of the burden so identified, it is apparent that [the provisions of the anti-protest law] are grossly disproportionate to the achievement of the stated purpose of the legislation.'[56] That is, his Honour weighed the marginal social importance of the implied freedom against the marginal social importance of the policy objective. But maybe the difference between Nettle J and the plurality is more apparent than real. Ultimately, they both arrived at the same conclusion in *Brown*: the anti-protest law was disproportionate.

How do arbitrariness and proportionality interact?

A number of human rights in the ACT, Victoria and Queensland turn on the concept of 'arbitrariness', including the right to life,[57] the right to privacy,[58] the right to liberty,[59] and (in Queensland only) the right to property.[60] For example, the right to privacy is a right 'not to have [one's] privacy … *arbitrarily* interfered with' (emphasis added).

52 *Brown v Tasmania* (2017) 261 CLR 328, 372–3 [140]–[146] (Kiefel CJ, Bell and Keane JJ).
53 See, similarly, *Ruddick v Commonwealth* (2022) 96 ALJR 367, 375 [23] (Kiefel CJ and Keane J), 386–7 [89] (Gageler J).
54 *Brown v Tasmania* (2017) 261 CLR 328, 420 [286], 422 [289] (Nettle J).
55 Ibid 423 [291] (Nettle J).
56 Ibid 425 [295] (Nettle J).
57 ACT s 9(1), Vic s 9, Qld s 16.
58 ACT s 12(a), Vic s 13(a), Qld s 25(a).
59 ACT s 18(1), Vic s 21(2), Qld s 29(2).
60 Qld s 24(2). Cf Vic s 20 (which contains an internal limitation of 'lawfulness' instead).

Arbitrariness raises ideas that go to whether the impact on the right is justified (for example, whether privacy has been interfered with for a good reason) rather than to the hard outer limits of the scope of the right (for example, whether privacy includes impacts on physical and mental integrity[61] such as a vaccination requirement[62]). This complicates the two-stage model of a human rights analysis of asking first whether the human right is limited, and second whether that limit is justified. Conceptually, arbitrariness straddles both stages of the analysis.

The reason why some of the human rights in the ACT, Victoria and Queensland have internal limitations (such as arbitrariness) is that they are drawn primarily from the *International Covenant on Civil and Political Rights*, which does not have a general limitation clause.[63] Accordingly, each right in the covenant needs to set out the content of the right as well as the way that a limit on the right can be justified. Combining the internal limitations of the rights derived from the covenant with a general limitation clause has been described by some academics as 'inapt', because it effectively results in a duplication of limitation provisions.[64] In any event, that is the reality of our 'hybrid model'.[65]

Over the past decade, there has been a debate in Victoria (and to a lesser extent in the ACT) about whether 'arbitrary' carries its ordinary meaning or its human rights meaning.[66] According to its ordinary meaning, arbitrary means 'capricious and not based on any identifiable criterion or criteria';[67] it 'denotes a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim'.[68] By contrast, drawing on the case law of the UN Human Rights Committee, the human rights meaning is 'capricious, unpredictable or unjust and also … unreasonable in the sense of not being proportionate to a legitimate aim sought.'[69] Recently, in the case of *Thompson v Minogue*, the Victorian Court of Appeal resolved the debate in favour of the human rights meaning.[70] Accordingly, it is now clear that 'arbitrary' means, among other things, 'disproportionate'.

61 *Pretty v United Kingdom* (2002) 35 EHRR 1, 35 [61] ('It covers the physical and psychological integrity of a person').

62 *Vavřička v The Czech Republic* (European Court of Human Rights, Grand Chamber, application nos 47621/13 and 5 others, 8 April 2021) [258]–[264].

63 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 35 [106] (Bell J); *McDonald v Legal Services Commissioner* [*No 2*] [2017] VSC 89, [30]–[31] (Bell J).

64 Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 166 [5.21] (in respect of s 15(3) of the charter).

65 Michael Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, 2015) 157.

66 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 66–7 [199] (Tate JA); *Re Beth* (2013) 42 VR 124, 144 [97] n 54 (Osborn JA); *ZZ v Secretary to the Department of Justice* [2013] VSC 267, [85] (Bell J); *DPP v Kaba* (2014) 44 VR 526, 570–1 [154]–[156] (Bell J); *Jurecek v Director, Transport Safety Victoria* (2016) 260 IR 327, 345 [68] (Bell J); *Miller v Commissioner for Social Housing* [2017] ACAT 10, [99] (Member Symons); *Little v Commissioner for Social Housing* [2017] ACAT 11, [136] (Member Symons); *Andrews v Thomson* (2018) 340 FLR 439, 450–1 [57] (Elkaim and Loukas-Karlsson JJ, Robinson AJ); *PBU v Mental Health Tribunal* (2018) 56 VR 141, 178–9 [124] (Bell J); *LG v Melbourne Health* [2019] VSC 183, [76] (Richards J); *McLean v Racing Victoria Ltd* (2019) 59 VR 422, 440 [66] (Richards J); *HJ v Independent Broad-Based Anti-Corruption Commission* (2021) 64 VR 270, 305 [152] (Beach, Kyrou and Kaye JJA).

67 *WBM v Chief Commissioner of Police* (2010) 27 VR 469, 484 [57] (Kaye J).

68 Ibid 483 [51] (Kaye J).

69 *PJB v Melbourne Health* (2011) 39 VR 373, 395 [85] (Bell J) ('*Patrick's Case*').

70 *Thompson v Minogue* [2021] VSCA 358, [55], [221] (Kyrou, McLeish and Niall JJA).

A parallel debate has been about how arbitrariness is to be folded into the two-stage model. On one view, if an interference with the right (to privacy, for example) is not 'arbitrary', then the right is not limited, and there is no need to move on to the justification stage.[71] The other view is that arbitrariness is relevant to the justification analysis (especially because 'arbitrary' means 'disproportionate'). Taking this approach, the word 'arbitrary' in the right to privacy is 'an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision'. That is, consideration of whether the interference is 'arbitrary' becomes 'subsumed in the overall justification analysis'.[72] A more pragmatic, intermediate approach has been to recognise that the difference is much of a muchness: 'Even if [arbitrariness and justification] are separate questions, the relevant evidence is the same, and it is convenient to consider them together'.[73]

The Victorian Court of Appeal also sought to solve this problem in *Thompson v Minogue*. The Court acknowledged there are 'difficult questions' about how the internal limitation of arbitrariness in particular rights interacts with the general limitation clause.[74] Ultimately, the Court opted to treat arbitrariness as being relevant to whether the right is limited at the first stage of the analysis, not whether the limit is justified in the second stage of the analysis.[75] There are good textual reasons for this conclusion. The general limitation clauses apply to human rights, which are defined to mean the human rights set out in each Act.[76] It takes a lot of squinting to read 'human rights' as meaning only some of the text of the rights set out in each Act (so that internal limitations are not part of the scope of the right).

But the Court of Appeal's clear answer in *Thompson* raises more questions. I will raise three.[77]

First, does the approach in *Thompson* effectively reverse the onus of proof? The person alleging a limit on human rights bears the onus of showing a limit, and the public authority then bears the onus of showing that the limit is justified.[78] If arbitrariness goes to whether there is a limit in the first place, effectively the complainant will be required to show why the impact on them is not proportionate. Yet matters that go to justification may be solely within the knowledge of the public authority. To try to avoid some of the unfairness that comes with this approach, the Court of Appeal left open the possibility that, in some cases, the complainant may be able to infer arbitrariness from the objective circumstances and the absence of any information from the public authority.[79]

71 See, albeit in respect of a different internal limitation, *Magee v Delaney* (2012) 39 VR 50, 81 [157] (Kyrou J) ('*Magee*').
72 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 35 [109]–[110] (Bell J).
73 *Minogue v Thompson* [2021] VSC 56, [86] (Richards J) ('*Minogue*'). See also at [140]–[141].
74 *Thompson v Minogue* [2021] VSCA 358, [44]–[45] (Kyrou, McLeish and Niall JJA). See also at [58], [78], [221].
75 Ibid [78] (Kyrou, McLeish and Niall JJA).
76 ACT s 5, Vic s 3, Qld s 7.
77 Building on previous analysis of the *Thompson v Minogue* decision in the specific context of the right to property in Queensland: see Kent Blore and Nikita Nibbs, 'A Theory of the Right to Property under the *Human Rights Act 2019* (Qld)' (2022) 30 *Australian Property Law Journal* 1, 19–20.
78 *Thompson v Minogue* [2021] VSCA 358, [47]–[48] (Kyrou, McLeish and Niall JJA).
79 Ibid [47] (Kyrou, McLeish and Niall JJA).

Second, does the distinction between limitation and justification break down where there is no onus of proof? Under the 'procedural limb', public authorities are required to give proper consideration to human rights whenever they make a decision.[80] Public authorities would fail to give proper consideration to privacy, for example, if they waited for someone to complain and discharge their onus of showing that the interference was arbitrary. Likewise, members in Parliament who introduce a Bill are required to set out their consideration of human rights in a statement of compatibility.[81] Members are going to have to grapple with arbitrariness themselves. If the distinction between limitation and justification breaks down in these scenarios, does arbitrariness effectively get 'subsumed in the overall justification analysis' anyway?[82]

Third, if 'arbitrary' means 'disproportionate', what work is left for the general limitation clause? Surely an interference with privacy which is found to be disproportionate, and therefore arbitrary, cannot somehow be found to be nonetheless proportionate under the general limitation clause. Conversely, an interference with privacy which is found to be proportionate, and therefore not arbitrary, will never need to be justified under the general limitation clause. The Victorian Court of Appeal was alive to this issue. Kyrou, McLeish and Niall JJA recognised that there is an unavoidable overlap: '… some or all of the facts and matters that inform the justification requirement will have already been considered on the question whether the interference is arbitrary'.[83]

Their Honours appear to have attempted to leave work for the general limitation clause by treating proportionality for the purposes of arbitrariness as slightly different from proportionality for the general limitation clause. Their Honours said:

> the phrase 'unreasonable in the sense of not being proportionate to the legitimate aim sought' does not mean that, in determining whether an interference with privacy is arbitrary, direct and express consideration must be given to the matters set out in s 7(2) of the Charter. In other words, the phrase does not incorporate the proportionality analysis in s 7(2). Rather, the phrase requires a broad and general assessment of whether, in all the circumstances, the interference extends beyond what is reasonably necessary to achieve the statutory or other lawful purpose being pursued by the public authority.[84]

This is a repeat of history. The Constitutional Court of South Africa also adopted a meaning of 'arbitrary' which is less than 'disproportionate' in order to try to retain some work for the general limitation clause to do.[85] The experiment has not been successful. In the South African case law on the rights to property and liberty, the general limitation clause never has

80 ACT s 40B(1)(b), Vic s 38(1), Qld s 58(1)(b).
81 ACT s 37, Vic s 28, Qld s 38.
82 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 35 [109]–[110] (Bell J).
83 *Thompson v Minogue* [2021] VSCA 358, [58] (Kyrou, McLeish and Niall JJA).
84 *Thompson v Minogue* [2021] VSCA 358, [56] (Kyrou, McLeish and Niall JJA). See also at [221].
85 *First National Bank of SA Limited v Commissioner for the South African Revenue Services* [2002] 4 SA 768, [65] (Ackermann J for the court).

any meaningful work to do.[86] As one text notes in respect of the right to property, treating arbitrariness as going to whether the right is limited 'has the effect of making the basis for justifying the infringement of s 25 the very reason why s 25 was infringed in the first place … It seems then that s 36 can have no meaningful application to s 25.'[87] In the most recent case on the right to property, the Constitutional Court noted that 'it is difficult to conceive of a situation where arbitrary law or conduct can be reasonable and justifiable'.[88]

A more fundamental problem with the *Thompson* approach is that structured proportionality may be built into the general limitation clause. The subtests of structured proportionality 'direct attention to different aspects of what is implied in *any rational assessment* of the reasonableness of a restriction'.[89] It is difficult to see how those subtests can be ignored when assessing whether the restriction is arbitrary in the human rights sense. An interference which had no legitimate aim would be capricious. An interference which was not rationally connected to the policy objective would be irrational. An interference which is unnecessary to achieve the policy objective would be unreasonable. Finally, an interference which comes at too high a cost to human rights is disproportionate.[90] The work of arbitrariness cannot be quarantined from the work of the general limitation clause.

The interaction between the general limitation clause and the internal limitation of arbitrariness is a vexed issue. *Thompson* resolves some of the topics for debate, but it also raises new questions.

Does proportionality apply to positive rights?

The German Constitutional Court has long recognised that a human right can be breached not only by going too far in limiting the right (*Übermaßverbot*) but also by doing too little to protect the right (*Untermaßverbot*).[91] Structured proportionality is generally applied in the first scenario, to answer the question of whether a limit on a *negative* right is justified. Many of the human rights protected in the ACT, Victoria and Queensland are negative rights. A negative right represents a *prohibition* on the state or a public authority from doing something. Take the example of a police officer who kills a person in self-defence. That would engage the right *not* to be (arbitrarily) deprived of life. You would then work through the steps of structured proportionality to see that the deprivation of life was justified by self-defence.

But what about *positive* rights and doing too little to protect the right? Positive rights represent a *command* that the state or a public authority take positive action of some kind. The ACT,

86 With respect to the right to liberty, see, for example: *De Vos NO v Minister of Justice and Constitutional Development* [2015] ZACC 21; 2015 (2) SACR 217; 2015 (9) BCLR 1026, [59] (Leeuw AJ for the court); *Lawyers for Human Rights v Minister of Home Affairs* [2017] 5 SA 480, [59]–[63] (Jafta J for the court). With respect to the right to property, see, for example: *First National Bank of SA Limited v Commissioner for the South African Revenue Services* [2002] 4 SA 768, [110] (Ackermann J for the court); *Mkontwana v Nelson Mandela Metropolitan Municipality* [2005] 1 SA 530, [125] (O'Regan J); *National Credit Regulator v Opperman* [2013] 2 SA 1, [79]–[80] (Van der Westhuizen J for the majority); *Chevron SA (Pty) Ltd v Wilson* [2015] ZACC 15; 2015 (10) BCLR 1158, [31]–[34] (Madlanga J for the court).

87 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta, 6th ed, 2013) 557.

88 *Chevron SA (Pty) Ltd v Wilson* [2015] ZACC 15; 2015 (10) BCLR 1158, [31] (Madlanga J for the court).

89 Lübbe-Wolff (n 31) 16 (emphasis added).

90 See the examples for each of these stages of structured proportionality in Blore and Nibbs (n 77) 31–34.

91 Grimm (n 15) 392.

Victoria and Queensland also protect positive rights. The ACT and Queensland even protect socio-economic rights, such as the right to work,[92] the right to education[93] and the right to health.[94] A more straightforward example is the positive aspect of the right to life in each jurisdiction: 'Every person has the right to life'.[95]

Positive human rights are characterised by 'alternativity', meaning that the state can fulfil its positive obligation in more than one way.[96] Robert Alexy takes the example of the right to life to explain alternativity:

> The prohibition of killing implies, at least *prima facie*, the prohibition of every act of killing, whereas the command to rescue does not imply a command to carry out every possible act of rescuing. It may be possible to save a drowning man by swimming to him, or by throwing him a life raft, or by sending out a boat, but it is not the case that all three acts are simultaneously required. Rather, what is required is that *either* the first act, *or* the second, *or* the third be performed.[97]

If any of those acts are performed, then the positive right to be rescued is not limited. That may be why a majority of the High Court declined to apply proportionality in *Murphy v Electoral Commissioner*.[98] The question in that case was whether the Commonwealth should have ensured 'direct choice' of the people by delaying the closing of the rolls until election day, instead of closing the rolls seven days after the issuing of the writs. Because, arguably, direct choice of the people is ensured by either option, provided one of the options is selected, there is no burden on ss 7 and 24 of the *Constitution*.

The picture is far more complicated where the different options available would protect the positive right to different extents. Let's say Queensland suffers a plague.[99] The right to life requires the state to take positive measures to address 'the prevalence of life-threatening diseases'.[100] The state could fulfil its positive obligation by:

- permanently adopting an elimination strategy, which leads to a negligible loss of life but with catastrophic impacts on the economy;
- adopting measures designed to 'flatten the curve', which leads to some loss of life, but with minimal impact on the economy; or
- allowing rapid spread of the plague so that Queenslanders can develop herd immunity as quickly as possible, leading to a catastrophic loss of life but negligible impacts on the economy.

92 ACT s 27B.
93 ACT s 27A, Qld s 36.
94 Qld s 37.
95 ACT s 9(1), Vic s 9, Qld s 16.
96 Robert Alexy, 'On Constitutional Rights to Protection' (2009) 3 *Legisprudence* 1, 5.
97 Ibid (emphasis in original).
98 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 52–3 [37]–[39] (French CJ and Bell J), 71–2 [98]–[102] (Gageler J), 94 [202] (Keane J), 122–4 [294]–[305] (Gordon J). Cf at 60–4 [60]–[74] (Kiefel J). This was one hypothesis put forward in Amelia Simpson, 'Section 92 as a Transplant Recipient?: Commentary on Chapter 8' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 283, 289.
99 For other examples, see the example of abortion in Alexy (n 96) 10–15; and the example of protection against trespass in Blore and Nibbs (n 77) 28–29.
100 UN Human Rights Committee, *General comment No. 36 – Article 6: right to life*, 124th session, UN Doc CCPR/C/GC/36 (3 September 2019) 6 [26].

Obviously, not all options are equal. According to Alexy, for positive rights, structured proportionality needs to be applied in a way that takes account of this alternativity. This can be done at the final balancing stage, by asking whether an alternative way of protecting the right would be more proportionate than the protection that has been selected.[101] In many ways, this mirrors Barak's idea of proportional alternatives.[102] If there is an alternative way to fulfil the positive right which strikes a much *fairer* balance (for example, between life and the economy), the way you have decided to fulfil the positive right may not strike a fair balance. The strategy of letting the plague rip through the community may come at too high a cost in lives lost.

Positive rights throw up further unanswered questions. Again, I will offer three.

First, in applying proportionality to impacts on positive rights, is full structured proportionality called for, or is it really only the final balancing stage that has any meaningful role to play? It might be thought that the sufficiency of the protection is not answered by enquiries about the means–ends relationship (covered by the first three steps of structured proportionality). Indeed, the German Constitutional Court skips over necessity testing altogether for positive rights, and goes straight to fair balance.[103]

Second, does proportionality go to identifying whether a positive right is limited, or in identifying whether a limit on a positive right is justified? Does the distinction between limitation and justification collapse for positive rights? The idea of alternativity is that, provided the state picks one of the alternative ways to fulfil the positive right, the right is not limited. But does this suffer the same drawbacks as 'arbitrariness' in bringing proportionality forward into the limitation stage of the analysis, effectively getting the horse before the cart?

Third, in the ACT and Queensland, where does the duty of progressive realisation for socio-economic rights factor into the analysis? Under the *International Covenant on Economic, Social and Cultural Rights*, the state does not have an obligation to spend limitless amounts of money fulfilling socio-economic rights such as the right to education and the right to health. Instead, under art 2, the state has a duty to 'take steps' according to 'its available resources' towards 'achieving progressively the full realization' of socio-economic rights.[104] In South Africa, the Constitutional Court has factored in the duty of progressive realisation by developing the *Grootboom* test,[105] similar to a strong form of the *Wednesbury* unreasonableness standard.[106] As with arbitrariness, the relationship between the *Grootboom*

101 Barak (n 6) 433–4.
102 Ibid 353.
103 Grimm (n 15) 392–3.
104 On the relationship between justification and the duty of progressive realisation, see Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Review* 557, 570; Fons Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of International Law* 167, 191–4
105 *South Africa v Grootboom* [2001] 1 SA 46, 67 [38] (Yacoob J, Chaskalson P, Langa DP, Goldstone, Kriegler, Madala, Mokgoro, Ngcobo, O'Regan, Sachs JJ and Cameron AJ agreeing).
106 Katharine G Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 248, 252–5. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

test and the general limitation clause has been a vexed issue.[107] If the state has acted reasonably in failing to provide housing, for example, the right to housing is not engaged. Conversely, if the state has acted unreasonably, it is virtually a foregone conclusion that the right is not only limited but unjustifiably so. The reason is that all of the work of justification has already been done by the *Grootboom* test, leaving nothing for the general limitation clause to mop up.[108]

Intergenerational equity: how does time factor into proportionality?

In March 2021, the Federal Constitutional Court of Germany delivered a groundbreaking ruling in *Neibauer v Germany*.[109] In that case, the complainants successfully challenged the failure of the German Government to take more urgent action on climate change.[110] That involved curly issues about positive rights and the German idea of breaching rights by doing too little (*Untermaßverbot*).[111] But the case also led the Constitutional Court to unpack a temporal dimension to proportionality.

Germany had committed to carbon neutrality by 2050, with an interim goal of reducing greenhouse gas emissions by 55 per cent on 1990 levels by 2030. The complainants said that this allowed overly generous greenhouse gas emissions until 2030, requiring future generations to bear the burden of rapidly reducing emissions thereafter, if Germany is to keep within its remaining carbon budget.

The Constitutional Court agreed. The Court held that the state is required by the rights to life and physical integrity (among other rights) to take action on climate change. There is an upper limit of the greenhouse gas emissions that the state can allow to be emitted consistent with its obligations to protect life. That upper limit is represented by Germany's remaining carbon budget. The longer Germany delays emissions reductions today, the steeper the reductions will need to be in the future, if Germany is to stay within the absolute limit set by the carbon budget.[112]

Equally, preventing greenhouse gas emissions will limit other rights and freedoms. For example, the freedom of movement will be impacted if certain cars are banned in the effort to reduce greenhouse gas emissions.[113] As the Constitutional Court pointed out, '[p]ractically all forms of freedom are potentially affected because virtually all aspects of human life involve the emission of greenhouse gases … and are thus potentially threatened by drastic

107 NW Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' (2013) 16 *Potchefstroom Electronic Law Journal* 170, 199–206.

108 *Khosa v Minister of Social Development* [2004] 6 SA 505, 540 [83]–[84] (Mokgoro J, Chaskalson CJ, Langa DCJ, Goldstone, Moseneke, O'Regan and Yacoob JJ agreeing), 549 [105]–[107] (Ngcobo J, Madala J agreeing); *Phaahla v Minister of Justice and Correctional Services* [2019] 7 BCLR 795, 812 n 56 (Dlodlo AJ, Mogoeng CJ, Khampepe, Mhlantla, Teron JJ, Basson, Goliath and Petse AJJ agreeing).

109 Bundesverfassungsgericht [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021.

110 Ibid [266].

111 Ibid [152]–[157], [172].

112 Ibid [120], [242]–[246].

113 See ibid [249].

restrictions after 2030.'[114] The Court went so far as to point out that activities as mundane as the wearing of clothes are at stake, given that the production, use and disposal of clothing and footwear currently accounts for 8 per cent of global greenhouse gas emissions.[115]

Thus, the state is required to strike a fair balance between the climate change impacts on the right to life, on the one hand, and the negative impacts on other human rights that arise from taking action on climate change, on the other hand.[116] Not only is the state required to strike a fair balance between those competing rights now, but it must strike a fair balance between those rights in the future. Moreover, the state must ensure an intertemporal proportionality as between proportionality now and proportionality in the future. Again, the image comes to mind of two sets of scales on either side of a set of scales. As the Court held:

> It follows from the principle of proportionality that one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom — something the complainants describe as an 'emergency stop'.[117]

Whether the impacts of climate change engage human rights protected in the ACT, Victoria and Queensland is an open question.[118] It is also unclear whether future generations hold human rights under Australian human rights legislation.[119] But a temporal dimension to proportionality may have broader application than climate change litigation. Take, for example, a snap COVID-19 lockdown, which severely curtails human rights for a short period of time in order to avoid less severe human rights impacts but over a much longer period of time. Introducing a temporal dimension to proportionality unpacks our intuitive assessment that a snap lockdown may be the most proportionate option, even though it involves the deepest impacts on human rights in the present moment. As the German Constitutional Court said, 'the impacts on future freedom must be proportionate from the standpoint of today'.[120]

But can the text of the general limitation clauses in the ACT, Victoria and Queensland accommodate this latest German innovation?

114 Ibid [117].
115 Ibid [37].
116 Ibid [197].
117 Ibid [192].
118 See Kent Blore, 'Climate Change and Human Rights under the Australian Charters', *Australian Public Law* (blog post, 3 April 2020) <https://auspublaw.org/2020/04/climate-change-and-human-rights-under-the-australian-charters/>; Rachel Pepper and Harry Hobbs, 'The Environment is all Rights: Human Rights, Constitutional Rights and Environmental Rights' (2020) 44 *Melbourne University Law Review* 634, 673–6; Justine Bell-James and Briana Collins, 'Queensland's *Human Rights Act*: A New Frontier for Australian Climate Change Litigation?' (2020) 43 *University of New South Wales Law Journal* 3.
119 See, for example, ACT s 9(2) ('This section [right to life] applies to a person from the time of birth').
120 Bundesverfassungsgericht [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021, [192].

Conclusion

The various approaches outlined in this article can be combined. For example, incremental burdens and legitimate aims can be combined with proportional alternatives as well as intertemporal proportionality. In that scenario, you would have a set of scales comparing the proportionality of a measure now and in the future. Within each of those proportionality analyses, you would have another set of scales comparing the proportionality of the impugned measure with the proportionality of an alternative measure. And within each of those proportionality analyses, on one side of the scales you would subtract the burden already imposed on the human right by other measures, and on the other side of the scales you would subtract the extent of the legitimate aim already achieved by other existing measures. The proportionality analysis starts to look so complicated that a South African–style 'global' judgment starts to look appealing.

In this article, I hope I have raised many questions and answered none:

- Do the general limitation clauses in the ACT, Victoria and Queensland embody a 'structured' form of proportionality, so that each of the steps of structured proportionality is mandatory and exhaustive?
- For necessity testing, does the hypothetical alternative need to be equally as effective in achieving the policy objective, or is near enough good enough?
- On each side of the scales, is it the 'incremental' limit on human rights and the 'incremental' value of achieving the legitimate aim that we need to focus on?
- How are we to reconcile the internal limitation of 'arbitrariness' with the general limitation clause, given that both are about proportionality?
- Does proportionality apply to positive rights, and, if so, does the proportionality test need to be modified to take account of 'alternativity'?
- Can the general limitation clauses accommodate a temporal dimension to proportionality?

These questions remain largely unexplored. There is a real debate to be had about proportionality under Australian human rights legislation, which is yet to begin.

Current issues in Australian military compensation law

*Peter Sutherland**

Recent years have seen an upswell in community dissatisfaction with existing military compensation arrangements, prompted to a large extent by the complexity of the legislative arrangements, major service delivery issues, and a growing recognition that military compensation needs a more holistic, 'wellbeing' approach if it is to meet the needs of veterans and their families.

This article follows from 'The History of Military Compensation Law in Australia' – a paper presented to the Veterans' Review Board's 2004 Veterans' Law Conference in July 2004, which was subsequently published in *AIAL Forum* in 2006.[1] The 2004 paper outlined the development of military compensation in Australia on a chronological basis from federation until 2004. This article is drawn directly from a more detailed paper, 'Military Compensation Law in Australia: 2004–2021', which was commissioned by the Royal Commission into Defence and Veteran Suicide and discussed in evidence before the royal commission by the writer on 5 April 2022.

The principal military compensation Acts and schemes

The *Military Rehabilitation and Compensation Act 2004* (Cth) ('MRCA') was intended to create a single military compensation scheme for injuries and diseases sustained by members of the Australian Defence Force ('ADF') in both operational service and peacetime service on and after 1 July 2004. The MRCA has achieved a single set of compensation entitlements going forward from 2004 in most cases. The objective, however, has been compromised by the fact that the previous two schemes (and the more than six Acts involved[2]) continue to apply in complex ways to injuries sustained before 1 July 2004. The predecessor legislation may also apply to new claims, aggravations and recurrences that manifest decades after the original injury.

Veterans' Entitlements Act 1986

The first bespoke Australian military compensation scheme was established during World War I, initially by the *War Pensions Act 1914* (Cth) and later as the *Repatriation Act 1920* (Cth). The *Veterans' Entitlements Act 1986* (Cth) ('VEA'), which commenced on 26 May 1986, was a consolidation of the various Repatriation Acts and associated legislation, and was the principal legislation which governed entitlements to pension or compensation for a service-related injury, disease or death occurring in operational service prior to 1 July 2004. The VEA also covered veterans who had full-time, peacetime service between 7 December

* Peter Sutherland is a Visiting Fellow at the Australian National University College of Law. He is a solicitor and Director of SoftLaw Community Projects Limited in Canberra. Peter was the Independent Legal Member of the Review of Military Compensation Arrangements, which reported to the Minister for Veterans' Affairs in 2011. The views expressed are those of the writer and do not necessarily reflect the views of the commissioners.

1 Peter Sutherland, 'The History of Military Compensation Law in Australia', (2006) 50 AIAL Forum 39.

2 Including the *Veterans' Entitlements Act 1986*, *Commonwealth Employees' Compensation Act 1930*; *Compensation (Commonwealth Government Employees) Act 1971*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, *Defence Act 1903* and *Military Compensation Act 1994*.

1972 and 7 April 1994 and who elected to claim under the VEA, rather than under the schemes covering injuries to Australian Government employees (which also covered injuries in peacetime military service).

The Repatriation Commission has general oversight of the VEA scheme.

The VEA's large existing client base (upwards of 250,000 veterans and dependants) includes World War I widows, veterans and widows from World War II, the British Commonwealth Occupation Force, Korea, Malaya/Malaysia, the Indonesian Confrontation and South Vietnam, and veterans and dependants from the First Gulf War, Timor-Leste, Iraq, Afghanistan (before 2004), and various peacekeeping commitments.

Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988

The *Commonwealth Employees' Compensation Act 1948* (Cth) provided for the inclusion of ADF members and cadets within the coverage of the *Commonwealth Employees' Compensation Act 1930* (Cth) ('1930 Act') on 3 January 1949, in respect of injuries sustained in peacetime service. This scheme had provided workers compensation coverage for Commonwealth Government employees since 1930. The 1930 Act was replaced by the *Compensation (Commonwealth Government Employees) Act 1971* (Cth) ('1971 Act') on 1 September 1971, and the 1971 Act was itself replaced by the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRCA') on 1 December 1988. Part X of the SRCA included transitional provisions which preserved elements of the 1930 and 1971 Acts, including the more limited entitlement to permanent impairment compensation under the predecessor Acts.

The *Military Compensation Act 1994* ('MCA'), which commenced on 7 April 1994, established a new 'Military Compensation Scheme' and closed off future access to dual entitlements under the VEA and the SRCA, except for ADF members who had operational service. The MCA also made some other, not very significant, changes to the application of the SRCA to ADF members, including the extension of cover to holders of honorary rank, members of philanthropic organisations providing services to the ADF, and discharged members involved in approved post-discharge resettlement training. As a result of anomalies in levels of compensation which were made very public by the Black Hawk helicopter training accident, additional benefits for severely injured members of the ADF and for the families of members killed in compensable circumstances were provided by Defence Determinations made under the *Defence Act 1903* (Cth).

On 12 October 2017, an entirely new Act, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) ('DRCA'), was enacted as a mirror of the SRCA and replaced that Act in its entirety in respect of ADF members, ex-members and their dependants. The Military Rehabilitation and Compensation Commission ('MRCC') was given general oversight of the DRCA scheme. Whilst the DRCA applies only to injuries suffered before 1 July 2004, the Department of Veterans' Affairs ('DVA') is still receiving a substantial number of claims under the DRCA from former members of the ADF, including new claims for injuries said to have occurred in national service, recruit training or general service in the 1960s, 1970s and 1980s.

The additional compensation under the *Defence Act 1903* continues to form part of the overall DRCA compensation scheme and is paid in respect of injuries sustained after 10 June 1997 and before 1 July 2004.

At March 2021, DVA had 57,506 DRCA clients, with 909 open rehabilitation cases and 4,039 clients on White treatment cards. Expenditure in 2019–20 was $291.1 million on compensation and support and $42.6 million on health.[3]

Military Rehabilitation and Compensation Act 2004

The MRCA received royal assent on 27 April 2004, and ss 1 and 2 and ss 360 to 385 (ch 9) commenced on that date. The remaining provisions of the Act commenced on 1 July 2004, which was the substantive date of commencement of the Military Rehabilitation and Compensation Scheme. The MRCC has general oversight of the MRCA scheme.

The MRCA has a similar structure to the DRCA, but took many important elements from the VEA, including the use of treatment cards and its framework for acceptance of initial liability for service injuries and diseases. Importantly, this framework included the required causal link with service, the two standards of proof, and the use of statements of principles ('SOPs'). Compensation for incapacity and for permanent impairment, and provision for rehabilitation, were taken from the SRCA/DRCA. Compensation for medical treatment and review processes were drawn from both schemes, and other complex interactions exist such as a one-off choice to take a Special Rate Disability Pension ('SRDP') for life (which is similar to the VEA TPI special rate pension), instead of receiving compensation for permanent impairment and incapacity for work.[4]

The transitional arrangements for the MRCA, which were introduced by the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (Cth) and by amendments to the VEA and the SRCA, are complex and sometimes uncertain in effect. A significant amendment to the transitional provisions for permanent impairment compensation was made by the *Military Rehabilitation and Compensation Amendment Act 2014* (Cth), after a significant anomaly was identified by the Review of Military Compensation Arrangements in 2011.

Significant events in military compensation: 2004 to 2022

This section of the article briefly describes four significant events which have affected military compensation arrangements since 1 July 2004, when the MRCA scheme commenced.

2011: MRCA Review report

The Minister for Veterans' Affairs established the Review of Military Compensation Arrangements ('the MRCA Review') in 2009. The terms of reference for the review focused

3 Department of Veterans' Affairs, *Initial Background Paper to the Royal Commission into Defence and Veteran Suicide* (includes annexures A–M), 1 September 2021.

4 Department of Veterans' Affairs, 2011, *Review of Military Compensation Arrangements*, report to the Minister for Veterans' Affairs, February 2011 (MRCA review report), ch 4 pt 6.

on the operation to date of the *Military Rehabilitation and Compensation Act 2004,* but also called for a review of the legislative schemes that governed military compensation prior to the MRCA and any anomalies that existed; the level of medical and financial care provided to members of the ADF injured during peacetime service; the implications of a compassionate payment scheme for the families of deceased ADF members; and the suitability of access to military compensation schemes for members of the Australian Federal Police ('AFP').

The MRCA Review reported in 2011. It concluded that the broad policy principles underpinning military compensation arrangements were accepted by the defence and veteran communities and that they were sound (such as an increased focus on vocational and non-vocational rehabilitation, while ensuring an appropriate level of compensation for both economic and non-economic loss), and identified some areas for improvement.[5]

The review confirmed the need to recognise the unique nature of military service through compensation arrangements that were specific to the ADF. That consideration led to the recommendation that the MRCA should not be extended to include members of the AFP who had been deployed on high-risk overseas missions.

The review supported the overall effectiveness of the MRCA scheme, including the use of the SOPs to resolve causation issues when determining initial liability (in alignment with the VEA), and the stronger focus of the scheme on vocational, medical and psychosocial rehabilitation than existed under the VEA. The review recommended improved transition arrangements, and that the existing two review pathways be refined to a single review pathway of internal review, Veterans' Review Board ('VRB') review and Administrative Appeals Tribunal ('AAT') review, with active case management at all stages.

2017: The Constant Battle report

The Senate Foreign Affairs, Defence and Trade References Committee established an inquiry into veterans' issues in September 2016. The committee held five public hearings and issued its report, *The Constant Battle: Suicide by Veterans*, in August 2017 ('*Constant Battle* report').[6]

The committee examined the framework of military compensation arrangements and their administration 'through the lens of the issue of suicide by veterans', which highlighted 'the burden of legislative complexity and administrative hurdles on veterans who are often seeking support at a vulnerable period of their lives'. The committee's consideration was informed by a number of previous parliamentary inquiries touching on aspects of the terms of reference. The report had the following structure:

- Chapter 1 — Introduction;
- Chapter 2 — Background;
- Chapter 3 — Suicide by veterans;

5 Ibid, Chair's introduction, [8].

6 Joint Standing Committee on Foreign Affairs, Defence and Trade, 2017, *The Constant Battle: Suicide by Veterans*, August 2017 ('*Constant Battle* report').

- Chapter 4 — The legislative framework;
- Chapter 5 — Administration issues;
- Chapter 6 — Transition issues;
- Chapter 7 — Other related matters.

In ch 4, the report discussed recent proposed legislative reform, including the Bill for the DRCA; key issues concerning compensation arrangements, including benefit levels and the relative generosity of the schemes; complexity and inconsistency; non-liability health care, which received significant positive feedback during the inquiry; and support for a review, including of the Repatriation Medical Authority and the SOPs. In Recommendation 6, the report proposed a reference to the Productivity Commission to simplify the legislative framework of compensation and rehabilitation for service members and veterans.

2019: Productivity Commission report

In March 2018, the Australian Government issued terms of reference for an inquiry by the Productivity Commission into the system of compensation and rehabilitation for veterans (serving and ex-serving ADF members). The government asked for 'a comprehensive examination of how the current compensation and rehabilitation system operates and should operate into the future'. The commission's final report, *A Better Way to Support Veterans,* was submitted to the Treasurer on 27 June 2019.

In its final report, the Productivity Commission made a telling observation on the history of the military compensation system:

> History explains, in part, why we have the system we have today. Some features of the system can be traced back to World War I and its after effects — a time when life expectancy, the economic position of women, service members' pay and motivations for enlisting, and the extent of the mainstream health and welfare system, were very different to what they are today. Since then, governments have added new features, often in an ad hoc manner and/or in response to particular incidents or pressure from veterans' groups. While a number of the original rationales for elements of the scheme have faded, a political desire to avoid reducing entitlements has meant that governments have not taken opportunities to remove duplication and redundancy.[7]

The Productivity Commission discussed at length the complexity of the various military compensation schemes and proposed legislative reforms which commenced with the improvement and harmonisation of the existing schemes and worked towards a simpler overall legislative structure. The emphasis of the commission was on practical, equitable reforms to the legislation such as simplifying the range of payments available (for example, recs 14.1, 14.4 and 14.9), removing the MRCA SRDP (rec 14.7), more closely aligning the DRCA and the MRCA (rec 13.1), closing off superannuation invalidity pensions (rec 13.3), improving rehabilitation for invalidity payment recipients (rec 13.4), and creating a single review path. The commission suggested that the process of incremental reform might ultimately lead to the creation of two legislative schemes (rec 19.1).

7 Productivity Commission, *A Better Way to Support Veterans*, inquiry report no 93, 27 June 2019 ('Productivity Commission Final Report'), 11.

The interim government response to the report noted that the Productivity Commission's proposed changes were intended to improve the experience of veterans and their families engaging with the system, and to support improvements in their long-term wellbeing:

> However, some of the Commission's solutions risk substantial disruption and the loss of some gains already made. The Government believes that major reform of the system, particularly the legislative framework and entitlements of veterans and their families, should be carefully considered and incrementally implemented. Any such legislative reform would need to be the subject of considerable consultation and collaboration with the Defence and ex-service communities.[8]

2021: Royal Commission into Defence and Veteran Suicide

On 8 July 2021, the Governor-General signed letters patent for the Royal Commission into Defence and Veteran Suicide addressed to royal commissioners Mr Naguib Kaldas APM (Chair), the Honourable James Sholto Douglas QC and Dr Peggy Brown AO. The royal commission was directed to provide an interim report by 11 August 2022 and a final report by 15 June 2023 (later extended to 17 June 2024). In its terms of reference, the royal commission was required to enquire into the following matters:

a. systemic issues and any common themes among defence and veteran deaths by suicide, or defence members and veterans who have other lived experience of suicide behaviour or risk factors (including attempted or contemplated suicide, feelings of suicide or poor mental health outcomes);

b. a systemic analysis of the contributing risk factors relevant to defence and veteran death by suicide, including the possible contribution of pre-service, service (including training and deployments), transition, separation and post-service issues, such as the following …

c. the impact of culture within the ADF, the Department of Defence and the Department of Veterans' Affairs on defence members' and veterans' physical and mental wellbeing;

d. the role of non-government organisations, including ex-service organisations, in providing relevant services and support for defence members, veterans, their families and others;

e. protective and rehabilitative factors for defence members and veterans who have lived experience of suicide behaviour or risk factors;

f. any systemic issues in the current availability and effectiveness of support services for, and in the engagement with, families and others …

g. any systemic issues in the nature of defence members' and veterans' engagement with the Department of Defence, the Department of Veterans' Affairs or other Commonwealth, State or Territory government entities (including those acting on behalf of those entities) about support services, claims or entitlements relevant to defence and veteran deaths by suicide or relevant to defence members and veterans who have other lived experience of suicide behaviour or risk factors, including any systemic issues in engaging with multiple government entities;

h. the legislative and policy frameworks, administered by the Department of Defence, the Department of Veterans' Affairs and other Commonwealth, State or Territory government entities, relating to the support services, claims and entitlements referred to in paragraph (g);

8 Department of Veterans' Affairs, 2020, *Interim Government Response to the Report of the Productivity Commission 'A Better Way to Support Veterans'*, 8 October 2020, 4.

i. any systemic risk factors contributing to defence and veteran death by suicide, including the following:

   i. defence members' and veterans' social or family contexts;

   ii. housing or employment issues for defence members and veterans;

   iii. defence members' and veterans' economic and financial circumstances;

j. any matter reasonably incidental to a matter referred to in paragraphs (a) to (i) or that you believe is reasonably relevant to your inquiry.

The royal commission was also directed to have regard (inter alia) to the Productivity Commission *A Better Way to Support Veterans* inquiry (para (k)), the work of the interim National Commissioner for Defence and Veteran Suicide Prevention (para (l)), and veterans' support in other countries, particularly Canada, New Zealand, the United Kingdom, and the United States of America (para (m)).

Current issues in military compensation law

'War and peace': the operational environment facing the ADF

Past overseas deployments of the ADF have shaped military compensation in Australia: the legislative framework; entitlements; government administration and services; advocacy frameworks; and overall financial liabilities.

It is possible to draw sensible conclusions about some of those effects, and to strive for a more coherent system overall. Ultimately, however, the legislative framework and cost of military compensation in Australia will be shaped by our strategic environment in the era of terrorism, the invasion of the Ukraine, and the growing geopolitical importance of China. One thing that can be achieved is to increase government and community awareness of the cost of military compensation and to factor that cost (and desirable early remedial interventions) into our decisions to deploy the ADF. Perhaps this is a cogent argument for some form of notional premium for the ADF — an issue which was considered by the Productivity Commission in 2019 and which is currently in substantial contention.

The 2020 Australian Government Actuary report *Actuarial Investigation into the Costs of Military Compensation as at 30 June 2019* ('AGA Report')[9] made a relevant observation on the link between ADF deployments and consequent compensation liabilities:

> 3.1.3 One factor that is likely to have influenced recent experience is the relatively high level of deployments on warlike operations.
>
> 3.1.4 When ADF units were deployed in East Timor in 1999, it marked the start of a period of relatively intense activity for the ADF, which subsequently saw forces deployed in Iraq, Afghanistan and the Solomon Islands. Overall, more than 50,000 people have been deployed on warlike/non-warlike service over the period. This may have created a large pool of people who may have a higher probability of making a successful claim and, where they do make a claim, may be eligible for higher benefits.

9 Australian Government Actuary, 2020, *Actuarial Investigation into the Costs of Military Compensation as at 30 June 2019*, 26 June 2020 ('AGA Report').

> 3.1.5 The availability of deployment opportunities has almost certainly altered the pattern of discharges over the last decade and a half. Both DVA and Defence have advised that discharge rates fall when there are opportunities for deployment. This is because there is both a very strong financial incentive (in the form of substantial tax free allowances) and because it is an opportunity for Defence personnel to make use of their training.

The AGA Report also noted that compensation liabilities may be affected by new or unusual conditions in the operational environment:

> 3.1.8 Exposure to hazards that may not have been recognised as dangerous at the time is a further factor in the operational environment. Asbestos is an obvious example that has impacted on DRCA expenditure. It is possible that currently unrecognised hazards will be identified in future and give rise to claims.

One example of a deployment raising novel compensation issues is Operation Bushfire Assist 2019–2020 in January 2020, in which up to 3,000 Australian Army reservists were called out to assist with firefighting and infrastructure support in the bushfires in south-eastern New South Wales and north-eastern Victoria.[10] It is likely that those reservists and civilian volunteers were exposed to unusually high levels of airborne contaminants and that, at least in the case of the reservists, many were not trained or properly equipped to cope with the hazardous circumstances encountered. Other recent peacetime operations of this nature have included:

- Operation COVID-19 Assist: ADF members who undertook a support role to the NSW Police Force during the Sydney lockdown in 2021 received an additional allowance under pt 12 of Defence Determination 2016/19, Conditions of Service. Item 1 in sch 1 to the Defence Determination, Conditions of Service Amendment (Operation COVID-19 Assist allowance) Determination 2022 (No 5) identified a risk of exposure to disease in the operation.

  This part provides an allowance to members who are force assigned to Operation COVID-19 Assist in Australia, recognising the increased risk of exposure to the COVID-19 virus and the disruption to usual working patterns, the uncertainty and duration of the commitment, and additional unique pressures faced while duties are being undertaken by members during the operation.

- Operation Tonga Assist 2022: HMAS *Adelaide* sailed to Tonga in February 2022 on a relief mission following the Hunga Tonga volcanic eruption and tsunami. At least 23 cases of COVID-19 were recorded among the crew. Given that most of those cases were contracted during the voyage of the naval vessel to Tonga, compensation entitlements are likely to arise from this deployment. The unanswered questions are how many and how severe.

- Operation Flood Assist 2022: The ADF supported the Queensland and New South Wales governments by providing personnel and equipment to assist flood-affected communities. ADF assistance included helicopter support, the use of Bushmaster and other high-clearance vehicles, debris removal, and large-scale clearance of flood-damaged waste.

10 Department of Defence, 2020, 'Australian Defence Force Reserve Call Out', advertisement, *Canberra Times*, 6 January 2020.

Those deployments, and other similar civil society commitments, suggest that the ADF may increasingly be called upon to provide support in civil emergencies. This role is not necessarily covered by current ADF training and, if it continues and expands, may skew training away from the key role of the ADF: the military defence of Australia. A bifurcated focus for the ADF could have significant implications for military compensation, particularly if ADF training, materiel, and work health and safety ('WHS') do not adapt to this new role.

While the impact on military compensation of this developing new civilian role for the ADF is uncertain, it is, at least, estimable and quantifiable. The impact on military compensation of major new ADF deployments overseas is, at best, a 'known unknown'.

Unravelling legislative complexity

Military compensation in Australia is delivered through three main schemes established under the *Veterans' Entitlements Act 1986*, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, and the *Military Rehabilitation and Compensation Act 2004*. There are, however, many other federal Acts supplementing and modifying the three main compensation Acts, and three distinct military superannuation schemes also provide income support and lump sums for injured veterans.

The legislative provisions governing military compensation in Australia are undoubtedly complex. The complexity arises from the manner in which compensation schemes emerged from, and were affected by, the various deployments of the ADF overseas, and from the overall legislative approach that this is beneficial legislation in which no veteran should be worse off because of amendment to the legislation or reform of any element of the various schemes. Many reviews have commented on the legislative complexity over the years, but all the legislative developments in military compensation since 1918 have compounded the problem.

Complexity: The current military compensation schemes

The complexity of military compensation arrangements in Australia is demonstrated by features of the main legislative frameworks:

- There are three distinct legislative schemes — the VEA, the DRCA and the MRCA — with significant differences in legislative structure and content.
- The *VEA* was established, and has remained, as a pension-based scheme with no access to lump sums, and provides medical treatment through treatment cards. It covers active service by ADF members in overseas deployments and, after 1972, some veterans with peacetime service only.
- The *DRCA* was created from the three compensation schemes covering Australian Government employees: the *Commonwealth Employees' Compensation Act 1930*, the *Compensation (Commonwealth Government Employees) Act 1971* and its successor, the *Safety, Rehabilitation and Compensation Act 1988*. The DRCA has a conventional workers compensation framework; namely, incapacity payments until age 67, lump-sum payments for permanent impairment, a focus on rehabilitation and return to work, and (initially) compensation for medical treatment by reimbursement of treatment

costs incurred by the member. It primarily covers peacetime service by ADF members, but some veterans with operational service have a dual entitlement with the VEA.

- The *MRCA* is an amalgam of the VEA and the DRCA and covers all injuries and diseases suffered by ADF members after 1 July 2004. The MRCA follows the VEA in its provisions for determination of initial liability (causal contribution, use of SOPs and two standards of proof). It is similar to the DRCA in its adoption of a compensation model with incapacity payments, compensation for permanent impairment and a focus on rehabilitation, and in the general legislative structure of the scheme. The MRCA includes an irrevocable election to receive a VEA-style special rate pension rather than compensation payments.

- The three main schemes relate to each other in very complex ways, including dual entitlements under each of the schemes for many ADF members, amendments and transitional provisions which maintain 'grandfathered' entitlements, and lack of legal certainty as to which scheme applies in many cases.

- Amendments to resolve anomalies often lead to further perceived anomalies and reactive legislative responses to further pressures by interest groups.

- Attempts at alignment between the schemes have on occasions been modestly successful; however, alignment is sometimes achieved by adopting an approach in which the most favourable element of each scheme is adopted, even though the relevant entitlements are not comparable due to fundamental differences between the schemes.

While there are three main legislative schemes within the military compensation framework, as discussed above, there are in fact at least nine pieces of federal legislation with overlapping application to ADF members, including the:

- *Veterans' Entitlements Act 1986*, which successfully consolidated many previous Repatriation Acts in 1986, and covers injuries and disease suffered in active service since WW I, and peacetime service between 7 December 1972 and 7 April 1994;

- *Commonwealth Employees' Compensation Act 1930*, which covered injuries in peacetime between 3 January 1949 and 31 August 1971, and which has been continued in effect by pt X of the DRCA;

- *Compensation (Commonwealth Government Employees) Act 1971*, which covered peacetime service between 1 September 1971 and 30 November 1988, and which has been continued in effect by pt X of the DRCA;

- *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, which replaced the *Safety, Rehabilitation and Compensation Act 1988* on 12 October 2017, with retrospective effect from 1 December 1988; the DRCA covers peacetime injuries between 1 December 1988 and 30 June 2004, and operational service from 7 April 1994 to 30 June 2004;

- *Military Compensation Act 1994*, which established the 'Military Compensation Scheme' by modification of the SRCA/DRCA, and applies to injuries to ADF personnel between 7 April 1994 and 30 June 2004;

- *Defence Act 1903*: Defence Determinations made under the Defence Act provide additional compensation for death and severe injuries to ADF members covered by the DRCA/SRCA from 7 April 1994, and also provides a basis for ex gratia compensation payments to injured ADF members in special circumstances, including veterans (and dependants) who were injured in peacetime service before 1949;
- *Military Rehabilitation and Compensation Act 2004* and the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*, which established a military compensation scheme for injuries suffered in ADF service on and from 1 July 2004;
- *Australian Participants in British Nuclear Tests (Treatment) Act 2006* (Cth), which provided medical treatment for diseases suffered by Australian military and civilian personnel who were exposed to radiation in the British nuclear tests in Australia between 1952 and 1963; and
- *Treatment Benefits (Special Access) Act 2019* (Cth), which provided medical treatment for members of Australian civilian surgical and medical teams that provided medical aid, training and treatment to local Vietnamese people during the Vietnam War.

This list does not include the three main military superannuation schemes,[11] which also interact with military compensation and which involve offsetting arrangements between compensation and superannuation entitlements.

One way to unravel this complexity might be by careful legislative change towards a unified scheme that has a clear conceptual basis. Another way might be to scrap the present complex, intertwined legislative schemes and create a single new compensation Act for all veterans which is simple in structure and expression and which meets community and veterans' expectations.

Hidden jurisprudence

The interactions between all of this legislation are legally complex and, in many cases, are not clear even to lawyers, let alone ex-service organisation ('ESO') lay advocates. There are Federal Court and AAT cases which give guidance on some issues; however, much still remains uncertain because many cases which might test the legislation are resolved in private by the VRB, or are settled during the AAT review process. The reasoning in such cases is not made public, but hopefully informs future decision-making by DVA. There is, however, no opportunity for the legal profession or ESO advocates to gain this knowledge, except through the imperfect mechanism of the 'bush telegraph'.

One example of this hidden jurisprudence is the fact that a veteran who is in receipt of VEA entitlements is able to make a claim under the DRCA for the same injury and, if the claim is successful, DRCA benefits will be paid and offset against VEA entitlements. When a claim of this nature was made several years ago (by a legally represented veteran), DVA

11 *Defence Force Retirement and Death Benefits Act 1973* (Cth), *Military Superannuation and Benefits Act 1991* (Cth) and the *Australian Defence Force Superannuation Act 2015* (Cth). Note also the effect of the *Australian Defence Force Cover Act 2015* (Cth).

did not oppose it, and apparently similar claims are now routinely accepted by DVA. This development in military compensation legal practice remains unpublicised.

One new Act?

Many ESOs are frustrated with the complexity of the current schemes and their interactions. They are attracted by the 'one new Act' approach, but have no clear idea how this could be achieved and what should be done about the existing legacy of accrued rights and individual entitlements.

The 2021 *Preliminary Interim Report* by Commissioner Boss, the Interim National Commissioner for Defence and Veteran Suicide Prevention ('Boss Report') essentially suggested a new Act approach, but the report's focus was on how to achieve a wellbeing model, rather than how to implement radical legislative change, as the following recommendation illustrates:

> **Recommendation 4.1**
>
> The Australian Government should fundamentally reconsider the purpose of the Department of Veterans' Affairs (DVA) rehabilitation and compensation legislative framework. The current framework, which is premised on a compensation model, should be replaced with a wellbeing model, which incorporates concepts of social insurance more aligned with the National Disability Insurance Scheme. This model should include safety net access to payments.[12]

The report's suggestion for a move from a compensation model to a wellbeing model, which incorporates concepts of social insurance as illustrated by the National Disability Insurance Scheme ('NDIS'), is, in my opinion, not practicable:

- The social insurance model of the NDIS was created out of a disparate range of disability services in which disabled Australians had very few accrued rights or legal entitlements (apart from discrimination law). The services they previously received often were not legal entitlements; they were simply an unfair and inadequate collection of discretionary government services and charitable provision. The NDIS started from (almost) a clean slate and did not engage a client base of more than 1 million Australian veterans, each of whom has an existing legal right to compensation payments, treatment cards, rehabilitation services, etc, and many of whom may, under the existing systems, have the right to make claims for additional entitlements for up to another 60 years.
- Even though the NDIS is in its early days, tensions are already emerging around the costs of the scheme, the quality and sensitivity of its administration, and problems in its review processes. Similar problems may quickly beset a veterans' social insurance scheme.

However, a wellbeing approach is not fundamentally inconsistent with a compensation model. A compensation model can deliver high-quality health and financial benefits, but that can be difficult to achieve due to factors such as the cost of the benefits under the scheme,

12 Interim National Commissioner for Defence and Veteran Suicide Prevention, 2021, *Preliminary Interim Report*, Commonwealth of Australia, 2021 ('Boss Report').

resentment by clients who are refused assistance because they do not meet liability or severity of injury criteria, administrative shortcomings, and accessibility problems.

Two legislative schemes — the Productivity Commission approach

The Productivity Commission, in its 2019 *A Better Way to Support Veterans* final report, proposed a conceptual basis for a reformed military compensation system: maintaining the VEA for its existing client base until that cohort reaches end-of-life (Scheme 1); improving the MRCA legislation and bringing the DRCA into alignment with the MRCA over time (Scheme 2); and recommendations to transition existing scheme members into the two new schemes, which would commence in 2025 (Recommendation 19.1).

This is an approach which I think may be achievable. It would, however, definitely face major challenges such as costs, maintaining reasonable equity while withstanding pressure by interest groups for 'more' and 'no one should be worse off', and drafting legislative amendments which navigate the shoals of accrued rights and withstand the impact of determined litigation. The long-term viability of our military compensation arrangements is likely to depend on successfully steering such a course.

Scheme 1 (the VEA) — Reducing the longevity of this residual scheme

In 2019, the Productivity Commission recommended that the VEA be continued in effect as a stand-alone military compensation scheme (Scheme 1) for existing members of the VEA scheme. It commented on the basis for maintaining Scheme 1 and how to offer choice to join Scheme 2:

- As noted earlier, Scheme 2 is the scheme better suited for the modern veteran, and it would be desirable to transfer veterans to this scheme where there would be no detriment to the veteran.
- There are unlikely to be benefits from switching older veterans to Scheme 2. It is expected that these veterans will be better off on the lifetime pension provided by Scheme 1, and are unlikely to benefit from the rehabilitation focus of Scheme 2. Veterans older than 55 years of age when the change is implemented who have been allocated to Scheme 1 should have all their future claims processed under this scheme, with no option to switch.
- However, younger veterans *may* be better off with the rehabilitation and income replacement focus of Scheme 2. Veterans 55 years of age or younger at the implementation date should be given the option to switch to Scheme 2 prior to, or at the time of, their next claim. If they elect to switch, the current benefits they are receiving would be recalculated based on Scheme 2, and all future claims would go through Scheme 2. They would receive support to help them make this decision, but the decision would be irrevocable.
- Most veterans receiving benefits under the VEA will be over 55 at the implementation date. About 4000 veterans receiving a VEA disability pension in December 2017 will be under 55 in 2025, and this is expected to decline over time. Offering financial advice and processing requests to switch schemes for this group should therefore be manageable.[13]

13 Productivity Commission Final Report (n 7) 830.

Under this scenario, Scheme 1 will continue in effect until at least the 2080s because it will cover the widow/ers of VEA special rate pensioners, who may not yet have been born. This is illustrated by the pension scheme for United States Civil War veterans, which lost its last pensioner in 2020 when Irene Triplett died.[14] She was the daughter of a Civil War veteran who married at 80 in 1924, and she lived until 90 years of age. She was receiving a pension of US$73.30 a month from the US federal Department of Veterans Affairs at the time of her death. The last remaining widow of a Civil War veteran is believed to have died in 2021, having married a 93-year-old veteran in 1936 at the age of 17.[15] She did not ever seek a pension under the US Government scheme. The VEA might not show the same extreme longevity as the US Civil War scheme, but it will last for at least 60 more years if not curtailed.

In order to achieve an earlier closure of Scheme 1, two actions could be considered:

- moving the younger cohort of VEA veterans to Scheme 2 on a compulsory basis, rather than an optional election basis; and
- from the date of the amending legislation, closing access to VEA pension entitlements and treatment entitlements for widows and widowers who were not married to, or in a domestic partnership with, the veteran at the time of the compensable injury (or possibly the date of grant of special rate pension).

These options may affect accrued rights and would affect expectations of future entitlements. However, there probably would not be an acquisition of property in constitutional terms, and the changes could be found to be legally valid as an alteration to statutory entitlements. I suggest that the movement of the younger cohort into Scheme 2 could be beneficial for many of them, particularly if the transfer was well constructed, with more 'carrots' than 'sticks'. In addition, an earlier closure of Scheme 1 would reduce overall complexity in the military compensation system and should reduce the frictions that arise when particular groups in the community have differing sets of entitlements, without a clear and equitable basis for that differentiation.

Improving Scheme 2 (the MRCA) — Incapacity provisions

One area for early legislative attention should be the incapacity compensation provisions in MRCA ch 4, pts 3, 4 and 5. These provisions are greatly 'over drafted', taking 90 pages and more than 110 sections to provide entitlement to compensation for incapacity. This must be contrasted with the 18 pages and 17 sections covering incapacity payments in the *Safety, Rehabilitation and Compensation Act 1988*, upon which the MRCA provisions were based. The major drafting problems are length and unnecessary complexity, which occurred because the MRCA sections attempted to legislate in 2004 what was essentially detailed policy created by the Military Compensation and Rehabilitation Service within Defence for the administration of incapacity entitlements (particularly in relation to reservists). Those provisions in the MRCA could have repetition removed and could be refined to express essential principles rather than exhaustively legislate processing steps.

14 Martin Pengelly, 'Irene Triplett, last person to collect an American civil war pension, dies at 90', *The Guardian*, 7 June 2020 < https://www.theguardian.com/us-news/2020/jun/07/irene-triplett-last-person-american-civil-war-pension-dies>.

15 'Woman believed to be last remaining widow of US civil war soldier dies', *Associated Press*, 9 June 2021.

A further issue arising in relation to MRCA incapacity payments is that, in my opinion,[16] the level of payment is too generous after 45 weeks of incapacity. This is probably a disincentive to return to work by injured members after discharge from the ADF — an outcome which is fundamental to the future wellbeing of those members who still have capacity for paid employment. One contributor to this problem is the additional amount added to incapacity payments under MRCA ss 104(1), 109(1), 141(1), 144(1), 164(1) and 168(1), which was set at $100 per week in 2004 and is now $178.11 per week. The conceptual basis for this payment was compensation for the loss of non-pay-related allowances; however, in the MRCA, the Service Allowance is added to normal earnings for the calculation of incapacity compensation for full-time members, and this allowance is intended to compensate for the rigours of service life. I suspect that the additional amount was one of the compromises between DVA and stakeholders to get the new 2004 Act 'over the line'. Perhaps the removal of this additional payment could be compensated by introducing superannuation guarantee payments on top of MRCA incapacity payments to ensure that seriously injured members have superannuation savings when their incapacity benefits cease at pension age.

Improving Scheme 2 (the MRCA) — Review of decisions

A right of appeal has existed in veterans' legislation since 1915, and the first external appeal tribunals were established in 1929. From the 1930s, a three-tier system existed for some 40 years: (i) Repatriation Boards; (ii) the Repatriation Commission; and (iii) appeal tribunals for entitlement and assessment. Following the Toose Report in 1975,[17] the Repatriation Review Tribunal was established, with a right of further review by the AAT. In 1985, the Repatriation Review Tribunal was replaced by the VRB.[18] An entirely different review system emerged for the SRCA: reconsideration by a more senior internal review officer within the determining authority, and a right to merits review by the AAT.

Initially, the MRCA offered both appeal paths (possibly reflecting the compromises necessary to achieve the MRCA); however, a single review path was recommended by the MRCA Review in 2011 and was finally implemented in 2017: (i) internal review on own motion by the MRCC or the Chief of the Defence Force (s 347), but no right for a claimant to require internal review; (ii) merits review by the VRB, including an enhanced case-management and ADR process; and (iii) AAT merits review, which includes case-management and settlement processes before a formal hearing process.

The DRCA continues to provide the review process which has been in operation since the commencement of the SRCA: (i) reconsideration of decisions by a person other than the original decision-maker (s 62); (ii) merits review by the AAT (s 64), with the applicant able to receive legal costs if the application for review is successful (s 67); and (iii) an appeal from the AAT to the Federal Court on matters of law or by judicial review.

16 An opinion which I expressed in the deliberations of the Review of Military Compensation Arrangements in 2011, as the Legal Member of the steering committee for the review.

17 PB Toose, *Report of the Independent Enquiry into the Repatriation System*, Australian Government Publishing Service, Canberra, 1975 ('Toose Report').

18 MRCA Review report (n 4) 222–223.

Over the life of the MRCA, there have been surprisingly few concluded decisions by the AAT on that Act: 20 between 2007 and 2011; 27 between 2012 and 2016; 30 between 2017 and 2021; and two in the first six months of 2022. This can be contrasted with the SRCA/DRCA, where the Military Compensation and Rehabilitation Service and later the MRCC have been very active and assertive litigants in the AAT in the compensation jurisdiction. The number of concluded AAT decisions on the DRCA has, however, significantly reduced in the past two years, numbering 11 in 2020, seven in 2021 and two in the first six months of 2022. This is probably because of a higher rate of settlement at the VRB and the AAT, and a less litigious approach by the MRCC.

There are many sensitivities in relation to reviews of military compensation decisions, including the role and operation of the VRB, how to support informed advocacy, the existence of different review arrangements for each of the main schemes, and the alleged adversarial approach taken by the DVA. It is beyond the scope of this article to attempt to resolve those contradictory currents; however, several observations are apposite:

- If the Productivity Commission's proposal for a two-scheme solution to legislative complexity is adopted, it may be desirable to accept that the review arrangements for each scheme could be different. It may be preferable to continue the review arrangements for Scheme 1 (the VEA) more or less as is, adopting any improvements that have wide support from stakeholders.

- The review arrangements for Scheme 2 (an improved MRCA, including the DRCA) should be developed with a view to best practice, but taking into account unique features of military compensation and the history of review in that jurisdiction. In my opinion, this would involve: (i) an internal review of the original decision which is conducted expeditiously, and which provides (inter alia) the basis for written submissions by the MRCC to the VRB; (ii) review by the VRB, building upon its strengths and improving upon any current weaknesses; and (iii) merits review by the AAT, with a mechanism for support of informed advocacy funded by the Australian Government (perhaps through the community legal centre / legal aid area of the Attorney-General's Department, rather than directly from DVA).

- The recent reduction in the number of AAT reviews going to a final hearing suggests that the DVA (through the Repatriation Commission and the MRCC) is adopting a less litigious approach to reviews of military compensation decisions. It is important, however, that test cases and claims that have no merit continue to be taken by the DVA to the AAT. Without this, there is no accessible jurisprudence and a consequent lessening of accountability. An appropriate balance needs to be struck between each individual's understandable desire for a positive outcome of their application for review and the overall integrity of the scheme, which relies on a fair application of known rules to the whole of the veteran community. Any adversarial attitudes by the department's advocates should be addressed by reinforcing a positive, veteran-centric culture and by ensuring that those advocates are well trained and well supported. This would be in line with the Model Litigant Policy (Cth) under the *Legal Services Direction 2017* (Cth) Appendix B.

- In my opinion, it would also be desirable to avoid briefing out AAT matters to private lawyers in a 'panel' system. In whatever manner those firms are briefed, it is in the nature of their business to 'win', and to value, justify and price their work within that cultural framework. This is the opposite of what the DVA should be seeking to achieve. Briefing to external firms may be necessary in appeals to the Federal Court, because of the specialist skills required in that field of litigation.

Service delivery for ADF members, veterans and their families

DVA administration

The consensus of reports since 2017, commencing with the *Constant Battle* report by the Joint Standing Committee on Foreign Affairs, Defence and Trade, is that DVA has fallen short in its administration of the military compensation system. I think that this must be balanced against the failures of the ADF in transition management and in WHS (for example, the entrenched culture of bullying, and difficulties in addressing sexual harassment), the delays by the Commonwealth Superannuation Commission ('CSC') in meeting its superannuation determination obligations, and the disinclination of the Department of Finance to fund necessary reforms in DVA administration, including a long overdue replacement of its claims-processing information technology ('IT').

A pathway out of these problems is emerging, and it is important to pursue administrative reforms with vigour, and in consultation with the ex-service community and other stakeholders. In turn, ESOs need to be demanding of change, but realistic about the fact that DVA has a responsibility to be fair and to act in the broader community interest, which at times is not necessarily compatible with the personal interests of individual veterans.

In particular, I suggest that the three major paths to administrative reform are improved transition from ADF to civilian life, expeditious claims processing, and improved communication with clients. This would provide a solid foundation for other, veteran-centric, reforms and should contribute to the prevention of suicide by ADF and ex-serving members.

Veteran-centric reform

Veteran-centric reform ('VCR'), initiated by the DVA, attracted an interesting comment in the 2020 AGA Report on its effect on the rate of permanent impairment claims:

> 10.1.8 The administrative changes made within DVA have increased the accessibility of services and benefits to the veteran community and policy initiatives such as Veteran Centric Reform have encouraged veterans to claim early for DVA benefits and increased awareness of these benefits amongst existing ADF members and the veteran population. This may have a short term effect in bringing forward claimants who may otherwise have claimed for a benefit in later years and captured existing veterans who may have faced barriers to claiming in previous years. The exact impact of these changes will not be known for a number of years and there is currently not enough data to help determine what the magnitude or length of the impact could be.[19]

19 Australian Government Actuary, 2020, *Actuarial Investigation into the Costs of Military Compensation as at 30 June 2019*, 26 June 2020 ('AGA report').

The VCR also received an endorsement by the Commonwealth Ombudsman in 2022:

> DVA has been implementing a Veteran Centric Reform (VCR) program since 2017 to deliver on the Government's vision for improved service delivery, person-centred design, and digital transformation. One of the main initiatives under the VCR program is to improve services for veterans and their families through better claims processing. Good communication with veterans is essential to this initiative. In particular, good communication through the provision of clear and regular information to veterans throughout the claim process can help to manage veterans' expectations and reduce feelings of uncertainty, anxiety or frustration while waiting for their claim to be assessed …
>
> Our investigation did not identify any significant concerns about DVA's policy and procedural framework for managing communication with veterans during the claim process. We observed that DVA's policy and procedural framework is relatively mature, and DVA is progressing several positive initiatives to further improve its approach to service delivery, including better communication with veterans throughout the claim process.
>
> We acknowledge that DVA is currently implementing some initiatives as part of the VCR program and this is likely to further improve DVA's approach to communicating with veterans …[20]

I concur with the strong community support for veteran-centric reform identified by the Senate Committee in the *Constant Battle* report.

Transition management

Progress has been made in relation to one important matter — transition from the ADF into civilian life — which was the subject of considerable discussion and recommendations by the 2011 MRCA Review,[21] the 2017 the *Constant Battle* report,[22] the 2019 Productivity Commission final report),[23] and the 2021 Boss Report.[24]

The Joint Transition Authority ('JTA') was established in October 2020. It sits within the Department of Defence and works in partnership with the DVA and the CSC. The JTA conducted a JTA Consultation Forum in September 2021 and is working on a transition strategy for publication in the first quarter of 2022. The early priorities of the JTA are stated to be the collection, analysis and sharing of transition data; collection and analysis of insights in a JTA Insights Register; development of a single ADF *Transition Manual* to unify the approach to transition across the three services; a review of separation health examination ('SHE') procedures; operational improvements in transition in each service, for example with the Royal Australian Navy to improve the process for personnel transition while posted to operational units at sea; and identification of, and prioritisation of support for, vulnerable transitioning members.[25]

There is little doubt that improved transition arrangements will have a positive impact on the military compensation system.

20 Commonwealth Ombudsman, 2022, *The Department of Veterans' Affairs communication with veterans making claims for compensation*, report 01/2022, January 2022, 1.
21 MRCA Review report (n 4) ch 7, recs 7.1–7.11.
22 *Constant Battle* report (n 6) ch 6, recs 14–19.
23 Productivity Commission Final Report (n 7) ch 7, recs 7.1–7.3
24 Boss Report (n 12) ch 7.
25 Department of Defence, *Joint Transition Authority Annual Progress Report*, 2021.

A financial time bomb is ticking!

The financing of veterans' entitlements and military compensation in Australia has features which lead to opaqueness in the cost of the system to the Australian community. They include the following:

- Appropriations for the costs of compensation are built into the entitling legislation. This means that scheme administrators cannot control or modify benefit expenditures except through legislative change which reduces either the quantum of individual benefit levels or the number of veterans who can access an entitlement.
- Necessarily, reductions in benefit levels or reductions in access are politically difficult, as financial support for veterans has wide and non-partisan community support. When changes to legislation are considered, the political reality is that the change will often be achieved only if a guarantee is given that no individual will be worse off. This approach militates against a reduction in expenditures, even if the measure has a strong justification.
- The administrative cost of benefit delivery through the DVA and Defence is subject to annual Budget processes. The outcomes of those processes can be arbitrary, as they are usually focused on the administrative cost and not on the increased cost of benefits which may occur because of inadequate administration. Arguably, an example of this was the repeated failure of DVA Budget bids after 2010 for the costs of a new, integrated, claims-processing IT system, until the furore surrounding the *Constant Battle* report highlighted the human and financial cost of delays and inadequacies in claims processing.
- The financial cost to the community of veterans' entitlements and military compensation is poorly recorded and poorly understood. In particular, it is difficult to establish the financial linkage between ADF actions (for example, deployments, and cultural failures such as bullying) and the ultimate long-term cost to the Australian community of those actions. This has been one impetus for the consideration of a 'notional premium' for ADF employment in successive reviews, including the 2011 MRCA Review and the 2019 Productivity Commission Final Report.

The 2020 report by the Australian Government Actuary, *The Costs of Military Compensation as at 30 June 2019*, is an informative window into the costs of the military compensation system, and a frightening prospect of future cost escalation.

The AGA Report considered only military compensation (DRCA and MRCA) and did not consider veterans' entitlements under the VEA. At present, the costs of VEA veterans' entitlements are high, particularly in respect of age-related health costs; however, this group is essentially closed and largely comprises widows from all conflicts up to Vietnam and a rapidly decreasing group of WW II and Korean War veterans. The future cost pressures in veterans' entitlements are more uncertain for two other groups of veterans: those who served in Vietnam and now are almost all past pension age; and veterans who served in operational areas prior to 1 July 2004 (for example, peacekeeping, the First Gulf War, Timor-Leste and Iraq) and have a dual entitlement under the VEA and the DRCA.

The AGA Report at tables 19.8 and 19.9 sets out estimates of a notional military compensation premium for 2019–20 for the ADF of $2,333.6 million,[26] compared with a notional premium of $1,448 million at the previous valuation. This premium amount translates to a notional insurance premium of 37.2 per cent of ADF salaries: 56.5 per cent for the Army, 21.5 per cent for the Navy, and 16.7 per cent for the Air Force.

An upward trend in military compensation liabilities is marked. The AGA Report at Table 1.2 estimated an outstanding claims liability at 30 June 2019 of $19,689.1 million, compared with an estimated liability at 30 June 2018 of $14,426.8 million in the previous actuarial report.[27] That increase was partly due to changed assumptions and partly due to increased compensation costs. The report also observed that MRCA permanent impairment claims increased more than ninefold over the past six years, and doubled year on year from 2017 to 2019 (from $200 million to $750 million), driven by an increase in both the average size of claim payments and the number of claimants.[28]

Throughout the whole of the AGA Report there is a story of increasing compensation costs in recent years. The military compensation cost-escalation picture between 2004 and 2010 was relatively reassuring, as the MRCA showed a relatively low level of take-up, particularly in the first few years of the new scheme. However, that is now changing, and both DRCA and MRCA benefit costs are increasing rapidly in both incapacity payments and compensation for permanent impairment. The report discusses the causes of that increase:

> 1.5.4 While the increase of $4.4bn in the estimate of the liability as at 30 June 2019 is substantial, it is my best estimate having regard to current experience; that is, I have not been intentionally conservative. The increase in the liability has been primarily driven by:
>
> - An increase in the number of medical recipients
> - An increase in the utilisation and average cost of medical benefits
> - An increase in the number of claimants in incapacity
> - An increase in the number of claimants and average size of benefits for permanent impairment.

26 This premium estimate is affected by the exclusion of Defence liabilities for the Additional Death Benefit, the Severe Injury Adjustment and common law claims. It is also understated because other uncertainties, including, for example, the near impossibility of ascertaining the potential liability arising from the provisions in the MRCA that entitle all veterans who have rendered warlike service on or after 1 July 2004 to a Gold Card at age 70. This liability will commence in around 10 years, but significant numbers are unlikely for another 30 years or so. AGA Report (n 9) [12.1.10].

27 This estimate of total liabilities does not include the liability in relation to additional benefits payable on death and severe injury under the *Defence Act 2003*, as those costs are borne by Defence and not by DVA (see AGA Report (n 9) [1.2.2]). This has the effect of understating the DRCA liability, but does not affect the MRCA liability as these enhanced benefit levels are incorporated into the MRCA. The report also notes, at [2.4.3], that the estimates do not include liabilities arising from common law claims against Defence, which include asbestos liabilities and common law actions by surviving spouses of common law plaintiffs, who were themselves barred from actions for damages by s 44 SRCA and s 388 MRCA.

28 AGA Report (n 9) [10.2.1].

The AGA Report makes a sobering comment on future trends:

> 2.2.1 Figure 2.1 shows total outlays on the MCS since 1996–97. Prior to 2004, expenditure had grown at a steady but moderate pace, averaging around 5 per cent per annum. The introduction of MRCA from 1 July 2004 led to a significant disruption in experience with an initial drop in outlays followed by a return to growth. Experience from 2012 accelerated at a much higher rate than had been seen previously in the scheme. From 2012 to 2019, outlays increased at a rate of 25 per cent per annum with an even more significant shift in experience over the last 4 years. Growth from 2015 to 2019 has been extremely rapid, increasing year on year to a 61 per cent increase from 2018 to 2019.
>
> 2.2.2 There are a number of possible interpretations of this data. An earlier view was that the growth from 2011 to 2015 was, in part, compensating for the very low growth in the years after the introduction of MRCA. However the more rapid increase in recent years challenges this view. Whilst there are differences in the benefits provided under MRCA, there has also been changes in the environment in which the schemes operate, including changing attitudes and modifications to DVA administrative practices. It now seems more likely that the most recent experience is part of the schemes transition to a 'new normal' that could be expected to persist indefinitely into the future. This latter interpretation would imply that the behaviour of MRCA claimants is fundamentally different from that observed for DRCA claimants prior to the scheme's closure. This 'new normal' that we have seen in recent experience is still changing year on year and currently far from a stable, mature state. As such, there is considerable uncertainty when interpreting this experience for long term future projections.
>
> 2.2.3 Continued increases in recent experience has led us to believe that we are not dealing with a temporary anomaly but rather a genuine shift in experience that needs to be taken into account in setting valuation assumptions. The change from a regime where claims could be made under either the DRCA or the VEA to one where all claims must come through the MRCA is likely to be playing some part, but so is the introduction of the single claim process, the availability of online claim facilities and the increasing involvement of ex-service organisations in supporting veterans' claims under DRCA and MRCA. The deviation of experience from pre-DRCA closure has persisted into the most recent year and has exhibited the highest difference seen to date.

The DVA claims that processing delay is a relevant factor in the cash-flow projections for the DRCA and MRCA, discussed in relation to Figure 1.3 of the AGA Report:

> 1.4.2 The cashflows have increased from the previous valuation, most noticeably from 2020–21 onwards. This step change is due to additional growth projected to account for the current rate of lodged permanent impairment claims and the existing backlog of unprocessed claims. It is important to note that there is substantial uncertainty as to the timing and magnitude of this impact as it is partially subject to processing constraints where funding decisions are outside of DVA's control. However, the current rate of processing appears unsustainable if experience in permanent impairment continues at its current pace with a continuing build-up of the existing backlog of unprocessed claims.

Putting it all together: personal observations

As the history of military compensation in Australia shows, reviews and reports are thick on the ground. Their legacy appears to be increased legislative complexity, increased benefit costs, and service delivery which has not met the expectations of ESO stakeholders.

Legislative reform

I consider that the two-scheme approach proposed by the Productivity Commission offers a reasonable chance of achieving substantial legislative reform, although undoubtedly the process will be highly contested and painful for all involved.

An approach of consolidating the whole system into a single Act (whether an entirely new Act or some development of the MRCA) is unlikely to succeed because:

- the VEA is conceptually different from the MRCA/DRCA;
- there is a very large number of elderly veterans who are embedded in the VEA system and are unlikely to cope well with significant change; and
- an entirely new legislative framework could not disassociate itself from accrued rights, entitlements and expectations within 20 years (or more).

A wellbeing approach

There is an undoubted need for a shift towards a wellbeing approach to military compensation. This would require informed policy proposals and practical, hard-headed reform of ADF transition and DVA service delivery. The Royal Commission into Defence and Veteran Suicide may be able to play a lead role in mapping a path for this transformation.

DVA administration

The *Constant Battle* report showed the depth of community concern about the administration of military compensation in Australia, and the significant impact of poor administrative practices on the rate of suicide of young ex-ADF members. The report, and a number of other recent reports on scheme administration, have mapped a path for administrative reform. The challenge is to implement those reforms with a focus on the wellbeing of veterans and their families. The reforms must extend beyond the DVA to the ADF, the CSC and other military compensation stakeholders.

Previous reports, such as the 2011 MRCA Review report, outlined the need for reform in transition, rehabilitation and claims management; however, the pace of change has been slower than is necessary. Much of this undoubtedly can be sheeted home to the DVA, which has the primary responsibility for implementation. However, it appears that the DVA has been subjected to substantial attrition over the past 10 years through the application of the efficiency dividend, and through difficulties in achieving Budget bids for necessary administrative reforms (including the need to replace its outdated claims-management IT). Real improvement in the situation of veterans and their families will not be achieved without an appropriate level of investment in the DVA, and in military compensation administration generally.

Scheme costs

The cost of the VEA is very high, particularly in respect of medical treatment costs, which reflect the large number of Gold Cards on issue and the increasing cost of what are, essentially, age-related diseases. This, however, might not be of great concern, as the future path of VEA costs is relatively predictable, and those costs will decline in future years as the WW II, Korea and Vietnam cohorts reach end-of-life. It may be desirable to move later veteran cohorts (such as peacekeepers and veterans of the First Gulf War, Timor-Leste and Iraq) out of the VEA into a reformed MRCA, but this may be less for cost reasons

and more for improved rehabilitation and return-to-work outcomes, and the opportunity to close down the VEA earlier than 2080 (or later). If the VEA is reopened in the face of a major international conflict involving hundreds of thousands of ADF members (as has been mooted as a possibility by some policymakers), cost projections would change significantly.

The increasing cost of the MRCA scheme is very worrying and is likely to affect choices for reform of the military compensation system. If, for example, military compensation were to move away from a causal threshold for acceptance of liability for compensation and simply introduce a scheme of medical treatment and financial support for all veterans according to personal need, the long-term financial cost to the Australian community could become unsupportable, and community pressure for significant restrictions on benefits and services could emerge. This problem would be compounded if the definition of a 'veteran' were widely drawn (for example, as a person with one day of service in the permanent forces).

The costs of the DRCA will become merged with those of the MRCA if Scheme 2 is implemented.

The best hope for containment of MRCA/DRCA scheme costs may rest with the following actions:

- Early intervention during ADF service, well-structured transition, a focus on rehabilitation and return to work, and a wellbeing approach. Non-liability health services immediately after discharge and interim financial support until claim determination would assist positive outcomes.
- Improved WHS in the ADF, in particular in respect of systemic problems of culture and bullying, and suicide prevention.
- An improved understanding of the compensation cost drivers in ADF activities. A notional premium for the ADF might be helpful to this understanding.
- Improved scheme administration by the DVA, including in particular the removal of delays in claim processing; improved communication with members, veterans and their families; and a supportive approach by the Department of Finance in relation to scheme administration costs.
- Reduction in legislative complexity, while maintaining the liability-based framework of military compensation.

Conclusion

The military compensation scheme is facing a crisis of confidence. To address this, I consider that there has to be a measured, careful approach to legislative reform and a thorough and rapid reform of scheme administration and service delivery to ADF members, veterans and their families.

An attempt to address the crisis of confidence by radical legislative change is fraught with danger. A veteran-centric, wellbeing approach to the administration of the scheme by the ADF and DVA, to address community concerns about problems in military compensation, has better prospects of success.

Therapeutic jurisprudence in child protection matters

*Gwenn Murray and Glen Cranwell**

Child protection is an important area of public law. Each of the states and territories has enacted legislation providing for the protection of children,[1] and in Queensland the legislative framework is contained in the *Child Protection Act 1999* (Qld) ('CP Act').

The paramount principle for administering the CP Act, set out in s 5, is that 'the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, are paramount.'

The general principles set out in s 5B of the CP Act include:

a. a child has a right to be protected from harm or risk of harm

b. a child's family has the primary responsibility for the child's upbringing, protection and development

…

k. a child should be able to maintain relationships with the child's parents and kin, if it is appropriate for the child.

Section 5BA sets out principles for achieving permanency for a child and the need for children to have ongoing, positive, trusting and nurturing relationships and stable living.

For Aboriginal and Torres Strait Islander children, s 5C of the CP Act sets out additional principles for placement, prevention, partnership, participation and connection, including:

b. the long-term effect of a decision on the child's identity and connection with the child's family and community must be taken into account.

Decision-making under the CP Act is variously undertaken by the chief executive[2] (or their delegate) of the Childrens Court of Queensland and by the Queensland Civil and Administrative Tribunal (QCAT). Our focus in this article is on review proceedings that are brought in QCAT, although many of our observations have broader application.

Our contention is that the guiding principles set out in the CP Act, as well as similar guiding principles in other state and territory child protection legislation, are a natural fit with

* Gwenn Murray and Glen Cranwell are both members of the Queensland Civil and Administrative Tribunal (QCAT). Gwenn is a criminologist and has over 25 years of experience in the areas of child protection and youth justice. Glen is admitted as a solicitor and has over 15 years of experience as a tribunal member. The views expressed are those of the authors and not those of QCAT.

1 See *Children and Young People Act 2008* (ACT); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Care and Protection of Children Act 2007* (NT); *Children's Protection Act 1993* (SA); *Children, Young Persons and their Families Act 1997* (Tas); *Children, Youth and Families Act 2005* (Vic); *Children and Community Services Act 2004* (WA).

2 Director-General, Department of Children, Youth Justice and Multicultural Affairs.

therapeutic jurisprudence. We consider that therapeutic jurisprudence, which is an interdisciplinary method of applying the law, can positively impact the social and psychological wellbeing of families and children. When appropriately applied in child protection proceedings, it can help to strengthen parenting and encourage relationships between applicant families and carers and the respondent Department of Children, Youth Justice and Multicultural Affairs (the department).

We note that, on the occasions that legal representatives appear in child protection proceedings or give legal advice to prepare parties for proceedings, they can also have an important role to play and we will address this in conclusion.

What is therapeutic jurisprudence?

The term 'therapeutic jurisprudence' originated in work undertaken by Wexler and Winick in mental health law in the United States in the late 1980s.[3] Simply put, therapeutic jurisprudence is the term used to describe an approach to the law that considers legal processes and procedures as having 'an impact on the physical and psychological wellbeing of the participants'.[4]

Therapeutic jurisprudence is based on the principles of voice, validation, respect and promoting self-determination:[5]

- *Voice* means providing an environment where the participant can tell their story to an attentive judicial officer.
- *Validation* involves the judicial officer acknowledging that he or she has heard the participant, values their contribution and will take their story into account.
- *Respect* is 'the manner in which the judicial officer interacts with the [participant], whether the judicial officer takes time to listen to the participant, the tone of voice and language used and the body language of the judicial officer in interacting with the participant'.[6]
- *Self-determination* is the opposite of paternalism and coercion. Choice promotes motivation, confidence, satisfaction and 'increased opportunities to build skills necessary for successful living'.[7]

In contrast to more formal adversarial proceedings, judicial officers employing a therapeutic jurisprudence approach should be more active, more collaborative, less formal, more attuned

3 David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David Wexler and Bruce Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991).

4 Michael King, 'Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities' (2003) 28 *Alternative Law Journal* 172.

5 Michael King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) 151.

6 Michael King, 'The Therapeutic Dimension of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92, 95.

7 Bruce Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1766.

to direct communication with the participants, more attuned to their personal circumstances, and more positive in their interactions with them.[8]

Thus, judicial officers fulfil an essential leadership role, providing guidance to all the various participants in working towards a common goal[9] — which in child protection matters is the safety, wellbeing and best interests of the child. The judicial officer can act as an example for participants and can model proper ways of interacting by:

- the way the judicial officer interacts with participants;
- demonstrating respect for other participants' views;
- using empathic communication techniques;
- promoting dialogue;
- facilitating participants in sharing ideas and suggestions for the conduct of a case; and
- using a non-confrontational style in addressing differences between participants.[10]

Therapeutic jurisprudence has been widely used in specialist problem-solving courts and tribunals — for example, drug courts, domestic violence courts, youth justice courts, mental health courts and tribunals, Indigenous courts and even some civil courts. More recently, there have been calls for the increased adoption of therapeutic jurisprudence principles by mainstream courts and tribunals. In this context, therapeutic jurisprudence has been used by some members of QCAT in the Tribunal's child protection jurisdiction.

While there is a substantial body of scholarship relating to therapeutic jurisprudence, there is a need for more comprehensive judicial and legal education in the theory and practice of therapeutic jurisprudence. We hope to make a modest contribution through this article.

Overview of child protection matters at QCAT

The Childrens Court has the power to make child protection orders under ch 2 pt 4 of the CP Act. The orders that can be made include:

- granting custody of the child to the chief executive (s 61(a)(ii));
- granting short-term guardianship of the child to the chief executive (s 61(e)); and
- granting long-term guardianship of the child to the chief executive (s 61(f)(iii)).

8 Jelena Popovic, 'Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121.
9 King (n 5) 36.
10 Ibid 10.

Where the Childrens Court has granted custody or guardianship of the child to the chief executive, QCAT has jurisdiction to review certain decisions of the chief executive or their delegate. These are set out in s 247 and sch 2 of the CP Act and include:

- a decision in whose care to place the child (s 86(2));
- not informing a child's parents of the person in whose care the child is and where the child is living (s 86(4));
- refusing to allow, restricting or placing conditions on contact between a child and the child's parents or a member of the child's family (s 87(2));
- removing a child from the care of the child's carer (s 89);
- refusing a certificate of approval as a foster carer or kinship carer (ss 136);
- reviewing case plans (ss 51VA and 51VB); and
- directing a parent about the supervision of a child (s 78).

In any particular proceedings before the Tribunal, the parties may include:

- the delegate of the chief executive;
- the child;
- a parent;
- a carer; and
- a person affected by a contact decision under s 87(2), which the Appeals Tribunal in *Department of Child Safety, Youth and Women v PJC and the Public Guardian*[11] considered was limited to the child's mother, father and any members of the child's family.

An application may be brought by the public guardian on a child's behalf pursuant to s 133 of the *Public Guardian Act 2014* (Qld) or by another person on behalf of the child with the president's approval pursuant to s 99P of the CP Act. In addition to being a party to the proceedings, children and young people can also express their views and wishes directly to the Tribunal themselves or through a letter or through the child advocate from the Office of the Public Guardian.

Section 99H of the CP Act provides that, for a hearing, the Tribunal must be constituted by three members, at least one of whom is legally qualified. For a compulsory conference, the Tribunal must be constituted by at least two members, at least one of whom is legally qualified.

11 [2019] QCATA 109 [90].

Pursuant to s 99H(4), the president of QCAT may choose a member to constitute the tribunal for child protection proceedings only if the president considers that the member:

a. is committed to the principles mentioned in ss 5A to 5C of the CP Act;

b. has extensive professional knowledge and experience of children; and

c. has demonstrated a knowledge of and has experience in one or more of the fields of administrative review, child care, child protection, child welfare, community services, education, health, Indigenous affairs, law, psychology or social work.

Paragraph 10 of *QCAT Practice Direction No 6 of 2015: Process for Administrative Reviews in Child Protection Matters* provides:

> The tribunal panel will include a lawyer and a member with child protection experience. Where the child is Aboriginal or Torres Strait Islander, the tribunal will endeavour to have an Aboriginal or Torres Strait Islander member sit on the review.

We consider the use of a multidisciplinary panel to be critical in child protection matters and central to the application of therapeutic jurisprudence.

The child protection expert will have knowledge and understanding of the child protection continuum, the effects of trauma and abuse on children, and attachment theory. They will also have knowledge and experience of social characteristics of vulnerable families, such as the prevalence and effects of domestic and family violence, mental health conditions, the effects of drug and alcohol misuse, and intergenerational poverty and abuse.

First Nations members will have knowledge and understanding of the cultural context and issues for the child, as well as for their family and community. Suitably qualified First Nations members could also be child protection experts. Matters relevant to the appointment of QCAT members include 'the need for membership of the tribunal to include Aboriginal people and Torres Strait Islanders', as well as 'the range of knowledge, expertise and experience of members of the tribunal'.[12]

The Tribunal must make decisions in the best interests of the child. This is determined by considering relational, legal, placement and cultural considerations in ensuring stability, safety and permanency. It is essential for the Tribunal to understand the unique needs of the child before it who has experienced trauma and disrupted attachments. This is particularly important when making decisions in stay applications, for example, that could result in the immediate removal or return of a child to a placement.

Applying therapeutic jurisprudence to child protection matters

As noted above, the parties to a proceeding may include child safety officers, the child, the child's parents, other family members, and the child's carers. The importance of the relationship between these parties for the wellbeing of the child cannot be overstated.

12 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 183(6)(b) and (d).

Tribunals are their own ecosystems, and how a member treats the participants can have therapeutic or anti-therapeutic effects. Exchanges within the proceedings can help set the tone for the relationship between the parties moving forward — in following the case plan or any agreement reached in the tribunal.

As Lens, Katz and Suarez noted, this is particularly true of child safety officer interactions.[13] Negative tribunal interactions, in which departmental officers are treated disrespectfully and as less than competent, can undermine the officers' authority and give parents justification to question or challenge the fairness of their requests.

Applicant parents or carers must also be treated with respect, using plain English and ensuring proper understanding of the proceedings.[14] It is not helpful to chastise applicants and point out their parental failing. While it is important that they are held to account for their behaviour and actions, positive interactions acknowledging their efforts and progress will encourage their parenting strengths and their relationships with child safety officers.

Positive tribunal interactions, in which departmental officers and applicants are treated as valued and competent, can enhance the relationship between parents and the department and encourage a model of cooperative action towards a shared goal.

Many reviewable decisions are made by the department through 'family-led decision making' practice. This practice approach, which is described in the *Child Safety Practice Manual*,[15] is one in which families are supported to take the lead in making decisions and in taking action to meet the safety, belonging and wellbeing needs of the child or young person. This approach has been developed from a New Zealand model. This is particularly important for Aboriginal and Torres Strait Islander families, as it ensures a focus on creating a culturally safe space and mapping kinship networks.

The compulsory conference for child protection review applications in QCAT is a facilitative mediation process that encourages the participation of, and gives voice to, families and carers to resolve issues directly with the department during the conference. This is a therapeutic jurisprudence approach to applying the law in the review of decisions.

Sometimes there are other underlying concerns that relate to the decision under review. For example, it may be that a contact decision is under review, but the heart of the concerns for the family are poor communication with the department. They may feel that they have little information about their children, such as school reports and photos, or want to be more involved in their children's lives, such as by attending health and medical appointments with them or simply knowing how they are.

From the department's perspective, while child safety officers might be trying to work with parents to build capacity for children safely to return home, such officers could also be receiving constant email and abusive phone calls from disgruntled families. Parents may

13 Vicki Lens, Colleen Katz and Kimberly Suarez, 'Case Workers in Family Court: A Therapeutic Jurisprudence Analysis' (2016) *Children and Youth Services Review* 107.

14 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29.

15 Queensland Government, *Child Safety Practice Manual* (2022) <https://cspm.csyw.qld.gov.au/>.

not be attending contact when arranged, leaving children disappointed; or drug screens that would demonstrate abstinence and ensure safety for children during contact may not be undertaken.

A better understanding of the position of the applicant and expectations of the respondent can be determined during the compulsory conference.

Often these types of arrangements are captured in agreements made by the parties in the compulsory conference. These conferences are particularly successful in achieving resolutions. Few applications progress to hearing — most are withdrawn at the compulsory conference — which highlights the importance of a therapeutic and facilitative mediation approach.

The process must focus on the ongoing relationship between the child and their family and the ongoing working relationship between the department and the family. If good communication strategies can be developed, with a clear plan about working together, this may increase the quality of both the decisions themselves and the way in which they are made. This is a protective jurisdiction but also a therapeutic jurisdiction.

For applicant parents and carers, they see that the department is held accountable for its decisions and actions at the compulsory conference, feel listened to, and have an opportunity to try to achieve a better outcome.

Parents sometimes express that they consider they are reaching case plan goals — returning clean drug screens, attending parenting courses — but there is no acknowledgement of this or a sense that they are any closer to improving contact arrangements or achieving reunification. Tribunal members, by acknowledging the progress of parents and reflecting this back to the department, can have an impact on parents and their working relationship with the department.

In child protection, unlike in other jurisdictions, the applicant and the respondent department need to have an ongoing working relationship for the duration of the child protection order. In some cases, that is until the children reach 18 years of age. This relationship must be preserved in the best interests of the children, so that goals such as reunification or greater contact can be achieved.

Implications for legal representatives

The duty of a legal representative to act in their client's interests in a child protection proceeding is no different from their duty in any other proceeding. However, whether a legal representative is acting for the child,[16] a parent, a family member, a carer or the chief executive,[17] we contend that the interests of their respective clients will be enhanced by adopting a collaborative approach rather than an adversarial one. It bears repeating that the

16 Children and young people can be directly represented if they are *Gillick* competent (*Gillick v West Norfolk AHA* [1986] AC 112) to give instructions or be represented by a separate representative through a grant of legal aid.

17 The chief executive is represented by a legal officer from Court Services.

paramount consideration in a child protection proceeding is the safety, wellbeing and best interests of the child.

Consistent with what we have outlined above, we consider that on the occasions that legal representatives do appear for applicants, they have a role in preparing their client to speak on their own behalf in the proceedings to the greatest extent possible. This maximises the client's involvement in the hearing (*voice*), and their sense of investment in the outcome (*self-determination*). We accept that there may be some issues where it is more desirable for a legal representative to speak on behalf of the client, such as points of legal interpretation or where the applicant is disadvantaged or particularly vulnerable.

Legal representatives also have a role in discussing with their client the views of other parties, insofar as they are known, prior to the proceeding; or to 'reality test' with them the prospects of success in achieving what they are wanting from the department. Being able to acknowledge another party's views ('validation'), even when they disagree with them, can open doors which might lead to favourable outcomes beyond the conference or hearing itself. We consider that legal representatives should also attempt to model a non-confrontational way of expressing disagreement with other parties ('respect'). In this regard, the role of the court services representative as the model litigant to assist the tribunal and the parties is also critical.

Conclusion

Legal representatives and tribunal members should not underestimate the effect that the tribunal process, decisions and reasons can have on children and families. They can also have an inherent therapeutic value. We have seen that insight into the vulnerability of families and the trauma of child protection decisions on them, and the words said to them, can have an important impact.

It is critical and good practice to be up-front about the child protection concerns, giving applicants the chance to be accountable and listening to them, while acknowledging their stress and trauma and the progress they have made. It gives them some hope and encourages their parental efforts to improve their situation in the future. Facilitating agreements with clear communication and plans may increase better and participative decision-making in the future.

When best practice is followed, child protection is both a protective and a therapeutic jurisdiction.

Is administrative law becoming less important in environmental law litigation?

*Dr Cristy Clark**

On 19 July 2022, the Minister for the Environment released the 2021 *State of the Environment Report*. The damning assessments made in the report provide some insight into why the former government may have refused to release it earlier. As the Minister noted, it makes confronting reading.

Front and centre in this report is the impact of climate change on our environment and society — including extreme weather events, increased biodiversity loss, poorer air quality, and coral bleaching.[1] However, despite this reality, Australian politics still remains captive to the mineral resource extractive industry, and our new government remains committed to approving new coalmines despite mounting community opposition and the evidence that this is simply unsustainable.[2] This recalcitrance — both here and globally — has forced the community to resort to litigation in an attempt to compel necessary action.

Historically, much of this kind of litigation in Australia would have relied on administrative law. This article explores why administrative law may be becoming less significant — or, at least, less useful — and consider some of the alternative areas with which people are engaging. It concludes by considering the kinds of changes that could make administrative law more useful to communities that are seeking to protect the environment from the impacts of climate change.

Declining relevance of administrative law

There are myriad reasons why administrative law has not been an effective means of protecting the environment — especially in relation to climate change. They include:

- the limited availability of merits review;[3]
- the tendency to give more weight and credence to claimed economic benefits;[4]
- the challenges of establishing a causal link between the emissions of a development and the larger, cumulative problem of climate change;[5] and

* Dr Cristy Clark is an Associate Professor, University of Canberra, Faculty of Business, Government and Law.

1 Blair Trewin, Damian Morgan-Bulled and Sonia Cooper, 'Australia State of the Environment 2021: Climate' in *Australia State of the Environment 2021* (Commonwealth of Australia, 2021).

2 Catie McLeod, 'Environment Minister Throws Support behind Mining Industry after "Shocking" Report', *News.com.au*, 19 July 2022 <https://www.news.com.au/technology/environment/environment-minister-throws-support-behind-mining-industry-after-shocking-report/news-story/5e2630779ead897066ca3a3648ca50d5>.

3 External merits review is not available for decisions made under the EPBC Act, and, while merits review is possible under NSW law, for example, it is not available where a public hearing has been held and an application has been assessed by the Independent Planning Commission (*Environmental Planning and Assessment Act 1979* (NSW) s 8.6) — which is a common process for coalmine approvals in NSW.

4 See, eg, Sandra Cassotta, Vladimir Pacheco Cueva and Malayna Raftopoulos, 'A Case Study of the Carmichael Coal Mine from the Perspectives of Climate Change Litigation and Socio-Economic Factors' (2021) 17 *Law, Environment and Development Journal* 67–71.

5 Ibid 63. On a global level, see Friederike EL Otto et al, 'Causality and the Fate of Climate Litigation: The Role of the Social Superstructure Narrative' (2022) *Global Policy* (publication forthcoming).

- the reluctance to consider Scope 3 emissions (emissions made elsewhere by burning the stuff we dig up here).[6]

Sometimes the omission of Scope 3 emissions has been dictated, such as when the merits review jurisdiction is restricted specifically to 'mining activity'.[7] A further reason is the common acceptance of the so-called 'drug dealer's defence', in which courts have accepted claims that if market demand for coal is not met by the proposed activities, it will be filled by coal mined from elsewhere.[8] All of this leads to a situation in which only Scope 1 (direct) and (sometimes) Scope 2 (those created by inputs to the project) emissions are considered, and those tend to be insufficient to justify the imposition of strong conditions or overturning the approval of a proposed mining project.

A further legislative limitation is the fact that climate change and greenhouse gas emissions are not considered to be 'matters of national environmental significance' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), and are not explicitly referenced as 'relevant factors' for the purposes of many state government decisions under laws such as the *Environmental Planning and Assessment Act 1979* (NSW) and the *Mining Act 1992* (NSW).[9] As a result, these issues must be drawn in by implication. For decisions under the EPBC Act, this means that impacts on biodiversity or the Great Barrier Reef tend to be relied on as a proxy — an approach that has yet to be successful.[10] Similarly, when litigants seek to challenge state government decisions, they are often forced to argue that climate change and greenhouse gas emissions fall within the bounds of the 'public interest', general considerations of environmental impact or the principles of 'ecologically sustainable development'. Thus far, such claims have met with very limited success.[11] Even where there is a legislative requirement to 'have regard to' relevant national

6 In the state context, see, eg, *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221; *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-op Ltd* [2012] QLC 13. In the Commonwealth context, see, eg, *Australian Conservation Foundation Inc v Minister for the Environment and Energy* [2017] FCAFC 134.

7 Murray Raff, 'Climate Change Litigation in Australia' (2021) 12(4) ANU Centre for European Studies Briefing Paper series, citing *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-Op Ltd* (n 6) 598; *Hancock Coal Pty Ltd v Kelly and the Department of Environment and Heritage Protection (No 4)* [2014] QLC (2014) 12; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48; *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No 4)* [2017] QLC 24.

8 See, eg, *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-Op Ltd* (n 6) 598; *Hancock Coal Pty Ltd v Kelly and the Department of Environment and Heritage Protection (No. 4)* (n 7); *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* (n 7); *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No 4)* (n 7); *Hancock Galilee Pty Ltd v Currie* [2017] QLC 35.

9 Or the equivalent elsewhere, such as the *Environmental Protection Act 1994* (Qld) and the *Mineral Resources Act 1989* (Qld).

10 The Federal Court had yet to find a sufficient connection between the emissions of a mining project and the impacts of climate change on matters of national significance recognised by the Act. See Raff (n 7) citing, for example, *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2008) 244 ALR 87; *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (n 6).

11 For example, the question of whether the impacts of climate change are relevant to a determination of 'the public interest' has been answered inconsistently over the years, but Chief Justice Preston answered it in the affirmative in *Gloucester Resources Ltd v Minister for Planning* [2019] 7 NSWLEC 7. Furthermore, the principles of 'ecologically sustainable development' have thus far been found to include only Scope 1 and 2 emissions; *Coast and Country Association of Queensland Inc v Smith*; *Coast and Country Association of Queensland Inc v Minister for Environment and Heritage Protection* [2015] 260 QSC 36. For further details, see Raff (n 7).

and state policies on greenhouse gas emissions, it has been determined that just considering them (rather than, for example, upholding those commitments) is sufficient.[12]

Industry pressure and government amendment

Many of these limitations could be remedied through legislative amendment. However, we tend to see the exact opposite: when a decision is made in favour of environmental protection, it is often met with backlash from industry, and the government responds with legislative amendment.

There are multiple examples of this tendency,[13] but the most notorious was the political reaction that followed the 2015 decision in the Adani case.[14] In response to the consent orders in that case, the government moved to limit standing under the EPBC Act to those 'persons aggrieved by the decision', in an attempt to limit the capacity of environmental groups to challenge mining projects under the Act.[15] While the amendment Bill never passed, the rhetoric from the Minerals Council and the government was extraordinary. Minister Hunt described the Mackay Conservation Group's case as being part of an illegitimate coordinated strategy amongst environmental groups to use 'green lawfare' to 'disrupt and delay key projects and infrastructure'.[16] Similarly, Attorney-General Brandis characterised the case as 'vigilante litigation by people … who have no legitimate interest other than to prosecute a political vendetta against development and bring massive developments … to a standstill'.[17]

Community expectations

Arguably, the Australian community has a very different conception of who has a 'legitimate interest' in relation to these kinds of projects. Since the mid-2000s, there has been a marked increase in visible community concern over the impact of resource extraction.[18] Relatedly, the Australian community has increasingly demonstrated an expectation that it will be provided with the opportunity meaningfully to participate in decisions that affect the environment, and that the science regarding climate change will be taken seriously in this context.[19]

That expectation is well supported by international environmental law, which has called for participatory rights in relation to environmental decision-making since at least the 1972 *Stockholm Declaration*.[20] Those participatory rights have been most explicitly

12 *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] 92 NSWLEC.
13 See Raff (n 7).
14 *Mackay Conservation Group Inc v Commonwealth of Australia* (Federal Court of Australia, 2015).
15 EPBC Amendment (Standing) Bill 2015.
16 Greg Hunt MP, *EPBC Amendment (Standing) Bill 2015 Second Reading Speech*, 20 August 2015.
17 'Transcript of Interview with Senator George Brandis', *SkyNews*, 16 August 2015 <https://www.attorneygeneral.gov.au/transcripts/Pages/2015/ThirdQuarter/16-August-2015-Australian-Agenda-program-SkyNews.aspx>.
18 David Turton, 'Unconventional Gas in Australia: Towards a Legal Geography' (2015) 53 *Geographical Research*; Cristy Clark, 'The Politics of Public Interest Environmental Litigation: Lawfare in Australia' (2016) 31 *Australian Environmental Review* 258.
19 Clark (n 18); Hanabeth Luke, Martin Brueckner and Nia Emmanouil, 'Unconventional Gas Development in Australia: A Critical Review of its Social License' (2018) 5 *The Extractive Industries and Society* 648.
20 *Stockholm Declaration: Report of the United Nations Conference on the Human Environment* (1973) Preamble (1), (6), (7) and Principle 1.

recognised in the *Aarhus Convention* (1998),[21] which protects:

- the right to access publicly held environmental information;
- the right to participate in environmental decision-making; and
- the right to challenge public decisions made in violation of environmental laws in court.[22]

Although Australia is not a party to the *Aarhus Convention*, the International Law Association has asserted that those principles regarding participatory rights have 'now become a general rule of international law regarding environmental management'.[23]

Looking beyond administrative law

While administrative law is a fundamentally important area of public law, it is designed to uphold the law and the status quo. This means that to seek transformative change, people have begun to explore actions moving beyond administrative law in an attempt to secure better outcomes for public-interest environmental litigation in Australia.

The Sharma case

A recent novel attempt to use private law for public-interest environmental litigation was *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*[24] ('*Sharma*'), in which eight children sought an injunction to restrain the Minister for the Environment from granting approval to the Vickery coalmine extension. The applicants claimed that the Minister owed them and other Australian children a duty of care to exercise her power under the Act with reasonable care so as not to cause them harm resulting from climate change, and that any approval would amount to a breach of that duty.

The most exciting thing about the *Sharma* case was that the legal arguments were successful at first instance, with Justice Bromberg accepting that the Minister did owe the children a duty of care and that an approval may amount to a breach. While his Honour declined to award an injunction,[25] this acceptance of the duty was significant.

However, the Minister appealed the decision on the grounds that:

1. she did not owe a duty of care to the children and, specifically, that the EPBC Act did not create such a duty; and
2. the conclusions reached by the primary judge in relation to both the impact of climate change generally, and the impact of this specific mine extension on climate change, were incorrect and reached beyond the evidence.

21 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, entered into force on 30 October 2001, United Nations Treaty Series 2161 ('Aarhus Convention').
22 Ibid, articles 4, 6–9.
23 John Dellapenna, *The Berlin Rules on Water Resources* (Report of the 71st Conference, International Law Association, 2004) 25.
24 [2021] FCA 560.
25 Ibid 499, 503–504.

The Full Court was unanimous in finding for the Minister in relation to the first point. Although each judge reached this conclusion for different reasons, all three agreed that the Minister did not owe a duty of care to the children in this case. In contrast, the Full Court unreservedly accepted the primary judge's factual findings in relation to climate change and the dangers it poses.[26]

However, the Full Court did not agree with the primary judge in relation to the reasonable foreseeability of the impact of this specific mine extension on climate change (or the 'causal nexus' between the mine extension and the impact of climate change on Australian children). Chief Justice Allsop and Justice Wheelahan both focused on an issue that has arguably plagued public-interest litigation in Australia: the issue of the separation of powers or institutional capacity. Both judges concluded that imposing a duty of care on the Minister would force the court into the role of re-evaluating, changing or maintaining 'high public policy', which is not the role of the judiciary.[27] Nonetheless, Justice Beach explicitly rejected those institutional capacity concerns and concluded, 'I accept that policy questions are involved. But whatever they may be, they can adequately be dealt with.'[28]

Ultimately, the appeal was a blow to the potential of private law to offer a new avenue for public-interest environmental litigation in Australia. Nonetheless, there appears to be room in the reasoning of all three judges for finding a duty of care in a different case where there is a closer causal relationship between the risk and the harm. Furthermore, the case represents a high-water mark in terms of the acceptance of climate science in litigation concerning the EPBC Act.

One case that may take advantage of this potential is *Pabai Pabai v Commonwealth*. In this case, two Torres Strait Islanders have taken the Australian Government to court, claiming that it owes a duty of care to protect the people, islands and culture of the Torres Strait from climate change.[29] The petitioners have grounded that claim in the law of torts, but also in the Torres Strait Treaty and their native title rights. This case raises a number of unique legal issues, and the decision in *Sharma* may not be determinative in regard to how it ends up playing out in court.

Human rights

Another group of Indigenous people from the Torres Strait — the 'Torres Strait Eight' — have also lodged a petition against the Australian Government in relation to climate change.[30] This group has taken its petition to the UN Human Rights Committee, alleging that Australia is violating their rights under the *International Covenant on Civil and Political Rights* due to the impact of the government's failure to address climate change on their rights to culture, privacy and life.

26 *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 35, [1]–[2] per Allsop CJ.
27 Ibid [260]–[266].
28 Ibid [633].
29 *Pabai Pabai & Anor v Commonwealth of Australia — Concise Statement* [2022] Federal Court of Australia VID622/2021.
30 Sophie Marjanac and Sam Hunter Jones, 'Are Matters of National Survival Related to Climate Change Really beyond a Court's Power?' (2020) *Open Global Rights* <https://www.openglobalrights.org/matters-of-national-survival-climate-change-beyond-courts/>.

This link between human rights and the environment is receiving increasing global recognition, including at the UN Human Rights Council, which passed a resolution last October recognising the right to a clean, healthy and sustainable environment.[31] On 26 July 2022, the UN General Assembly made a declaration along similar lines,[32] and moves are underway in the ACT to give serious consideration to the inclusion of this right in the *Human Rights Act 2004* (ACT).[33] That would bring the ACT into line with the global norm, since 'around 80 per cent of UN member States [already recognise] the right to a healthy environment in constitutional or legislative texts.'[34]

The right to a healthy environment can contain both substantive and procedural obligations. Substantive obligations might, for example, impose a duty on the government to protect, preserve and improve the environment for the benefit of the community (in much the same way as claimed by the applicants in *Sharma* and the Torres Strait Island cases), while procedural obligations would likely reflect those participatory rights set out in the *Aarhus Convention*.[35]

The ACT has been a leader in relation to the legislative protection of human rights in Australia, but Victoria and Queensland also have human rights instruments[36] and have shown themselves to be willing to follow developments in international jurisprudence. A test for Queensland is currently before the court with the Waratah Coal case.[37] In that case, the applicants have contended that the grant of a mining lease (in the Galilee Basin) would be incompatible with the *Human Rights Act 2019* (Qld). Absent an explicit right to a healthy environment, the applicants have grounded their claim in a range of other rights recognised under the Act, including the rights to privacy and life and the cultural rights of Aboriginal and Torres Strait Islander peoples.

The community concern reflected in this explosion of novel litigation can also be seen in escalating community protest action. In this context, we have witnessed an unfortunate trend of increasingly draconian anti-protest laws being passed in response,[38] which highlights the connection between the right to protest and environmental rights.[39] Perhaps the best

31 *Resolution 48/13 The Human Right to a Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/RES/48/13 (United Nations Human Rights Council, 8 October 2021).

32 United Nations General Assembly, 'The Human Right to a Clean, Healthy and Sustainable Environment', UN Doc A/76/L.75.

33 Justice and Community Safety Directorate, *Right to a Healthy Environment Discussion Paper: Public Consultation to Inform Consideration of the Introduction of a Right to a Healthy Environment in the Human Rights Act 2004* (ACT Government, 30 June 2022).

34 UN Special Rapporteur on Human Rights and the Environment, *Good Practices in Implementing the Right to a Healthy Environment* (2020) <http://www.srenvironment.org/report/good-practices-in-implementing-theright-to-a-healthy-environment-2020>.

35 See nn 15–16 above.

36 *Charter of Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

37 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 4)* [2022] QLC 3 (Land Court of Queensland, 18 March 2022).

38 *Summary Offences and Other Legislation Amendment Act 2019* (Qld); *Roads and Crimes Legislation Amendment Act 2022* (NSW); *Police Offences Amendment (Workplace Protection) Act 2022* (Tas); *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth).

39 *Australia: Climate Protesters' Rights Violated — Disproportionate Punishments, Excessive Bail Conditions* (Human Rights Watch, 22 June 2022) <https://www.hrw.org/news/2022/06/22/australia-climate-protesters-rights-violated>.

known case in this category is *Brown v Tasmania*,[40] in which the High Court invalidated the *Workplaces (Protection from Protesters) Act 2014* (Tas)[41] as an impermissible burden on the implied freedom of political communication. Since that judgment, however, many governments have passed laws that criminalise peaceful protest (and specifically target environmental protesters).[42] Litigation to challenge the validity of at least some of these laws is already being considered.

Finally, litigants are also taking claims directly against the resource extractive industry. The Australasian Centre for Corporate Responsibility is taking action against Santos by arguing that its claims that natural gas is a 'clean fuel' that provides 'clean energy', and that it has a credible pathway to net zero emissions by 2040, constitute misleading and deceptive conduct under the *Corporations Act 2001* (Cth) and the Australian Consumer Law.[43]

Glimmers of hope for administrative law

Of course, while these alternative pathways for legal action are opening up out of community desperation to participate in environmentally significant decisions — a desperation that is only increasing as the impacts of climate change become more evident and serious — this doesn't mean that administrative law is no longer relevant to public-interest environmental litigation. A key takeaway from these developments is the need for improvements in administrative law jurisprudence concerning environmental law. In response to this evident need, this concludes by considering a few glimmers of hope that such improvements are already in development.

Gloucester

The first of those glimmers is Chief Justice Preston's progressive decision in *Gloucester Resources Ltd v Minister for Planning*[44] ('*Gloucester*'), which reversed a significant number of the problematic approaches considered above, including by considering the impact of the Scope 3 emissions of the proposed Rocky Hill Coal Project as part of its assessment of the project and decision to uphold the Minister's refusal to grant approval, and accepting that those emissions are contributing to a wide range of environmental impacts.[45]

In this decision, Preston CJ took Australia's and NSW's commitments under the Climate Change Convention and the Paris Agreement into consideration and, relatedly, adopted a carbon budget approach to determining the significance of the project's greenhouse gas emissions,[46] and used that lens to take cumulative impacts seriously. In doing so, his Honour also rejected the 'market substitution' argument (or so-called drug dealer's defence) that, if the coal were not supplied by this project, then it would simply be supplied to market from another mine.[47]

40 *Brown v Tasmania* (2017) 261 CLR 328.
41 *2014* (Tas).
42 *Summary Offences and Other Legislation Amendment Act 2019* (Qld); *Roads and Crimes Legislation Amendment Act 2022* (NSW); *Police Offences Amendment (Workplace Protection) Act 2022* (Tas); *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth).
43 *Australasian Centre for Corporate Responsibility v Santos Limited* (Federal Court of Australia).
44 *Gloucester Resources Ltd v Minister for Planning* (n 11).
45 Ibid 435.
46 Ibid 526.
47 Ibid 538.

Finally, his Honour adopted a sceptical approach to the developer's claims about hypothetical offsets and projected economic benefits by refusing to accept that the project's emissions would be offset by a variety of projected reductions from 'some unspecified and uncertain action at some unspecified and uncertain time in the future',[48] and by determining that the developer had overstated the economic benefits, with the result that they did not justify the environmental and social impacts of the mine.

Bushfire Survivors for Climate Action

In another decision,[49] Preston CJ found that the New South Wales Environment Protection Authority (EPA) had failed to fulfil its statutory duty to protect the environment from the threat of climate change, because none of the instruments it presented adequately provided for that protection.[50] In this case, the applicants had relied on s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) ('POEA Act'), which provides that the EPA is required to 'develop environmental quality objectives, guidelines and policies to ensure environment protection'. The Court referred to the objectives of the EPA in determining the nature and scope of the duty contained in s 9(1)(a). Those objectives are set out in s 6(1) of the POEA Act and include a requirement 'to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development'.[51] Preston CJ then drew on evidence from a range of sources, including the most recent report of the Intergovernmental Panel on Climate Change, to determine that the principles of ecologically sustainable development necessarily include protecting the environment from the effects of climate change.[52] As a result, his Honour ordered the EPA 'to develop environmental quality objectives, guidelines and policies to ensure environmental protection from climate change' and to pay the costs of the applicants.

Sharma

As mentioned above, despite the loss in relation to the recognition of a duty of care, *Sharma* has broken new ground in terms of the unequivocal acceptance of the science of climate change, including both its causes and its impacts. Allsop CJ, for example, began his judgment by noting that the facts of climate change were not in dispute and were largely admitted by the Minister:

> The threat of climate change and global warming was and is not in dispute between the parties in this litigation … Evidence was led [at the trial that] … by and large, the nature of the risks and the dangers from global warning, including the possible catastrophe that may engulf the world and humanity was not in dispute.[53]

This staunch approach to the evidence could well prove significant for future litigation under the EPBC Act — so long as the issue of causation is easier to establish.

48 Ibid 529–530.
49 *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* [2021] NSWLEC 92.
50 Ibid 142.
51 Ibid 41.
52 Ibid 60.
53 *Minister for the Environment v Sharma (No 2)* (n 26) [1]–[2].

Legislative reform

Finally, of course, there is also the possibility of legislative reform. One option would be to add a climate trigger to the EPBC Act. The Minister did not rule this out when asked about it at the National Press Club on 19 July 2022, but she did say that the government planned to focus on the recommendations of the Samuel report, which did reject such a trigger. Nonetheless, the idea has been picked up by the cross-bench and may well end up on the agenda as negotiations on climate legislation continue.[54]

While all areas of law are relevant to the climate crisis, the community has a legitimate expectation that public law will function to hold government (and industry) to account if they continue to act contrary to the best available scientific evidence and against the public interest. Therefore, it is now up to us — as lawyers (and members of the judiciary) — to pick up on these hopeful glimmers, and a range of others, and to keep pushing for this necessary change. In the face of catastrophic climate change, legitimate community demand for climate justice, and government intransience, there is no other ethical option.[55]

54 Brendan Sydes, Anita Foerster and Laura Schuijers, 'The Greens' Climate Trigger Policy Could Become Law. Experts Explain How it Could Help Cut Emissions — and Why We Should be Cautious' [2022] *The Conversation* <https://theconversation.com/the-greens-climate-trigger-policy-could-become-law-experts-explain-how-it-could-help-cut-emissions-and-why-we-should-be-cautious-187998>.

55 Hon Justice Brian J Preston SC, 'Climate Conscious Lawyering' (2021) 95 ALJ 51.