AIAL FORUM

ISSUE 106 DECEMBER 2022

Australian Institute of
Administrative Law

AIAL FORUM

ISSUE 106 DECEMBER 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) 106 *AIAL Forum*.

Printed by Instant Colour Press

ISSN 1 322-9869

Printed on Certified Paper

AIAL FORUM

CONTENTS

Recent developments

Anne Thomas

Public interest disclosure reform

On 30 November 2022, the Government introduced the Public Interest Disclosure Amendment (Review) Bill 2022, which aims to strengthen protections for public sector whistleblowers.

The Bill will:

- enforce a positive duty to protect whistleblowers on principal officers and to provide ongoing training and education to public officials in their agency;
- strengthen protections for disclosures and introduce protections for witnesses, including expanding the definition of detriment that will attract remedies;
- enhance the oversight roles of the Ombudsman and Inspector-General of Intelligence and Security;
- facilitate the reporting and sharing of information related to public interest disclosures to ensure they can be properly addressed;
- improve the allocation and investigation processes for authorised officers and principal officers; and
- remove solely personal work-related conduct from the scope of disclosable conduct.

The Bill will ensure immediate improvements to the public sector whistleblower scheme are in place before the National Anti-Corruption Commission commences in mid-2023.

The Bill implements 21 of the 33 recommendations of the 2016 Review of the Public Interest Disclosure Act by Mr Philip Moss AM.

A second stage of reforms to the *Public Interest Disclosure Act 2013* is planned to commence next year to address the underlying complexity of the scheme and provide effective and accessible protections to public sector whistleblowers.

More information about the Bill can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6958>.

<https://ministers.ag.gov.au/media-centre/public-interest-disclosure-reform-30-11-2022>

Parliament votes to restore standing of the Australian Human Rights Commission

On 27 October 2022, the Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Bill 2022 was passed by Parliament and came into effect on 10 November.

The Act amends the *Australian Human Rights Commission Act 1986*, *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984* to codify a merit-based and transparent selection and appointment process for members of the Australian Human Rights Commission.

The Act ensures statutory appointments to the Commission are made through a merit-based and transparent selection process that is consistent with the United Nations General Assembly Principles relating to the Status of National Institutions, also known as the Paris Principles.

The Act will address the concerns raised by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation which has deferred the Commission's re-accreditation as an 'A'-status National Human Rights Institution.

As Australia's national human rights institution, an independent AHRC is fundamental to Australia's human rights agenda — both internationally and domestically.

More information about the Act can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6917>.

<https://www.markdreyfus.com/media/media-releases/parliament-votes-to-restore-standing-of-the-australian-human-rights-commission-mark-dreyfus-kc-mp/>

AUSTRAC CEO reappointment

The Attorney-General, the Hon Mark Dreyfus KC MP, has announced the reappointment of Ms Nicole Rose PSM as Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC). Ms Rose's two-year reappointment commenced on 13 November 2022.

Ms Rose was first appointed CEO in 2017 and has ably led Australia's financial intelligence unit and anti-money laundering and counter-terrorism financing (AML/CTF) regulator in its important role of detecting, deterring, and disrupting criminal abuse of the financial system.

Ms Rose has helped develop crucial ties between AUSTRAC and industry, including strengthening the AUSTRAC-led Fintel Alliance — a world-first public−private partnership against money laundering, terrorism financing and other serious crime.

AUSTRAC, under Ms Rose's leadership, has also undertaken several high-profile enforcement investigations and actions against both the banking and casino sectors. This includes a $1.3 billion penalty order for 23 million contraventions of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* — the largest ever civil penalty in Australian history.

We congratulate Ms Rose on her reappointment.

<https://ministers.ag.gov.au/media-centre/austrac-ceo-reappointment-07-10-2022>

Appointment to the High Court of Australia

The Governor-General, His Excellency General the Hon David Hurley AC DSC (Retd), has appointed the Hon Justice Jayne Jagot as a Justice of the High Court of Australia.

Justice Jagot commenced on 17 October 2022 upon the retirement of the Hon Justice Patrick Keane AC, who retired after nine years of distinguished service on the High Court.

Justice Jagot is the 56th Justice of the High Court and the seventh woman appointed to the Court.

Justice Jagot is regarded as an outstanding lawyer and an eminent judge. She previously served as a Judge of the Federal Court of Australia.

We congratulate Justice Jagot on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-high-court-australia-29-09-2022#:~:text=Justice%20Jagot%20will%20commence%20on,High%20Court%20will%20be%20women.>

National Anti-Corruption Commission Act 2022

On 28 September 2022, the Attorney-General, the Hon Mark Dreyfus KC MP, introduced the National Anti-Corruption Commission Bill 2022 into the House of Representatives. The Bill passed on 30 November 2022 with a number of Government amendments. The Act establishes a transparent and independent National Anti-Corruption Commission that will investigate and report on serious or systemic corruption in the Commonwealth public sector.

Specifically, the National Anti-Corruption Commission, once formally stood up, in accordance with the Act, will:

- operate independently of government and have broad jurisdiction to investigate serious or systemic corrupt conduct across the Commonwealth public sector;
- have the power to investigate ministers, parliamentarians and their staff, statutory officer holders, employees of all government entities, and contractors;
- have discretion to commence inquiries on its own initiative or in response to referrals from anyone, including members of the public and whistleblowers. Referrals can be anonymous;
- be able to investigate both criminal and non-criminal corrupt conduct, and conduct occurring before or after its establishment;
- have the power to hold public hearings; and
- have a mandate to prevent corruption and educate Australians about corruption.

The definition of corrupt conduct is central to the Commission's jurisdiction and encompasses conduct by a public official that involves an abuse of office, breach of public trust, misuse of information or corruption of any other kind. It also includes conduct by any person that could adversely affect the honest or impartial exercise of a Commonwealth public official's functions.

Other conduct that could adversely affect public administration, such as external fraud, will continue to be dealt with by existing integrity agencies.

The Commission will be the lead Commonwealth agency for the investigation of serious or systemic corruption and will work in partnership with other agencies that form part of the Commonwealth's broader integrity framework, including the Australian Federal Police and the Australian Public Service Commission.

The Commission will have the power to refer corruption issues to other Commonwealth, state and territory agencies for their consideration — for example, where an issue involves broader criminality or official misconduct that falls within the jurisdiction of another independent investigative agency.

The Commission will be able to hold public hearings in exceptional circumstances and if satisfied it is in the public interest to do so. The default position is that hearings will be held in private.

The Commission will be able to conduct investigations on its own initiative or in response to referrals or allegations from any source.

Agency heads will be required to report any corruption issue in their agency to the Commission if they suspect it could be serious or systemic.

The legislation also ensures that there are appropriate safeguards against undue reputational damage and provides protections for whistleblowers and journalists.

A multi-partisan parliamentary joint committee is to oversee the Commission and is empowered to require the Commission to provide information about its performance. The committee will be responsible for approving the appointments of the Commissioner, the Deputy Commissioners and the Inspector. The Inspector is to deal with any corruption issues arising in the Commission and complaints about the Commission.

The Government has committed funding of $262 million over four years for the establishment and ongoing operation of the Commission. This funding ensures that the Commission has the staff, capabilities and capacity to triage referrals and allegations it receives, conduct timely investigations, and undertake corruption prevention and education activities.

The Commission is expected to be established by mid-2023.

Prior to its enactment, the Bill was referred to the Joint Select Committee on National Anti-Corruption Commission Legislation. The Committee reported on the Bill on 10 November 2022. The report can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Anti-Corruption_Commission_Legislation/NACC/Report>.

The Act and second reading speech can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6917>.

<https://ministers.ag.gov.au/media-centre/speeches/national-anti-corruption-commission-bill-2022-28-09-2022>

Government takes steps to eliminate sexual harassment in Australian workplaces

The Government introduced the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 on 27 September 2022. It was passed on 28 November 2022.

This Act implements seven legislative changes recommended by Sex Discrimination Commissioner, Kate Jenkins.

Specifically, the Act:

- places a positive duty on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible;
- strengthens the Australian Human Rights Commission with new functions to assess and enforce compliance with this new requirement, including the capacity to give compliance notices to employers who are not meeting their obligations;
- expressly prohibits conduct that results in a hostile workplace environment on the basis of sex; and
- ensures Commonwealth public sector organisations are also required to report to the Workplace Gender Equality Agency on its gender equality indicators.

The Government is committed to finalising implementation of all recommendations of the Respect@Work Report as a matter of priority.

The Minister for Employment and Workplace Relations, the Hon Tony Burke MP, is separately progressing the inclusion of a prohibition on sexual harassment in the *Fair Work Act 2009* (Cth).

The Act was referred to the Senate Legal and Constitutional Affairs Legislation Committee prior to its passage. The Committee's report of the 3 November 2022 can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RespectatWork2022/Report>.

The Bill and second reading speech can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6916>.

<https://ministers.ag.gov.au/media-centre/government-takes-steps-eliminate-sexual-harassment-australian-workplaces-27-09-2022>

Consultation begins on the National Principles to Address Coercive Control

At the 12 August 2022 meeting of Attorneys-General, all jurisdictions agreed to take collective action to address family, domestic and sexual violence. The meeting endorsed a consultation draft of National Principles to address the pattern of abusive behaviour designed to create power and dominance over another person or persons (coercive control).

The draft National Principles to Address Coercive Control are now available for public consultation.

The National Principles will help to create a shared national understanding of coercive control — a pattern of abusive behaviour that a perpetrator uses to create and keep power over another person or persons.

The consultation process is open to everyone. Consultation will also include targeted roundtable discussions and further advice from an Advisory Group comprised of victim-survivor advocates, family and domestic violence experts, and representatives of people at increased risk of coercive control.

The consultation process closed on Friday, 11 November 2022. To access the draft National Principles, visit <https://consultations.ag.gov.au/families-and-marriage/coercive-control/>.

<https://ministers.ag.gov.au/media-centre/consultation-begins-national-principles-address-coercive-control-16-09-2022>

Nomination of Judge Hilary Charlesworth to the International Court of Justice

Her Excellency Judge Hilary Charlesworth has been nominated for re-election as a Judge of the International Court of Justice. The election will take place at the United Nations Headquarters in New York in late 2023.

The Australian National Group will formally nominate Judge Charlesworth as a candidate for the election when nominations open in early 2023. The Australian National Group is an independent body of esteemed Australian jurists who serve as Members of the Permanent Court of Arbitration in The Hague.

Judge Charlesworth is an outstanding candidate, and an eminent scholar and jurist who has made an exceptional contribution to the study and practice of international law. She currently serves as a Judge of the Court after securing a decisive win in elections held in November

2021 following the death of Australian Judge James Crawford, who served as a judge of the Court from February 2015 until his death. Judge Charlesworth is the first Australian woman elected to the Court and only the fifth female permanent judge in the Court's 77-year history.

We congratulate Judge Charlesworth on her nomination.

<https://ministers.ag.gov.au/media-centre/nomination-judge-hilary-charlesworth-international-court-justice-02-09-2022>

Establishment of inquiry into the appointment of the Hon Scott Morrison MP to multiple departments

On 26 August 2022, the Government announced the appointment of the Hon Virginia Bell AC to lead an inquiry into the appointment of former Prime Minister Scott Morrison MP to administer departments other than the Department of the Prime Minister and Cabinet and related matters.

The Solicitor-General's legal advice publicly released on the matter found that the principles of responsible government were fundamentally undermined by the actions of the former Morrison government. The inquiry seeks to restore and strengthen public trust in Australian democracy.

Specifically, the inquiry examined and reported on the facts and circumstances surrounding Mr Morrison's appointment to five departments during 2020 and 2021 and the implications arising from them. It also examined and reported on the practices and policies which apply to ministerial appointments and recommended procedural or legislative changes to provide greater transparency and accountability.

The Terms of Reference are at <https://www.ag.gov.au/about-us/publications/inquiry-multiple-ministerial-appointments>.

The Commissioner reported to the Prime Minister on 25 November 2022. On 30 November 2022, the House of Representatives passed a rare censure motion (86:50) against the former Prime Minister.

Text of the censure can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/26233/&sid=0013>.

<https://ministers.ag.gov.au/media-centre/establishment-inquiry-appointment-hon-scott-morrison-mp-multiple-departments-26-08-2022>

Establishment of the Royal Commission into Robodebt

The Governor-General, His Excellency General the Hon David Hurley AC DSC (Retd), has issued Letters Patent establishing a Royal Commission into the former debt assessment and recovery scheme known as Robodebt.

The Commission will examine, among other things:

- the establishment, design and implementation of the scheme; who was responsible for it; why they considered Robodebt necessary; and any concerns raised regarding the legality and fairness;
- the handling of concerns raised about the scheme, including adverse decisions made to the Administrative Appeals Tribunal;
- the outcomes of the scheme, including harm to vulnerable individuals and the total financial cost to government; and
- measures needed to prevent similar failures in public administration.

The Commission's focus will be on decisions made by those in senior positions. The full scope of the inquiry is outlined in the Royal Commission's Terms of Reference at <https://robodebt.royalcommission.gov.au/about/terms-reference>.

Catherine Holmes AC KC has been appointed the Royal Commissioner. Ms Holmes is a former Chief Justice of the Supreme Court of Queensland.

The Government has allocated $30 million for the Royal Commission and the final report will be delivered to the Governor-General by 18 April 2023.

<https://ministers.ag.gov.au/media-centre/establishment-royal-commission-robodebt-25-08-2022>

Review of the Commonwealth Modern Slavery Act 2018

The Government has released for public consultation an issues paper on the effectiveness of the first three years of the *Modern Slavery Act 2018*. The issues paper is part of the statutory review of the Act being completed by Emeritus Professor John McMillan AO.

The review will assist to inform the government's commitments to tackling modern slavery, including the appointment of an Anti-Slavery Commissioner to work with business, civil society, NGOs and state and territory governments to identify and address modern slavery risks in business operations and global supply chains.

The issues paper has revealed significant engagement by business and society with the Modern Slavery Act, with more than 6,000 entities reporting under the Act. However, there is still significant work to do to improve compliance with the Act.

The Government has committed to introducing penalties for noncompliance, which aim to hold eligible companies to account.

The three-month consultation period for the review closed on 22 November 2022.

The issues paper can be viewed at <https://consultations.ag.gov.au/crime/modern-slavery-act-review/>.

The review will be completed by 31 March 2023. The final report will be tabled in Parliament.

<https://ministers.ag.gov.au/media-centre/review-commonwealth-modern-slavery-act-2018-22-08-2022>

Australia joins the Global Cross-Border Privacy Rules Forum

The Government has announced Australia has joined the Global Cross-Border Privacy Rules Forum (Global CBPR), a multilateral initiative that aims to better facilitate the flow of data across borders.

The Global CBPR will establish a certification system to help companies demonstrate compliance with internationally recognised data privacy standards. The forum builds on the APEC CBPR formed in 2011 and is open to participation by non-APEC members.

The Government 'encourages interoperability and cooperation between economies to help bridge differences in data protection and privacy frameworks. We support the development of an open and reliable digital trade environment that strengthens consumer and business trust in digital transactions and promotes global trade by facilitating the secure flow of data'.

<https://ministers.ag.gov.au/media-centre/australia-joins-global-cross-border-privacy-rules-forum-17-08-2022>

Meeting of Attorneys-General progresses actions to address family, domestic and sexual violence

The first meeting of Attorneys-General under the Albanese government was held on 12 August 2022. At the meeting there was agreement on collective action to address family, domestic and sexual violence. The meeting endorsed a Consultation Draft of National Principles to address the pattern of abusive behaviour designed to create power and dominance over another person or persons (coercive control). The principles represent a significant step towards a shared national understanding of coercive control.

The Draft National Principles will be released for public consultation shortly. Further information can be found on the Attorney-General's Department website at <https://www.ag.gov.au/families-and-marriage/families/family-violence>.

The meeting also endorsed the five-year Work Plan to Strengthen Criminal Justice Responses to Sexual Assault. The plan urges states and territories to work together to improve the experiences of victim-survivors in the criminal justice system and harmonise and better define laws around sexual assault. It focuses on the following priority areas:

- strengthening legal frameworks to ensure victim-survivors have improved justice outcomes and protections, wherever necessary and appropriate, across Australia;

- building justice sector capability to better support and protect victim-survivors; and
- supporting research and greater collaboration to identify best practices, and to ensure actions are supported by a sound and robust evidence base.

More information about the Work Plan can be found at <https://www.ag.gov.au/crime/sexualviolence>.

The Attorneys-General also discussed progress towards model defamation reform, issues of youth justice, and indigenous justice reform.

<https://ministers.ag.gov.au/media-centre/meeting-attorneys-general-progresses-actions-address-family-domestic-and-sexual-violence-13-08-2022>

Release of the Australian Law Reform Commission's inquiry into judicial impartiality and the law on bias

The final report of the Australian Law Reform Commission's (ALRC) inquiry into judicial impartiality and the law on bias was tabled in federal Parliament on 2 August 2022.

The Terms of Reference for this inquiry directed the ALRC to consider whether:

- the law about actual or apprehended bias relating to judicial decision-making is sufficient and appropriate to maintain public confidence in the administration of justice;
- the law provides clarity to decision-makers, the legal profession and the community about how to manage potential conflicts and perceptions of partiality; and
- the mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, are sufficient and appropriate.

The ALRC considered whether, and if so what, reforms to the laws on judicial impartiality and bias may be necessary or desirable.

The ALRC found that, in general, the Australian public has a high level of confidence in Australian judges and courts and the Australian judiciary is highly respected internationally. Moreover, the report found that the substantive law on actual or apprehended bias does not require amendment.

The ALRC made 14 recommendations to promote and protect judicial impartiality and public confidence in the Commonwealth judiciary, including:

- reforms to the procedures Commonwealth judges use to determine whether they should withdraw from a case when a party raises a potential issue of bias;
- publishing guidance on how litigants should raise issues of bias with a judge and how such issues are decided;

- establishing a Federal Judicial Commission as an additional and accessible oversight mechanism to support litigant and public confidence in judicial impartiality; and
- strengthening institutional structures to support judges and address systemic biases, including through changes to appointment procedures, judicial education, and collection of court user feedback and case data in the Commonwealth courts.

The Government will consult widely on the report and respond in due course.

The final report and further information can be accessed at <https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/>.

<https://ministers.ag.gov.au/media-centre/release-australian-law-reform-commissions-inquiry-judicial-impartiality-and-law-bias-02-08-2022>

Government response to the Australian Law Reform Commission report on judicial impartiality and the law on bias

On 29 September 2022, the Government released its response to the Australian Law Reform Commission (ALRC) Report 138 — *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, tabled in Parliament on 2 August 2022.

The ALRC report found that, in general, the Australian public has a high level of confidence in Australian judges and courts, that the Australian judiciary is highly respected internationally, and that the substantive law on actual or apprehended bias does not require amendment.

The Government's response to the report addresses the three recommendations directed to the Government and the Attorney-General.

These recommendations are that the Australian Government should:

- establish a federal judicial commission;
- develop a more transparent process for appointing federal judicial officers on merit; and
- collect, and report annually on, statistics regarding the diversity of the federal judiciary.

The Government has given in-principle support to the establishment of a federal judicial commission to address concerns about the conduct of judges and reinforce public trust in the judicial system. The establishment of a federal judicial commission is one of 14 recommendations in the report.

The Government will consult closely with the federal courts and other key stakeholders on the recommended establishment of a federal judicial commission.

The Government notes the remaining 11 recommendations directed at the federal courts, the Council of Chief Justices of Australia and New Zealand, and the Law Council of Australia. The Government will consult with these entities on these recommendations where appropriate.

The Government Response to the Report can be accessed at <https://www.ag.gov.au/legal-system/publications/government-response-australian-law-reform-commission-report-138-without-fear-or-favour-judicial-impartiality-and-law-bias>.

<https://ministers.ag.gov.au/media-centre/government-response-australian-law-reform-commission-report-judicial-impartiality-and-law-bias-29-09-2022>

7 September 2022: Publication of the Commonwealth Ombudsman's Stored Communications and Telecommunications Data Annual Report

On 7 September 2022, the Commonwealth Attorney-General, the Hon Mark Dreyfus KC MP, tabled the Commonwealth Ombudsman's report on oversight of agencies' use of stored communication and telecommunications data powers in Australia from 1 July 2020 to 30 June 2021.

Stored communications are communications that already exist and are stored on a carrier's systems. This includes items like emails and text messages. Telecommunications data is the information about a communication, but not the content of the communication itself — commonly referred to as 'metadata'. This can include subscriber information and the date, time and duration of a communication.

In 2020–21 the Commonwealth Ombudsman reviewed 20 Commonwealth, state and territory law enforcement and integrity agencies' use of these powers against the requirements of the *Telecommunications (Interception and Access) Act 1979* (Cth). The Ombudsman made 29 recommendations, 386 suggestions and 116 better practice suggestions for improvement across the agencies inspected.

During the inspections, agencies proactively identified and disclosed many issues. The Ombudsman found that most agencies were receptive to the findings and demonstrated a commitment to either building or strengthening their culture of compliance.

The report outlines the key issues and areas that were found to be critical to an agency's compliance with the Act in 2020–21. This included agencies':

- record-keeping of internal authorisations for access to telecommunications data;
- policies and procedures for checking (vetting) whether communications and data received are consistent with the parameters of the relevant warrant or authorisation;
- frameworks for use, communication, recording and destruction of communications consistent with legal requirements; and
- availability and quality of training and guidance materials to support officers in complying with legal requirements.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2022/7-september-2022-publication-of-the-commonwealth-ombudsmans-stored-communications-and-telecommunications-data-annual-report>

New laws to improve Government accountability and transparency

The Auditor-General Amendment Bill 2022 was introduced in the Western Australian Legislative Assembly on 19 October 2022 by the McGowan government. The Bill was passed on 22 November and received assent on 29 November 2022.

The Act provides the Western Australian Auditor-General with unprecedented express statutory rights to access highly sensitive Government information as part of reforms boosting public transparency and accountability.

The Auditor-General serves a critical role in public integrity, as an independent officer of the Parliament who is responsible for scrutiny of the finances and activities of state and local government entities.

The Act overcomes longstanding deficiencies in the existing legal framework that have inhibited successive Auditors-General from accessing highly sensitive information, including that which is subject to Cabinet confidentiality, legal professional privilege, and other claims of public interest immunity.

The new laws provide that the confidentiality of the material will be maintained, including by limiting the further public disclosure of material that is privileged or subject to an immunity.

The main amendments include:

- whereas previously Auditors-General have been able to access Cabinet documents only with the permission of Cabinet, a statutory right of access will exist for the first time;
- Government will give the Auditor-General access to legal advice; and
- instead of having to physically attend the Department of Premier and Cabinet to view Cabinet documents, this highly sensitive Government information will be made available in an electronically secure form in the Auditor-General's office.

The Act ensures that any matters of parliamentary privilege remain the remit of Parliament.

More information about the Act can be accessed at <https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=97E914ED65D118C8482588DF002994D6>.

<https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/10/New-laws-to-improve-Government-accountability-and-transparency.aspx>

Recent decisions

Establishing the materiality threshold for procedural fairness applicants

Nathanson v Minister for Home Affairs [2022] HCA 26

The High Court handed down its decision in the appeal on 17 August 2022. The full bench held that the appeal should be allowed, and the application remitted to the Administrative Appeals Tribunal to be heard and determined according to law.

The appellant, a New Zealand citizen, arrived in Australia in 2010 and was granted a Class TY Subclass 444 Special Category visa in 2013. In 2018, the delegate of the respondent Minister cancelled that visa pursuant to s 501(3A) of the *Migration Act 1958*. The visa was cancelled on the grounds that the delegate was satisfied that the appellant did not pass the character test in s 501(6) of the Act. At the time the appellant was serving a sentence of imprisonment for offences including depriving a person of personal liberty, aggravated assault, stealing, and driving a vehicle in a dangerous manner. The offences were considered serious and the appellant was sentenced to a period of imprisonment for two years and six months.

On 10 January 2019, a delegate of the Minister decided not to revoke the cancellation of the appellant's visa under s 501CA(4) of the Act. In making that decision the delegate was required to comply with the ministerial direction made under s 499 of the Act (Ministerial Direction 65). Ministerial Direction 65 required the decision-maker to consider as a primary consideration, among other things, 'the protection of the Australian community from criminal or other serious conduct', and in considering this also take into account the seriousness of certain offences.

The appellant applied to the Tribunal for review of the delegate's decision. On 28 February 2019, Ministerial Direction 65 was replaced by Ministerial Direction 79, which had one relevant difference, the inclusion of an additional factor for consideration in assessing the nature and seriousness of the non-citizen's conduct: the principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed. In the Minister's closing submissions to the Tribunal, the Minister contended that the appellant had been involved in violent conduct against his wife that was to be considered 'extremely serious' in light of new Ministerial Direction 79. The Tribunal did not draw the appellant's attention to this allegation or give the appellant any opportunity to address it.

On 4 April 2019, the Tribunal affirmed the delegate's decision, having found that the appellant had been involved in two incidents of violent conduct against his wife, and in light of Ministerial Direction 79 that conduct was to be regarded 'seriously'.

On 18 October 2019, Colvin J of the Federal Court of Australia dismissed the appellant's application for judicial review of the Tribunal's decision, as the course taken by the Tribunal, while procedurally unfair, did not constitute jurisdictional error as it was not material to the Tribunal's decision. The subsequent decision of the majority of the Full Court of the Federal

Court of Australia also dismissed the appellant's appeal, finding that the primary judge was correct to find that unfairness was not material, as the appellant failed to articulate a specific course of action which could have realistically changed the result.

The question on appeal before the High Court was whether the procedural unfairness by the Tribunal was in fact material such that it involved jurisdictional error. Chief Justice Kiefel and Keane and Gleeson JJ, in a joint judgment, held, in light of the decision of the Court in *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590 ('*MZAPC*'), that materiality of a breach requires consideration of whether the decision that was in fact made could have been different had the relevant condition been complied with 'as a matter of "reasonable conjecture" with the parameters set by the historical facts that have been determined' ([32]). The plurality held that the standard of 'reasonable conjecture' is undemanding and, where a Tribunal errs by denying a party a reasonable opportunity to present their case, this does not require demonstration of how that party might have taken advantage of the lost opportunity ([33]). In this case, there was no need for the appellant to establish the nature of any additional evidence or submissions that might have been presented to the Tribunal, had the hearing been procedurally fair.

Justice Gageler made the additional clarifying remark that 'the onus on which the applicant bears to establish materiality is no greater than to show that, as a matter of reasonable conjecture within parameters set by the historical acts established *on the balance of probabilities* (emphasis added), the decision *could* have been different had a fair opportunity to be heard had been afforded' ([47]). He further added that 'establishing that threshold of materiality is not onerous'.

Justice Gordon, likewise, emphasised that there was no additional or separate onus on the appellant to demonstrate that the error could realistically have resulted in a different decision ([63]). This was due to the fundamental nature of the error — denial of procedural fairness. Justice Gordon went on to note that as the majority in *MZAPC* acknowledged, there are categories of error which necessarily result in invalidity such as where the error is so egregious that it will be jurisdictional regardless of the effect the error may have had on the conclusion of the decision-maker. A serious denial of procedural fairness, such as involving a denial of an opportunity to be heard in relation to an important issue in the context of an evaluative decision (as in this case), falls into this category. However, Gordon J was unwilling to pin this down as a decisive rule; rather, she stated that whether a denial of procedural fairness would be material in all cases would depend on each situation ([78]). The more serious the error the more obvious it will be that the conjecture that the decision could have been different if a fair opportunity to be heard had been afforded is both open and reasonable ([83]).

Justice Edelman, while in agreement with the rest of the bench, noted his position taken in *MZAPC*, contrary to the primary joint judgment in that case, that the onus of proof regarding materiality is not borne by the applicant for judicial review but, rather, the respondent who alleges that the error is not material.

What it takes to be 'reasonably satisfied'

Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2) [2022] FCA 1121

The case was heard before Bromberg J in the Federal Court of Australia. The matter concerned an application for judicial review of a decision of a delegate of the first respondent, the National Offshore Petroleum Safety and Environmental Management Authority ('NOPSEMA'). NOPSEMA regulates offshore petroleum activities in Australian waters and, as part of its functions, approves environment plans under reg 10(1)(a) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth). The decision of the delegate made on the 14 March 2022 was purportedly made under reg 10(1)(1) to accept the environment plan submitted by the second respondent, Santos NA Barossa Pty Ltd, under reg 9. To accept the environment plan, NOPSEMA was required to be 'reasonably satisfied' that the plan met the criteria specified in the Regulations, including that the plan demonstrated that the 'titleholder' (Santos in this case) had carried out the consultation required by the Regulations and, in particular, reg 11A.

The effect of NOPSEMA's acceptance of the environment plan was that Santos was permitted to carry out petroleum activity — namely, the drilling and completion of eight production wells as part of the Barossa Project, the focus of which is the offshore gas-condensate field in the Timor Sea. Without NOPSEMA's acceptance, the petroleum activity would be a strict liability offence under reg 6.

The applicant, Mr Tipakalippa, claimed that he and the Munupi clan, of which he is an elder, were not consulted by Santos in relation to the environment plan. The Munupi clan is one of the traditional owners of the Tiwi Islands, with 'sea country' in the Timor Sea, extending to and beyond the area identified for the petroleum activity. As such, they were 'relevant persons' for the purposes of consultation required under reg 11A — that is, persons 'whose functions, interests or activities may be affected by the activities to be carried out under the environment plan'.

The issue raised in the applicant's first ground of review was whether a precondition to the valid acceptance of the environment plan was infected by legal error — namely, was NOPSEMA 'reasonably satisfied' that the environment plan met the criteria set out under reg 10A of the Regulations, including the requirement to consult under reg 11A.

In applying the principles in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 and *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 ('*Connell*'), for assessing whether a decision-maker had the state of satisfaction required by statute as a precondition of jurisdiction, Bromberg J noted that there are other forms of error beyond those mentioned by Latham CJ in *Connell* that may also infect a state of satisfaction. In this case, relying on the observation of the Full Court in *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527 [109], Bromberg J found that a failure to consider a matter that the statute required be considered may also undermine the lawfulness of the state of satisfaction required ([67]). Likewise, legal unreasonableness is also an applicable form of error.

Considering the phrase 'reasonably satisfied' under reg 10(1)(a), Bromberg J held that these words dictated the standard of satisfaction that NOPSEMA was required to apply in making the decision required of it. In considering that standard, Bromberg J found that the requirement of 'reasonable satisfaction' and the requirement that a decision-maker proceed reasonably were not unrelated, such that 'the first feeds into the second and the standard of reasonableness required will be set by their combination and governed by the requirements or objectives of the scheme in question' ([74]). Consequently, there is no fixed standard of legal unreasonableness (or reasonableness); rather, it is fact dependent and, depending on the statutory task required of the decision-maker, may be applied more stringently in some cases than in others.

Justice Bromberg stated that 'the nature of the task required of the decision-maker in reaching a state of satisfaction will also have a bearing' on whether it was reached reasonably. For example, where the state of satisfaction to be reached requires significant subjectivity, such as in relation to a matter of opinion or policy or taste, unreasonableness will be harder to establish.

Moreover, in making the assessment as to whether the decision was beyond power because it was legally unreasonable, where there are reasons of the decision-maker that provide an understanding as to how and why a state of satisfaction was reached have been provided, Bromberg J stated that these should form the focus of the assessment ([77]), as it is this reasoning used by the decision-maker that is the basis for the satisfaction reached.

Turning to NOPSEMA's decision, Bromberg J found that the regulatory task required of the Authority was to be 'reasonably satisfied' in relation to each of the criteria under reg 10A and, in respect of the requirement to consult, that the titleholder had consulted with each and every relevant person. The task of NOPSEMA was therefore, in part, to assess whether the environment plan had 'demonstrated' that every relevant person had been consulted. There was no subjective element to this task.

Justice Bromberg dedicated a portion of his judgment to analysing the method used by Santos to identify the relevant people the titleholder was required to consult. He found that the method set out in the environment plan was erroneous, as it failed to identify with sufficient accuracy the types of interests that could be affected by the project, such that it could not have effectively identified all relevant persons. As such, the environment plan could not demonstrate that consultation had occurred with each relevant person, including the applicant and the Munupi clan. Moreover, the environment plan itself did not assert that all relevant persons had been identified and consulted. Despite this, the reasons of NORPSEMA, on the other hand, noted that it was satisfied based on the environment plan that the consultation requirement had been met.

Justice Bromberg found that, irrespective of NOPSEMA's reasons, due to the absence of information necessary to demonstrate that each relevant person had been consulted, NOPSEMA was not in a position to form the requisite state of satisfaction and, as such, could not have been reasonably satisfied that the criteria under the Regulations had been met ([156]). The acceptance it gave was, therefore, not lawfully given.

The applicant's second ground contended was that, if the titleholder does not comply with the consultation requirement in regulation 11A, a decision to accept the environment plan which is affected by that noncompliance is invalid. This argument was rejected by Bromberg J as a misinterpretation of the regulatory scheme — namely, that the requirement to consult in reg 11A could not be relevantly distinct from the state of satisfaction NOPSEMA was required to have under regs 10 and 10A. Specifically, the jurisdictional fact of reg 10(1) — that is, the requisite state of satisfaction — is not that there has been compliance with the criteria to the satisfaction of the Court but that there has been compliance to the reasonable satisfaction of the decision-maker.

The Court ordered that the decision of NOPSEMA on 14 March 2022 pursuant to reg 10(1)(a) be set aside.

The matter has since been appealed to the Full Court. The decision of the Full Court was handed down on 2 December 2022 in which the appeal was dismissed. The Court finding that the orders made by Bromberg J were not affected by legal error.

State and territory legislation cannot impose criminal liability on the Commonwealth executive without clear statutory intention to do so

Aboriginal Areas Protection Authority v Director of National Parks [2022] NTSCFC 1

The Chief Executive Officer of the Aboriginal Areas Protection Authority ('the Authority') charged that the Director of National Parks (the Director) conducted works at Gunlom Falls, Kakadu National Park, between 22 March and 30 April 2019 in breach of s 34 of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ('the Sacred Sites Act').

The works involved the realignment of the walking track at Gunlom Falls. The area on which the works were carried out is designated a 'sacred site' under the Sacred Sites Act. The area is also a Commonwealth reserve under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), for which the Director had the functions to administer, manage and control (s 514B(1)(a) EPBC Act). The Director carried out the works without an Authority certificate or a Minister's certificate as required under the Act. No ministerial approval for the works was required under the EPBC Act.

The case was stated as a special case and referred to the Full Court of the Supreme Court of the Northern Territory under s 21(1) of the *Supreme Court Act 1979* (NT). The question of law to be answered by the full bench was: do the offence and penalty prescribed by s 34(1) of the Sacred Sites Act not apply to the Director (a) as a matter of statutory construction; or (b) because they are beyond the legislative power of the NT Legislative Assembly?

The full court held that the offence and penalty under s 34(1) of the Sacred Sites Act did not apply to the Director as a matter of statutory construction.

The Court considered the application of the presumption set out in *Cain v Doyle* (1946) 72 CLR 409, 425, and more recently in *Bropho v Western Australia* (1990) 171 CLR 1, that a statute will not impose criminal liability on the executive, including government instrumentalities with the same legal status, without the clear legislative intention and purpose to do so ([25]).

In order to determine whether the presumption applied, the Court considered:

1. whether the Director was an entity to which the presumption against the imposition of criminal liability on the executive government applies; and
2. if so, whether the Director is intended to have the same legal status as the executive government in relation to the operation of the presumption; and
3. if so, whether the Sacred Sites Act, either expressly or by implication, disclosed a legislative intention to impose criminal liability on the Commonwealth executive government.

The presumption applies to the 'Crown' which can identify as the executive branch of government represented by the ministry and the administrative bureaucracy which tends to its business. The administrative bureaucracy includes authorities and instrumentalities of the Crown, including those with separate legal personality such as statutory corporations, provided they have the same legal status as executive government in the relevant aspects (see [41]−[42]).

The Court noted that, in determining whether an incorporated entity is part of the executive, other considerations such as the presence or absence of a statutory ability on the part of the executive to control the membership and/or activities of the entity is of central importance. The higher the degree of control, the more likely the intention is that the entity is to be treated as an alter ego of the Crown. However, this examination only turns upon the existence of a statutory ability of control rather than the extent to which that control is actually exercised. Other considerations include whether the entity performs government functions, whether it is funded by the executive and whether it is accountable to the executive in terms of finances and outcomes ([48]).

The Director was held to be a body corporate under s 514 of the EPBC Act and considered a corporate Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth). The Director has the functions to administer, manage and control Commonwealth reserves (s 514B(1)(a) EPBC Act) and is generally subject to ministerial control — specifically, the Director must perform its functions and exercise its powers in accordance with any directions given by the Minister. The Director's functions are funded by the executive government to which the Director is accountable to and for. Moreover, the Court found that the intention of the statutory scheme for Commonwealth reserves was to enable the Commonwealth to administer, manage and control these reserves through the Director, rather than an incorporated Director to perform its functions independently of the Commonwealth. As such, the legislative intention is for the Director to have the same legal status as the federal executive government and enjoy the same privileges and immunities including the presumption against criminal liability to the extent that it is withdrawn or modified under the statutory scheme ([65]).

The Court held that, while the Sacred Sites Act did purport to bind the Territory Crown, and to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities (s 4(1)), this was insufficient to bind the Commonwealth. As a result, the Sacred Sites Act could not impose criminal liability in the Director. However, the Court did note that this immunity could still be removed by the NT Legislative Assembly by the enactment of legislation in sufficiently clear terms.

The Authority has sought leave to appeal to the High Court.

Not a suicide pact?: judicial power and national defence and security in practice

*The Hon Justice John Logan RFD**

In his 2006 work *Not a Suicide Pact: The Constitution in a Time of National Emergency*,[1] the American jurist and academic Judge Richard Posner undertakes a critical analysis of United States constitutional issues relating to measures adopted in and from that country in response to the religiously motivated terrorist attacks which occurred on 11 September 2001. His provocative title is not confected. Instead, it is inspired by the concluding paragraph of a pointed, dissenting judgment delivered by Jackson J in the United States Supreme Court in *Terminiello v Chicago*.[2]

In *Terminiello v Chicago*, the Supreme Court, by a bare 5:4 majority, reversed a judgment of the Supreme Court of Illinois which had affirmed a conviction for disorderly conduct, contrary to an ordinance of the City of Chicago. The conduct concerned was the use by the petitioner, Reverend Father Arthur Terminiello, of highly inflammatory language attacking Jews, President Franklin Roosevelt and First Lady Eleanor Roosevelt, Communists and others at a public meeting in Chicago of the Christian Veterans of America. The municipal law as construed and applied by the state courts was held to violate the First Amendment to the United States Constitution which, materially, prohibits abridgement of the freedom of speech. In concluding his dissenting judgment, Jackson J stated:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[3]

Judge Jackson was then but recently returned to the court from leave of absence granted to him so that he could undertake the duty of lead prosecutor for the United States at the principal war crimes trial before the International Military Tribunal at Nuremberg.[4] If one is aware of this role, and it would have been well known at the time, his Honour's particular reference in his judgment[5] to a present obstacle in the United States to a strategy adopted by the Nazis for assuming power, 'mastery of the streets', being the authority of freely elected municipal authorities to make laws prohibiting the inciting of riots, is not just understandable but persuasive.

---

* The Hon Justice Logan is a Judge of the Federal Court of Australia and of the Supreme and National Courts of Papua New Guinea and President of the Defence Force Discipline Appeal Tribunal. This is an edited version of a paper delivered at the Australian Institute of Administrative Law National Conference, Canberra Australia Friday, 22 July 2022. The views expressed in this article are the author's own. They are not to be regarded as those of either the Australian or Papua New Guinea governments or any court or tribunal of which the author is a member.

1 R Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

2 337 US 1 (1949).

3 337 US 1, 37.

4 Encyclopaedia Britannica, 'Robert H Jackson', <https://www.britannica.com/biography/Robert-H-Jackson>.

5 337 US 1, 23–4.

Yet also persuasive is this observation in the judgment of Douglas J for the majority:

> The vitality of civil and political institutions in our society depends on free discussion.[6]

Even so, the majority view is not, with respect, readily reconcilable with the 'fighting words' exception to the First Amendment then but recently earlier established by a unanimous Supreme Court in *Chaplinsky v New Hampshire*.[7]

Mr Chaplinsky was a Jehovah's Witness lay preacher who had been handing out pamphlets and preaching from the footpath before an ever-increasing crowd in the centre of a New Hampshire municipality. The crowd started to spill over onto the road, blocking traffic, and a commotion was developing in response to some of Mr Chaplinsky's language (he referred to organised religion as a 'racket'). Upon noticing this, the town marshal asked Mr Chaplinsky to tone down his language and avoid causing a commotion. Mr Chaplinsky persisted and, upon noticing this, a police officer took him to police headquarters to the town marshal. There, Mr Chaplinsky shouted at the town marshal, allegedly, 'You are a God-damned racketeer' and 'a damned Fascist'. He was arrested and charged under a state law prohibiting the use of offensive language. Mr Chaplinsky admitted stating all of the words charged, with the exception of 'God'. He was convicted and fined. The Supreme Court of New Hampshire affirmed that conviction. Mr Chaplinsky's petition for certiorari was dismissed by the Supreme Court. In delivering the Court's judgment, Murphy J stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any *Constitution*al problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[8]

The recently decided *Dobbs v Jackson Women's Health Organisation*,[9] in which the United States Supreme Court held that there was, in that country, no constitutionally entrenched right to abortion, is presently noteworthy for the view expressed by the majority that such a right was not supported by the concept of 'ordered liberty', which has long been regarded in that Court's jurisprudence as a feature of the United States Constitution. Writing for the majority, Alito J stated, 'Ordered liberty sets limits and defines the boundary between competing interests'.[10]

The difference of opinion evident in *Terminiello v Chicago* is really a difference as to where lies a boundary between personal liberty and public peace and order.

What has all this to do with Australia?

In the broadest sense of constitutional law, Australia does have a Bill of Rights — the *Bill of Rights 1689* (Eng), which forms part of our legal inheritance from the United Kingdom. The stipulation, found in Art 9 of that statute, that a proceeding in parliament may not be impeached or questioned in any court or place outside parliament underpins freedom of

6 337 US 1, 4.
7 315 US 568 (1942).
8 315 US 568, 571–2.
9 597 US 1 (2022).
10 597 US 1, 31.

speech in parliament. But we do not have any equivalent in the Australian Constitution of the Bill of Rights entrenched by amendment in the United States Constitution, of which the free speech guarantee forms part.

My purpose in referring to the origins of the inspiration for the title to Judge Posner's work is not to embark upon a survey of United States First Amendment jurisprudence or to advocate, one way or the other, whether a like, so-called 'Bill of Rights' should or should not be entrenched in our *Constitution*. Rather, it is to explore whether, in our jurisprudence, there are like competing themes in relation to the approach of the judicial branch to issues concerning national defence and security and whether it can be said that the Australian judiciary have approached our *Constitution* as if it were a 'suicide pact'.

I have not sought to undertake this task by reference to the dense thicket of legislation which the Commonwealth Parliament has enacted since 2001 with the avowed purpose of responding to what has been termed the 'War on Terror'. To do so would not only yield an article of intolerable length but also very likely result in losing sight of the underlying jurisprudential wood for all of the legislative trees.

While what constitutes the 'War on Terror' might be regarded as having its origins in the attack on the United States on 11 September 2001[11] and in the responsive wars in Iraq and Afghanistan earlier this century, in truth, depending on one's historical perspective and level of abstraction in examination, it is possible to see a recurring, historical theme in the motivations for that attack. For example, this is how the then Lt Winston Churchill, attached to the Malakand Field Force on operations in the late 19th century on the north-west frontier of then British India, now Pakistan, bordering Afghanistan, described the foe that force faced:

> Every influence, every motive that provokes the spirit of murder among men, impels these mountaineers to deeds of treachery and violence. … That religion, which above all others was founded and propagated by the sword — the tenets and principles of which are instinct with incentive to slaughter … stimulates a wild and merciless fanaticism.[12]

I take the 'War on Terror' presently to mean, for Australia, the 'threat of religiously motivated violent extremism from Sunni violent extremist groups [which] persists, with the violent narrative espoused by terrorist groups — such as the Islamic State of Iraq and the Levant, and al-Qa'ida', as defined and assessed by the Australian Security and Intelligence Organisation ('ASIO').[13] That same understanding was adopted by Kiefel CJ, Keane and Gleeson JJ in the recently decided *Alexander v Minister for Home Affairs*[14] ('*Alexander's case*') concerning the purported revocation of a dual-national's Australian citizenship, a case to which I shall return later in this article.

11 George H Bush Presidential Library, 'Global War on Terror', <https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror>.

12 WS Churchill, *The Story of the Malakand Field Force*, originally published by Longmans Greens & Co in 1898, quote from reprint by Leo Cooper, in association with Octopus Publishing Group. London, 1989, pp 3−4.

13 Australian National Security, Current National Terrorism Threat Level, available at <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level> ('National Terrorism Threat Level Assessment').

14 [2022] HCA 19.

ASIO assesses current Australia's current National Terrorism Threat Level to be 'Probable'.[15] The current National Terrorism Threat Level assessment by ASIO does not separately assign any threat to Australia arising from our support for the Ukraine in its resisting the latest invasion of its territory by Russia on and from 24 February this year.

The present assessed threat is very different from that presented by conventional wars — the First World War, the Second World War and the Korean War — and to the counter-insurgency operations in Malaya, Borneo and South Vietnam in which Australia participated in the 20th century. It is also very different from the domestic espionage and subversion threat faced by Australia during the Cold War, which ran from the late 1940s to the collapse of the Berlin Wall and Soviet hegemony in Eastern Europe in 1989.

I undertook my voluntary military service in the Army Reserve[16] in the immediate aftermath of the cessation of Australian involvement in South Vietnam and the fall of that country's government in 1975 and in the closing stages of the Cold War. In those days, training for first appointment as an Army officer still had the flavour of commanding an infantry platoon in operations abroad against a guerrilla force which had some conventional military support. Later training for duties as an intelligence staff officer on a formation headquarters also had its focus on operations abroad, against a foreign enemy in conventional warfare, albeit with some exposure to the nature and extent of domestic counter-intelligence duties. The foreign enemy was unidentified but the weapons characteristics and tactics with which I gained some familiarity resembled those of Group Soviet Forces Germany.

In contrast, the presently assessed threat entails, and has entailed, not just operations abroad against identified terrorists and their sponsors but also the prospect of religiously motivated violence in Australia. The occasion for such operations abroad and that domestic prospect may frequently be related.

It is and always will remain a moot point whether the Lindt Café incident in Martin Place, Sydney, in December 2014 was a manifestation of Mr Man Monis' motivation by Islamic State or whether that professed association aggrandised the action of a deeply troubled individual.[17] More certain is that the terrorist activity detected, exposed and forestalled by Operation Pendennis, then Australia's longest running terrorism investigation, which culminated in the arrest of members of two self-starting militant Islamist cells in late 2005, was so motivated.[18] Later in time was the successful foiling in 2009 of a Melbourne-based self-starting cell, similarly motivated, which had planned to attack Holsworthy Army Barracks in New South Wales.[19] And these are but examples.

15 National Terrorism Threat Level Assessment (n 13). [Editor's note: downgraded to 'possible on 27 November 2022 <www.skynews.com.au/australia-news/defence-and-foreign-affairs/australias-national-terrorism-threat-leve>.]

16 I enlisted in the Australian Army as an Officer Cadet in January 1975 and was commissioned into the Australian Intelligence Corps in the Army Reserve in July 1976. I transferred in the rank of Major in that Corps to the Standby Reserve in 1993 and am now on the Retired List.

17 State Coroner of New South Wales, *Inquest Into the Deaths Arising from the Lindt Café Siege* (New South Wales Government, 2017) ('Lindt Café Coroner's Report'), Pt IV, Ch 10, para 71 <https://www.lindtinquest.justice.nsw.gov.au/Pages/Findings.aspx>.

18 Bart Schuurman, Shandon Harris-Hogan, Andrew Zammit and Pete Lentini, 'Operation Pendennis: A Case Study of an Australian Terrorist Plot, Perspectives on Terrorism' (2014) 8(4) *Perspectives on Terrorism* 9 <https://www.jstor.org/stable/26297199?seq=1>.

19 This and other incidents are mentioned in Schuurman et al (n 18).

That such a threat has not gone away in Australia is evident every time one travels by air and experiences airport screening, in the present strict control of entry into military bases and in the bollards which line entry points into our major public squares and shopping malls.

In 2014, the apprehended threat of such terrorism, based on the experience of a uniformed Australian Army officer at a Sydney railway station, was such that members of the Australian Defence Force ('ADF'), and even school cadets, were advised via their chains of command to 'carefully consider wearing their uniforms in public'.[20] In London the year before, in a religiously motivated attack, a soldier wearing a 'Help for Heroes' t-shirt, jogging back to an Army barracks, was viciously attacked and killed by two terrorists.[21] Not once, in the better part of two decades of Active List service in the Army Reserve, did I ever have any apprehension about being wounded or killed because I wore our country's uniform or military sports attire in public. In the mid-1970s, it was possible to drive into many military bases in Australia without any let or hindrance; not so now.

It is conventional to view the ADF as having three arms: the Royal Australian Navy, the Australian Army and the Royal Australian Air Force. That view is formalised in the *Defence Act 1903* (Cth).[22] In a uniformed sense, it is correct. However, three other agencies have national defence and security as their sole raison d'être. These are:

a. ASIO;[23]

b. the Australian Security Intelligence Service ('ASIS');[24] and

c. the Australian Signals Directorate ('ASD').[25]

In my view, it is accurate to regard these agencies as, respectively, the fourth, fifth and sixth arms of our wider ADF, the non-uniformed arms.

In relation to domestic defence and security, the ADF, ASIO and the ASD operate in cooperation with the Australian Federal Police, the Australian Border Force and state and territory police services. However, the primary role of the police services is the maintenance of the King's Peace. Indeed, the several states are expressly forbidden by the *Constitution* from raising any naval or military force without the consent of the Commonwealth.[26] That has never been given.

20 ABC, 'ADF personnel cautioned on wearing uniforms after Sydney attack reported', 25 September 2014, <https://www.abc.net.au/news/2014-09-25/uniformed-adf-officer-attacked-by-men-in-sydney-nsw-police-say/5769874>.

21 ABC, 'London terrorist attack: Man hacked to death with meat cleavers outside Woolwich army base', 23 May 2013, <https://www.abc.net.au/news/2013-05-23/man-hacked-to-death-in-suspected-london-terrorist-attack/4707506?nw=0&r=Map>.

22 Defence Act *1903* (Cth) s 17.

23 Continued in existence by s 6 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

24 Continued in existence by s 16 of the *Intelligence Services Act 2001* (Cth).

25 Ibid.

26 *Constitution*, s 114.

In contrast, the primary role of the ADF is to kill the King's enemies, thereby protecting the states from invasion, with a secondary role of protecting the states from domestic violence, if so requested by a given state.[27] There is support in authority, discussed below, relating to the breadth of Commonwealth executive authority with respect to the preservation of the nation, and related incidental legislative power, for the position that this domestic protective role may be undertaken on the initiative of the Commonwealth executive government, even in the absence of a request from a particular state.[28]

The present authority for the existence of each of these six arms of the ADF is statutory. That was not always so in relation to ASIS. It was initially established in the exercise of Commonwealth executive power, as found in s 61 of the *Constitution*.

Since the Commonwealth assumed responsibility for naval and military defence in the aftermath of federation,[29] the authority for the existence of the uniformed arms of the ADF has always been statutory. The reason for that is deeply rooted in our constitutional inheritance from the United Kingdom. There, the experience during the 17th century of the end, by civil war and regicide, of the Divine Right of Kings and the replacement of the latter by the dictatorship of Lord Protector Oliver Cromwell, backed by the New Model Army, resulted in the firm and continuing belief that a standing army should only be tolerated by parliamentary authority; hence the first *Mutiny Act 1689* (Eng). The enactment of that statute at the same time as the Bill of Rights was no coincidence.

Given the statutory foundation for all arms of the ADF, uniformed and otherwise, I propose first to address how the judiciary have approached the nature and extent of Commonwealth legislative power with respect to defence. That legislative power with respect to defence is found in s 51(vi) of the *Constitution*.[30]

The prevailing judicial approach, from early in the life of our federation, has been that:

a. the power has an elastic quality, the extent of the legislative remit it confers upon the parliament being inherently related to the threat presented to Australia at a given time;[31] and

b. the adjectives 'naval and military' which govern 'defence' are not words of limitation but, rather, of extension, present only so as to emphasise that defence comprehends all types of warlike operations.[32]

27 *Constitution*, s 119.

28 A detailed treatment of the subject of ADF aid to the civil power both in relation to protection from domestic violence and more widely — for example, in relation to natural disasters — is beyond the scope of this article. For a comprehensive discussion of the topic, I refer the reader to Samuel White, *Keeping the Peace of the Realm* (LexisNexis Australia, 2021).

29 *Constitution*, s 69.

30 The power to make laws with respect to '(vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'.

31 *Farey v Burvett* (1916) 21 CLR 433, 443 (Griffith CJ), 448 (Barton J), 452–3 (Isaacs J); Powers J agreeing.

32 Ibid 440 (Griffith CJ).

A noteworthy feature of the First World War era case which established these propositions, *Farey v Burvett*, is an observation by Isaacs J, the underpinning sentiment in which resembles Jackson J's 'not a suicide pact' observation in *Terminiello v Chicago*, set out above:

> The *Constitution*, as I view it, is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled.

So it was that, in *Farey v Burvett*, the Commonwealth Parliament's legislative power with respect to defence was held to extend to the enactment of legislation conferring on the executive a power to make regulations which extended to commodity price controls, even though the control of prices was not a specific head of Commonwealth legislative power. *Farey v Burvett* demonstrates that the phenomenon of 'total war', not just direct military operations, was well understood by the judiciary very early in the history of our federation as a legitimate incident for the exercise of legislative power with respect to defence.

Earlier in the First World War, the High Court had held that the defence power extended to an ability of the parliament lawfully to enact legislation which supported the making of a regulation providing not just for the wartime internment of enemy aliens but also of any naturalised person in respect of whom the Minister for Defence 'has reason to believe is disaffected or disloyal'.[33] A like conclusion was reached during the Second World War as to Commonwealth legislative competence with respect to defence supporting a conferral of power to make a regulation to enable the detention of a person if a Commonwealth Minister was 'satisfied with respect to any particular person, that with a view to prevent that person acting in any manner prejudicial to the public safety or the defence of the Commonwealth it is necessary so to do'.[34]

The effect of *Farey v Burvett* is that, while it is necessary for there to be discerned a relevant connection between a legislative or subordinate legislative measure and defence to support its validity, with the court enabled to take judicial notice of prevailing circumstances as to the nature and extent of a threat to Australia, once such a connection is discerned, it is not for the judiciary to question the necessity for the measure adopted either by the parliament or, as the case may be in relation to subordinate legislation, the Governor-General in Council.[35]

That this is the position was confirmed in the immediate post-Second World War era case, *Dawson v Commonwealth of Australia* ('*Dawson*'), in which Latham CJ stated:

> [It] is not the duty or a function of the Court itself to consider whether in its opinion such Regulations are 'necessary' for defence purposes. Questions of legislative policy are determined by the legislature, not by the Courts. If it can reasonably be considered that there is a real connection between the subject matter of the legislation and defence, the Court should hold that the legislation is authorized by the power to make laws with respect to defence.[36]

Although that particular pronouncement in *Dawson* was not, and is still not, controversial, a six-member court split equally and sharply in that case as to whether s 51(vi) of the *Constitution* had ever supported the general regulation-making power in the *National*

33 *Lloyd v Wallach* (1915) 20 CLR 299.
34 *Ex parte Walsh* [1942] ALR 359.
35 *Farey v Burvett* (1916) 21 CLR 433, 442–3.
36 (1946) 173 CLR 157, 173.

Security Act 1939 (Cth) ('NSA') so as to permit the lawful making of a provision in the *National Security (Economic Organization) Regulations 1942* (Cth)[37] that 'a person shall not, without the consent in writing of the Treasurer, purchase any land' in Australia. With respect, just to state the subject of those regulations is to engender a counter-intuitive reaction as to the existence of a 'real connection' with defence.

Ironically, perhaps, the occasion for there being an evenly numbered court was that the remaining judge, Webb J, was, at the time, on leave of absence so as to undertake the role of President of the International Military Tribunal for the Far East in Tokyo.[38] The validity of the provision was upheld on the basis of the Chief Justice's opinion to that effect in accordance with the then position under the *Judiciary Act 1903* (Cth).[39]

Many more cases concerning the extent of the legislative power with respect to defence in peace and war might be cited. Suffice it to say that the more sweeping and permanent in effect a legislative or subordinate legislative measure, the more a subject of application is consigned to executive satisfaction; and the more removed that subject is from obvious assistance in the prosecution of a major, subsisting war in which Australia is engaged, the less likely it is to be supported by the defence power.

After a comprehensive survey of authority, two learned members of the academy made this observation concerning the breadth of knowledge which the judiciary must bring to bear in relation to the extent of the defence power, with the whole of which I respectfully agree:

> It is obvious that in determining whether a law is or is not within the defence power, judges are required to have a very wide knowledge of human affairs outside the narrow confines of the law. As economics are a vital factor in war and defence today they must have a broad knowledge of economic matters. In so far as the defence of Australia may be vitally linked with the defence of the United Kingdom, the Commonwealth, Asian countries and Pacific countries, they may be required to have some knowledge of broad international defence strategy. And they must necessarily have some knowledge of international affairs generally. These are all matters on which genuine differences of opinion are possible, matters which, in a unitary State, are essentially problems for the executive and legislative authorities to decide.[40]

These days of course, the defence of Australia would more accurately be said to be vitally linked with the United States, although defence ties with the United Kingdom remain strong.

Viewed against this body of jurisprudence, and as I further expose later in this article, the difficulty presented by the presently ongoing 'War on Terror' is that the related threat to domestic peace and good order is not one which fits neatly into established categories concerning the ambit of the legislative power conferred by s 51(vi) of the *Constitution*. These categories were established last century against a background of wars conducted between state actors. The nature of the 'War on Terror' is such that it cannot even be assimilated with a threat of domestic espionage and subversion, which was a feature of the Cold War.

37 Reg 6(1).

38 HA Weld, 'Webb, Sir William Flood (1887–1972)', *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <https://adb.anu.edu.au/biography/webb-sir-william-flood-11991/text21499> published first in hardcopy 2002, accessed online 23 June 2022.

39 *Judiciary Act 1903* (Cth) s 23(2)(b).

40 RD Lumb and KW Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd edition, 1981) pp 130–1 [246].

To conceive of what is or is not a legitimate subject for the exercise legislatively of the defence power as capable of classification according to whether Australia is in a period of profound peace, preparing for the prospect of war between state actors, engaged in war with one or more state actors or winding down from such a war is just not apt to cover indefinitely continuing circumstances where what are, superficially, isolated, random acts of domestic violence are incited by non-state actors at home and abroad, supported by foreign state actors with whom Australia is not formally at war. And such incitement has never been more readily possible than in the digital age.

In relation to the ambit of the defence power and at the margin, but particularly in periods of international tension short of general hostilities, and in the aftermath of general hostilities, there may be more scope for the admission of evidence as to the need or continuing need for particular measures.[41] The recently decided *Alexander's case*[42] indicates that there is probably like scope for the admission of such evidence in relation to the validity of measures adopted in response to the 'War on Terror'. Even so, much is left in practice to judicial notice in determining whether a particular law can be said to be one with respect to defence.

Alexander's case highlights both the permissible use, and the limits of use, of evidence in the resolution of cases concerning the limits of Commonwealth legislative competence in matters touching upon national security.

At issue in *Alexander's case* was the validity of s 36B of the *Australian Citizenship Act 2007* (Cth), which provided that the Minister for Home Affairs may make a determination that a person ceases to be Australian citizen if satisfied, among other matters, that the person engaged in specified conduct demonstrating repudiation of allegiance to Australia. Acting, amongst other things, on advice from ASIO about Mr Alexander's activities abroad and the threat of domestic terrorist acts presented by the return to Australia of foreign fighters, the Minister revoked the Australian citizenship of this hitherto dual Australian–Turkish citizen. Some of the references to ASIO assessments in the judgments are evidently references to material before the Minister; other references to ASIO and other intelligence community views are not.

The issue in *Alexander's case* was not the extent of Commonwealth legislative power with respect to defence but rather the reach of the separate head of legislative power to make laws with respect to naturalisation and aliens[43] and whether the power conferred by statute on the Minister was punitive such that it could only validly be conferred on a court exercising Commonwealth judicial power, pursuant to Ch III of the *Constitution*.

41 As in *Jenkins v The Commonwealth* (1947) 74 CLR 400 and *Sloan v Pollard* (1947) 74 CLR 445.
42 [2022] HCA 19.
43 *Constitution*, s 51(xix).

In their joint judgment, Kiefel CJ, Keane and Gleeson JJ made the following references to intelligence community material, which extended beyond that emanating from ASIO to a report of the Independent National Security Legislation Monitor:

> 57. The risk posed by foreign fighters, defined by ASIO as 'Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas', is an aspect of this general threat. While relatively few returned fighters have posed a direct risk to the Australian community, those that did have been responsible for some of the most lethal terrorist attacks.
>
> 58. ASIO has reported that, since 2012, around 230 Australians (or former Australians) have travelled to Syria or Iraq to fight with or support groups involved in the Syria–Iraq conflict. Of that number, 50 are estimated to have returned to Australia, the majority before 2016.
>
> 59. In a submission to the Parliamentary Joint Committee on Intelligence and Security's 2019 review of the Australian Citizenship Amendment (Citizenship Cessation) Bill, ASIO continued to assess that the return of Australians who have spent time with Islamist extremist groups in Syria or Iraq has the potential to exacerbate the Australian threat environment 'for many years to come'. This is because foreign fighters can be expected to have developed characteristics such as a greater tolerance for and propensity towards violence, and to have established jihadist credentials. Several serious terrorist plots in Australia between 2000 and 2010 each involved at least one returned foreign fighter.
>
> …
>
> 90. In 2019, a report by the Independent National Security Legislation Monitor ('the INSLM Report') reviewed the operation, effectiveness and implications of the citizenship cessation provisions, including s 33AA. The INSLM Report stated that the 'main focus' of these laws was involvement with the Islamic State, although they were not so limited. The INSLM Report considered that Australia's counter-terrorism framework required a range of mechanisms, and that '[i]n some, possibly rare cases, citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia'.
>
> 91. However, the INSLM Report concluded that the citizenship cessation provisions, including s 33AA, lacked necessity, proportionality and proper protections for individual rights. The INSLM Report further identified, in addition to the risk of de facto or temporary statelessness, a denial of due process. While s 36D affords a citizen the due process of a criminal trial before the Minister's discretion arises, a significant feature of s 36B is that it operates without due process at all.[44]

In the result, Kiefel CJ, Keane and Gleeson JJ concluded that the power conferred on the Minister by s 36B of the Australian Citizenship Act was punitive and that, in conferring that power on the Minister, rather than a court exercising judicial power, the Parliament had exceeded its legislative competence as conferred by the aliens power.

Justice Gageler concurred with this conclusion and agreed generally with the reasons of Kiefel CJ, Keane and Gleeson JJ. However, in separately delivered reasons for judgment, his Honour elaborated upon why it was that the forfeiture of citizenship was punitive, not protective. His Honour also addressed the use and limits of legislative pronouncements as to

44 [2022] HCA 19.

purpose and of evidence from the intelligence community in resolving issues as to the limits of legislative competence. The relevant passages concerning these latter subjects should be set out in full:

> 20. A legislature of limited powers 'cannot arrogate a power to itself by attaching a label to a statute' and cannot, merely by including a statement of purpose in legislated text, require a court to identify the purpose of a law as something that it is not. Not unknown in our constitutional history is for a law which purports to be designed to achieve a constitutionally permissible purpose to be found on close inspection 'in truth' to pursue a constitutionally impermissible purpose.
>
> 21. That said, the constitutional relationship between the judiciary and the legislature is such that a statement of legislative purpose must be treated by a court as a solemn and presumptively accurate declaration of why a law is enacted. The declaration is made by the legislature to itself and to the world.
>
> 22. The legislatively declared purpose might well be elucidated with reference to other aspects of the text or context. It might need to be supplemented or qualified in order to explain some detail of the law. It might need to be translated to a level appropriate for constitutional analysis in a particular context. Absent strong reason for concluding that the stated purpose is not a true purpose, however, it must be accepted and respected.
>
> 23. When enacting the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) ('the 2020 Amending Act'), Parliament chose to explain the purpose of the whole of the subdivision within which s 36B is included. Parliament did so in s 36A. Translated to the level appropriate for analysis of the compatibility of s 36B with Ch III of the *Constitution*, the purpose declared in s 36A is properly characterised as one of denunciation and exclusion from formal membership of the Australian community of persons shown by certain conduct to be unwilling to maintain or incapable of maintaining allegiance to Australia. The nature of the conduct understood by the Parliament to be capable of showing that unwillingness or incapacity is elucidated by the operative provisions of the subdivision and is limited to criminal conduct found to have been engaged in by a person in the past. Thus the purpose of denunciation and exclusion from formal membership of the Australian community is solely on the basis of past criminal conduct. That purpose can only be characterised as 'punitive'.
>
> 24. The revised explanatory memorandum for the Bill for the 2020 Amending Act contains nothing to cast the purpose of s 36B as declared by s 36A in a different light. Nor does the second reading speech.
>
> 25. The Bill for the 2020 Amending Act had its origin in a report to the Attorney-General in 2019 by the Independent National Security Legislation Monitor. The parliamentary process which resulted in the Bill's enactment included an inquiry in 2019 and report in 2020 by the Parliamentary Joint Committee on Intelligence and Security ('the PJCIS').
>
> 26. The defendants did not seek to draw on anything in either of those reports to support their submission that the purpose of s 36B is appropriately identified as the protection of the Australian community. Rather, they sought to draw on a submission made to the PJCIS in the course of its inquiry.
>
> 27. The submission was made by the Australian Security Intelligence Organisation ('ASIO'). The thrust of that submission was that ASIO considered 'citizenship cessation' to be 'a legislative measure that works alongside a number of other tools to protect Australia and Australians from terrorism'. The submission implied that ASIO saw those 'other tools' as including prosecution for terrorism offences, which it said would sometimes result in 'the better security outcome'. The concept of 'protection' which ASIO employed in its submission was therefore one that encompassed invocation of a judicial process by way of prosecution for an offence.

28. The language of 'security' and 'protection' in which ASIO cast its submission is explicable by reference to ASIO's statutory charter. The statutory functions of ASIO centrally include obtaining, correlating, evaluating and communicating intelligence relevant to 'security'. The definition of 'security' relevantly includes 'the protection of, and of the people of, the Commonwealth' from politically motivated violence.

29. A submission made by a responsible government agency to a parliamentary inquiry cannot be dismissed as beyond the scope of the material which might properly inform judicial identification of the purpose of a law. In the context of examining the compatibility of s 36B with Ch III of the *Constitution*, however, the ASIO submission to the PJCIS is of no analytical utility whatsoever. ASIO's frame of reference is such that even prosecution which results in the imposition of punishment by a court for a terrorism offence is regarded as being for the protection of the Australian community. That is not the frame of reference within which determining whether a statutory purpose is 'protective' needs to occur in the context of the doctrine of separation of judicial power enshrined in Ch III of the *Constitution*. The concept of 'protection' as employed in ASIO's submission to the inquiry therefore does not assist in identifying the purpose of s 36B in the context of the constitutional inquiry.

[Footnote references omitted]

These statements by Gageler J are not, with respect, idiosyncratic but well supported by authority. They are not confined in their application to a case concerning the legislative power to make laws with respect to naturalisation and aliens but apply generally in relation to exercises of Commonwealth legislative power. They highlight that there may be scope for the admission of evidence as to the existence of a relevant connection between a head of legislative power and its purported exercise. However, in a constitution which not only distributes sovereign national power between three branches of government — legislative, executive and judicial — but also limits the nature and extent of legislative power, it is just not possible for one branch to assume the function of the other or for the legislature itself to define the limits of its legislative competence.

Apart from the inability itself to define the limits of its legislative competence, a limitation on the legislative branch is, as *Alexander's case* highlights, an inability to confer the exercise of judicial power other on courts constituted by persons enjoying the tenure and related independence for which s 72 of the *Constitution* provides. Another illustration of this limitation, arising directly in relation to the ADF, is *Lane v Morrison*.[45] The Parliament's endeavour to consign the adjudication and punishment of service offences to a court foundered in that case not because it was not possible, in an exercise of the defence power, to consign that function to a court established pursuant to Ch III of the *Constitution* but because the members of the court established for that purpose by amendments to the *Defence Force Discipline Act 1982* (Cth) were not appointed pursuant to s 72 of the *Constitution*. Thus, it would have made no difference to the outcome in *Alexander's case* if the function of deciding whether to revoke citizenship had, for example, been consigned to the Administrative Appeals Tribunal or even to an institution termed a court but whose members were not appointed pursuant to s 72 of the *Constitution*.

45 (2009) 239 CLR 230.

A Second World War era case which repays present reading, given the religiously motivated nature of the presently identified and ongoing terrorist threat and measures adopted to address that threat, is *Adelaide Company of Jehovah's Witnesses v The Commonwealth* ('*Jehovah's Witnesses*').[46]

That is not, of course, because that branch of the Christian faith is in any way a motivator of present terrorism, which is not to say that one reason for recalling *Jehovah's Witnesses* is not for its unanimous conclusion that the prohibition in s 116 of the *Constitution* in respect of laws preventing the free exercise of any religion does not prevent the Commonwealth Parliament from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, are prejudicial to the prosecution of a war in which the Commonwealth is engaged. That same conclusion would seem necessarily to follow in respect of a measure which addressed the espousing of doctrines or principles of any religion or branch thereof which motivate those who engage in or plan, in or in relation to Australia, acts of terrorism.

Another, and perhaps more important, reason for recalling *Jehovah's Witnesses* is for the fate of measures adopted via the *National Security (Subversive Organisations) Regulations 1940* (Cth), purportedly authorised by the NSA, to address a threat apprehended not just by religiously motivated advocacy but also by any organisations considered by the Governor-General to be prejudicial to the conduct of the war. The case was decided in 1943, at the height of an intense war between Australia and state actors, during which mainland Australia had, the previous year, been directly attacked by conventional enemy forces for the first time ever.[47]

This case, too, saw a sharp difference of opinion in the High Court as to the validity of the measures adopted. Those differences resemble the differences in the United States Supreme Court in *Terminiello v Chicago*. While the validity of all the measures was at issue, it is instructive to consider the fate of four particular provisions in those regulations. That is because the observations made about their validity have ramifications for the present day.

Regulation 3 of those regulations provided:

> Anybody corporate or unincorporated the existence of which the Governor-General, by order published in the Gazette, declares to be in his opinion, prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, is hereby declared to be unlawful.

Regulation 4 provided:

> Anybody in respect of which a declaration is made in pursuance of the last preceding regulation shall, by force of that declaration, be dissolved.

46 (1943) 67 CLR 116.

47 Notably, Darwin was first bombed on 19 February 1942 with air raids continuing until November 1943: <https://www.awm.gov.au/collection/E84294>; Japanese midget submarines had conducted an attack on shipping in Sydney harbour on the evening of 31 May – 1June 1942: <https://www.navy.gov.au/history/feature-histories/japanese-midget-submarine-attack-sydney-harbour>; Wyndham, Broome, Townsville and Cairns were also bombed during the war: <https://www.awm.gov.au/articles/encyclopedia/air_raids>.

Regulation 6A provided:

> Any house, premises or place or part thereof which was occupied by a body immediately prior to its having been declared to be unlawful may, if a Minister by order so directs, be occupied in accordance with the provisions of the order so long as there is in the house, premises or place or part thereof any property which a Minister is satisfied belonged to, or is used by or on behalf of, or in the interests of, the body, and which was therein immediately prior to the body having been declared to be unlawful.

Regulation 6B provided that all property taken possession of, or delivered to a person thereunto authorised by a person in pursuance of the regulation shall be forfeited to the King for the use of the King and shall, by force of the regulation, be condemned.

In relation to these particular regulations, Latham CJ and McTiernan J concluded that regs 3, 4 and 6B were supported by the defence power in s 51(vi) of the *Constitution* but reg 6A was not. In contrast, Rich and Williams JJ considered that each of these four regulations (and more) was not validly so supported. The remaining member of the court, Starke J, considered that the regulations were wholly invalid.

In my view, the key judgments, in terms of wider, present relevance, are those of Williams J (with whom Rich J agreed) and of Starke J. I propose therefore first to analyse the reasons of Williams J and to offer some reflection on those reasons in the context of the current 'War on Terror'.

Justice Williams commenced his consideration of the attack made other than on the basis of transgression of s 116 of the *Constitution*, with this observation, 'A state of war, however prolonged the duration of a conflict such as the present war may be, does not continue indefinitely'.[48] Underpinning this observation is an understanding of warfare as a conflict between state actors resulting from a formal declaration, 'a state of war'. This did accord with not just the experience of Williams J of the then current Second World War but also of his Honour's direct, personal experience of military service during the First World War.[49]

The notion of an indefinitely continuing threat of religiously motivated violence in mainland Australia, outside the confines of a war between state actors, would have been completely foreign to Williams J and his contemporaries. At that point in Australia's history as a federation, the only example on Australian soil, even of a possibly religiously inspired attack on civilians, had occurred during the First World War at Broken Hill on 1 January 1915, when two Muslim immigrants sympathetic to the Ottoman empire had fired at close range on a train carrying residents to the annual picnic, killing three and wounding seven.[50] That was in the course

48 (1943) 67 CLR 116, 161.

49 Sir Dudley Williams served in the Royal Field Artillery on the Western Front during the First World War, was awarded the Military Cross for gallantry and was twice mentioned in dispatches: see Graham Fricke and Simon Sheller, 'Williams, Sir Dudley', *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <https://adb.anu.edu.au/biography/williams-sir-dudley-12031>.

50 One, Mullah Abdullah had been born in Afghanistan; the other, Gool Mohammed, was an Afridi tribesman from the North West Frontier who had served in the Ottoman army before migrating to Australia. They raised the Turkish flag over the position from which they fired on the train. Three civilians were killed and seven wounded in their attack on the train. Mullah Abdullah and Gool Mohammed were killed later in the day at their fallback position in an exchange of gunfire with a group of soldiers, police and local rifle club members: M Dash, 'The Battle of Broken Hill', *Smithsonian Magazine*, 20 October 2011 <https://www.smithsonianmag.com/history/the-battle-of-broken-hill-113650077/>.

of a war between state actors, relevantly the nations of the then British empire and the Ottoman empire. Very shortly after the start of that war, one of the two perpetrators had written to the Minister of War in Istanbul, offering to re-enlist, and actually received a reply by post in Australia. That reply encouraged him to 'be a member of the Turkish Army and fight only for the Sultan', without specifying where or how. The Ottoman sultan was also then the Keeper of Holy Places for the Islamic faith. For some of that faith, loyalty to the sultan and one's religion were therefore intertwined. Such intertwining was far from universal, as many members of the Islamic faith loyally served the king emperor in the United Kingdom's Indian Army in that same war.

Having made this observation, Williams J immediately allowed, 'Because war promotes abnormal conditions, abnormal means are required to cope with them, and this justifies the Parliament of the Commonwealth under the defence power enacting many laws in times of war which would be beyond its scope in times of peace'.[51] This, with respect, exactly encapsulated the orthodox conception of the elastic nature of the defence power. In keeping with this conception, his Honour cited[52] with approval this statement by Dixon J in *Andrews v Howell*:

> The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto.[53]

Also in keeping with this conception, Williams J added:

> A state of war, therefore, justifies legislation by the Commonwealth Parliament, in the exercise of the defence power, which makes many inroads on personal freedom, and which places many restrictions on the use of property of an abnormal and temporary nature which would not be legitimate in times of peace.[54]

Once again, an understanding of war as having a quality of formality about it, a 'state of war', is evident in this statement. That aside, the understanding evident in this statement exemplifies a by then conventional judicial recognition that the defence power can, during war, support intrusions on civil liberties which would be invalid during peacetime. At present, and ever since 11 September 2001, the West, not just the United States, has, in a very real sense, been in a state of war thrust on it and undeclared by it — a state of war with religiously motivated extremists.

In keeping with the then state of Australian and also overseas authority, Williams J allowed that wartime internment measures grounded on a state of ministerial satisfaction as to likely interference with the prosecution of the war were supported by the defence power.

51 (1943) 67 CLR 116, 161.
52 Ibid.
53 (1941) 65 CLR 255, 278.
54 (1943) 67 CLR 116, 161.

Especially in hindsight, the way in which his Honour discussed what was and was not constitutionally permissible is presently instructive:

> It is recognized that the internment of such persons on mere suspicion without trial for some period not exceeding that of the war upon the opinion of a Minister that their liberty is prejudicial to the safety of the realm is a valid exercise of a plenary administrative discretion. The justification for what would be in times of peace an unwarranted interference with the liberty of the subject is that in many instances it would be against the public interest for the Minister to have to disclose to a court the confidential information upon which he acted (*Liversidge v Anderson*; R *v Secretary of State for Home Affairs; Ex parte Budd*). It is the exercise of an administrative discretion to interfere with the freedom of individuals by conscripting them for service in the armed forces of the Commonwealth, or by compelling them to labour in some particular locality at some particular form of work connected with the prosecution of the war. It is also an interference with the freedom of individuals in somewhat different but no more extreme form necessitated by the same emergency to compel them to undergo internment. Such an interference was described by Lord MacMillan in *Liversidge's Case* to be, a comparison with conscription, a relatively mild precaution. … But an Act which said that if, in the opinion of a Minister, the existence of any body of individuals was considered to be, prejudicial to the defence of the Commonwealth during the war, these individuals were forthwith to be cremated and all their property confiscated to the Crown, would be such a complete destruction of the personal and proprietary rights of individuals for an offence of such an indefinite nature that it would go far beyond anything that could conceivably be required for the purposes of meeting the abnormal conditions created by the war.[55]

At the time, and over a pointed and now famous dissent by Lord Atkin, the House of Lords had concluded in the then recently decided United Kingdom internment case, *Liversidge v Anderson*,[56] cited by Williams J in the passage quoted, that the internee, Mr Liversidge, was not entitled to particulars of the basis upon which the Home Secretary, Sir John Anderson, had formed the belief that he was of hostile associations and that his detention was lawful if the Minister had in good faith formed that belief. Hindsight tells us that this understanding that a subjective belief held in good faith was sufficient to constitute 'reasonable cause to believe' is no longer regarded as correct, either in the United Kingdom[57] or Australia.[58]

While internment based on executive determination for some or all of the period of a major war in which Australia is engaged is soundly supported by authority, albeit now with the caveat that *Liversidge v Anderson* is no longer good law, the ability of the Commonwealth Parliament lawfully to authorise executive ordained detention and compulsory questioning[59] of an Australian citizen for any period on national security grounds is less certain on existing authorities concerning the defence power, if that power is conceived solely on the quadripartite basis established during the 20th century. That such powers were considered necessary by Parliament in the sequel to the 11 September 2001 attacks and Bali bombing

55 Ibid 162 (footnote references omitted).
56 [1942] AC 206.
57 *R v Inland Revenue Commissioner; Ex parte Rossminster Ltd* [1980] AC 952, 1000, 1011, 1017–8.
58 *George v Rockett* (1990) 170 CLR 104, 112.
59 As found in Pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth).

in 2002 is manifest.[60] However, as has been seen, legislative assessment and legislative competence do not necessarily coincide.

Hindsight also provokes the thought that, behind the reference by Williams J in the passage quoted to the impossibility of lawful, executive ordained 'cremation' may well have been at least an inkling by his Honour of the genocide then unfolding in Europe in respect of Jews and others on the initiative of Nazi Germany.

Another thought provoked is that, in modern times, the explosion of a drone-launched guided missile cremates, if not atomises, its human targets. Thus, the emphatic rejection by Williams J of the notion that the defence power would support the validity of legislative authorisation of the killing in Australia of those who were, in the Minister's belief, interfering with the prosecution of a war sounds an interrogative note, absent reconsideration of the scope of the defence power, about the validity of any legislative warrant based on that power for the targeting from Australia during the 'War on Terror' even of persons abroad who are considered by the executive to be threats to Australian security. I offer below some further reflection about such actions when considering the scope of executive power. Even more so, it makes it unlikely indeed that the defence power would support any legislatively sanctioned, pre-emptive killing of such persons in Australia as an adjunct to the current 'War on Terror'.

For Williams J, the occasion for the invalidity of the regulations lay in the sweeping, imprecise field of their potential application, via a ministerial declaration, to 'unlawful doctrines' and the permanent effects of immediate dissolution of an organisation, and related forfeiture of its property, including effects on third parties such as creditors.[61]

Intriguingly, although the subject was unnecessary to decide in light of his Honour's conclusion that the reg 6B was not supported by the defence power, Williams J also considered that it was as clear as 'burning daylight' that 'the determination by police officers or the Attorney-General of the controversies which could arise under regs 6(4) and 6B(1) and (2) as to whether property belonged to an unlawful body or to innocent third parties would be an exercise of judicial power, so that these sub-regulations would be invalid on this ground'.[62] This observation is a reminder that it is not just, as in *Alexander's case*, the punitive that may be beyond valid legislative consignment to the determination by an officer of the executive but also the proprietary.

60 The history and policy position is summarised in an April 2017 submission of the Attorney-General's Department to the Parliamentary Joint Committee on Intelligence and Security, Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 — Special Powers Relating to Terrorism Offences (2017) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiyxKf55_n4AhUGE7cAHT4jBy4QFnoECCcQAQ&url=https%3A%2F%2Fwww.acic.gov.au%2Fsites%2Fdefault%2Ffiles%2F2020-08%2Fattorney-generals_department_submission-review_of_asios_questioning_and_detention_powers_0.pdf&usg=AOvVaw3-sg97xtURSpCfclC9RSfq>. See also that committee's related report: Parliamentary Joint Committee on Intelligence and Security, *ASIO's Questioning and Detention Powers* (Commonwealth of Australia, 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report/section?id=committees%2Freportjnt%2F024080%2F24748>.

61 (1943) 67 CLR 116, 164–6.

62 Ibid 167–8.

A similar rationale as to the limits of the defence power is evident in the separate judgment of Starke J in the *Jehovah's Witnesses*. His Honour stated:

> In themselves the Regulations are arbitrary, capacious and oppressive. Bodies corporate and unincorporate are put out of existence and divested of their rights and their property on the mere declaration of the Executive Government.[63]

Interestingly, in the context of any legislative authorisation from Australia of remote targeted killing, his Honour also observed, in highlighting the limits, even in wartime, of the defence power:

> Thus, to suggest, an extravagant illustration, a regulation under the *National Security Act that* any person who the Governor-General declares has acted, in his opinion, in a manner prejudicial to the defence of the Commonwealth or the efficient prosecution of the war shall be executed, could not be supported as a regulation with respect to defence or the safety and defence of the Commonwealth, because of its arbitrary and capricious nature. It would not do to say that it was merely an abuse of power and that the remedy was political, for the regulation would he beyond power: it would not be a regulation with respect to defence or the safety and defence of the Commonwealth.[64]

In contrast to Williams J (and Rich J), Starke J did not consider that reg 6B constituted an invalid conferral of judicial power.[65] The supporting authority cited by Starke J was *Re the Will of Kronheimer; Roche v Kronheimer*[66] ('*Kronheimer*'). In that case, the High Court upheld the validity of a regulation made under the *Treaty of Peace Act 1919* (Cth) which, in the implementation of the economic clauses of the Treaty of Versailles, authorised the confiscation by executive order of property otherwise vested under a will in enemy aliens. The validity of the regulation was upheld primarily on the basis of the defence power but also treated as supported by the external affairs power.[67] In turn, *Kronheimer* provokes the thought that, even were legislative warrant not to be found under the defence power for targeted killing abroad of those considered by the executive to be a threat to Australian national security, such authority may alternatively be found in the external affairs power.

In many ways, *Jehovah's Witnesses* was a jurisprudential predecessor in the High Court to the Cold War era *Australian Communist Party v The Commonwealth*[68] ('*Communist Party case*'). At that time, there was a dimension of that 'war' which was far from 'cold'. Along with those from many other members of the United Nations, each arm of the ADF then had units deployed in Korea in active military operations against the North Korean People's Army, backed by the Chinese 'People's Volunteer Army'.[69]

The *Communist Party case* concerned the validity of the *Communist Party Dissolution Act 1950* (Cth). Over a vigorous dissent by Latham CJ, which echoes a similar dissent by his Honour in *Jehovah's Witnesses*, six members of the High Court concluded that the

63 Ibid 154.
64 Ibid.
65 Ibid 156.
66 (1921) 29 CLR 329.
67 QV *Constitution*, s 51(xxix).
68 (1951) 83 CLR 1.
69 Australian War Memorial, 'Korean War, 1950–53' <https://www.awm.gov.au/articles/atwar/korea>.

legislation was beyond the legislative competence of the Parliament and invalid. Once again, the differences resemble the differences in the United States Supreme Court in *Terminiello v Chicago*. The majority concluded that the legislation could not be supported by s 51(xxxix) of the *Constitution*, as incidental to the executive power found in s 61 of the *Constitution*, or under an implied power to make laws for the preservation of the Commonwealth and its institutions from internal attack and subversion, or under the defence power in s 51(vi) of the *Constitution*.

The present ramifications of views expressed by the majority in the *Communist Party case* are best assimilated by reference to excerpts from two key sections of the impugned legislation, s 5 and s 9, with the addition to them, parenthetically of 'Al-Qaeda' after 'Australian Communist Party', so as to give those views contemporary relevance. So annotated and materially, these sections respectively provided:

> 5(1) This section applies to anybody of persons, corporate or unincorporate, not being an industrial organization registered under the law of the Commonwealth or a State —
>
> (a) which is, or purports to be, or, at any time after the specified date and before the date of commencement of this Act was, or purported to be, affiliated with the Australian Communist Party [Al-Qaeda];
>
> (b) a majority of the members of which, or a majority of the members of the committee of management, or other governing body of which, were, at any time after the specified date on or before the date of commencement of this Act, members of the Australian Communist Party [Al-Qaeda] or of the Central Committee or other governing body of the Australian Communist Party [Al-Qaeda];
>
> (c) which supports or advocates, or, at any time after the specified date and before the date of commencement of this Act, supported or advocated, the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin, or promotes, or, at any time within that period, promoted, the spread of communism [Al-Qaeda], as so expounded; or
>
> (d) the policy of which is directed, controlled, shaped or influenced, wholly or substantially, by persons who —
>
> - were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party [Al-Qaeda] or of the Central Committee or other governing body of the Australian Communist Party[Al-Qaeda], or are communists[members or sympathisers of Al-Qaeda]; and
>
> - make use of that body as a means of advocating, propagating or carrying out the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin [Al-Qaeda].
>
> (2) Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the *Constitution* or of the laws of the Commonwealth, the Governor General may, by instrument published in the *Gazette*, declare that body of persons to be an unlawful association.

…

9(1) This section applies to any person —

(a) who was, at any time after the specified date and before the date upon which the Australian Communist Party[Al-Qaeda] is dissolved by this Act, a member or officer of the Australian Communist Party[Al-Qaeda]; or

(b) who is, or was at any time after the specified date, a communist [member or sympathiser of Al-Qaeda].

(2) Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the GovernorGeneral may, by instrument published in the *Gazette*, make a declaration accordingly.

Of the majority judgments, the most searching analysis of the possible foundations of legislative competence for the Communist Party Dissolution Act is found in the judgment of Sir Owen Dixon. There is nothing in any of the other majority judgments which might occasion any more expansive view of a possible constitutional foundation for that legislation. I propose therefore to confine my analysis of the majority view and its ramifications for the 'War on Terror' to his Honour's judgment.

In detailing why neither s 5 nor s 9 of the Communist Party Dissolution Act was valid, Dixon J first addressed the defence power. He stated that they exhibited 'no apparent connection' with that power.[70] One wonders, with great respect, whether this same lack of apparent connection would then have been found in relation to the Nazi Party or, now, in relation, for example, to Al-Qaeda. His Honour nonetheless returned later in his judgment, as shall I in this analysis, to what support there might be for the legislation via that head of power.

Obviously, with the phrase, 'prejudicial to … the execution or maintenance of the *Constitution*' used in the sections in mind, Dixon J next stated that 'Its apparent reference is to s 61 of the *Constitution* as affording a subject upon which s 51 (xxxix) might operate'. His Honour then stated, 'But it is hardly necessary to say that when the country is, for example, actually encountering the perils of war measures to safeguard the forms of government from domestic attack and to secure the maintenance and execution of at least some descriptions of law might be sustained under the defence power, even if it were thought that their nature took them outside the scope of s 51(xxxix) in its application to s 61'.[71]

As to this apparent combination of the s 51(xxxix) incidental power and s 61 executive power as a legislative foundation, the vice discerned by Dixon J in each of ss 5(2) and 9(2) was that they 'give no … specific or reasonably definite description of any act, matter, thing or event, attending the exercise of the executive power. There is nothing but the vague or intangible conception of the existence of a body or the activities of a man being prejudicial to the executive power'.[72]

70 (1951) 83 CLR 1, 186.
71 Ibid.
72 Ibid.

During the Cold War, there certainly were state actors, the Soviet Union, Communist China and their satellite states. But there was never a formal declaration of war by Australia with any of these state actors. At most, there was a national response to a series of United Nations Security Council resolutions which culminated in a call for Member Nations to 'furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'.[73]

But the reasoning of Dixon J is not to be dismissed in terms of present relevance on the basis of a naive lack of understanding that a threat to the existence of a nation state and its governance and peace could be found otherwise than in the actions of a hostile state actor. Dixon J was not unaware of the singular challenges presented by a war of ideas and values to pluralist democracies where freedom of political belief and expression are prized. His Honour expressly addressed this in the *Communist Party case* in examining the limits of legislative competence under the incidental power:

> For myself I do not think that the full power of the Commonwealth Parliament to legislate against subversive or seditious courses of conduct and utterances should be placed upon s 51 (xxxix) in its application to the executive power dealt with by s 61 of the *Constitution* or in its application to other powers. I do not doubt that particular laws suppressing sedition and subversive endeavours or preparations might be supported under powers obtained by combining the appropriate part of the text of s 51 (xxxix) with the text of some other power. But textual combinations of this kind appear to me to have an artificial aspect in producing a power to legislate with respect to designs to obstruct the course of government or to subvert the *Constitution*. *History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.* In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.[74]

The emphasised observations in this passage have become famous as a defence of liberty to espouse a competing political belief, unpopular to the government of the day. They are analogous to the observation, quoted above, made in the United States Supreme Court by Douglas J in *Terminiello v Chicago*. Equally, in my view, it does no injustice to the dissent of Latham CJ in the *Communist Party case* to summarise it as based on the same premises as those found in the dissent of Jackson J in that United States case.

Although Dixon J was not a member of the court which decided *Jehovah's Witnesses*, the flaw which he found in s 5(2) and s 9(2) of the Communist Party Dissolution Act was the same type of vagueness as that found by Williams J in that earlier case. Justice Dixon stated:

> The extent of the power which I would imply cannot reach to the grant to the Executive Government of an authority, the exercise of which is unexaminable, to apply as the Executive Government thinks proper the vague formula of sub-ss (2) relating to prejudice to the maintenance and execution of the *Constitution* and the laws, and by applying it to impose the consequences which under the Act would ensue.[75]

73 United Nations Security Council Resolutions Nos 83 and 84 of 27 June and 7 July 1950 respectively: <https://digitallibrary.un.org/record/112027?ln=en>.

74 (1951) 83 CLR 1, 187–8 (emphasis added).

75 Ibid 188.

The flaw then lay in the provision for extension of application by executive satisfaction against the vague criterion of likelihood of acting prejudicially to the maintenance and execution of the *Constitution* and the laws of the Commonwealth.

Justice Dixon returned to the limits of the incidental power later in his reasons for judgment, stating:

> Wide as may be the scope of such an ancillary or incidental power, I do not think it extends to legislation *which is not addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance and yet does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject*, but proceeds directly against particular bodies or persons by name or classification or characterization, whether or not there be the intervention of an Executive discretion or determination, and does so not tentatively or provisionally but so as to affect adversely their status, rights and liabilities once for all. It must be borne in mind that it is an incidental or ancillary power, not a power defined according to subject matter.[76]

In the clause emphasised may be found support for legislation addressed to meeting a threats of particular, violent conduct which has been manifest in the 'War on Terror' but a generalised prohibition of a particular organisation and pre-emptive internment of its members based on executive satisfaction would require reassessment of conclusions reached in the *Communist Party case* or at least the reception of evidence which allowed those conclusions to be distinguished.

Later yet, Dixon J elaborated upon the clause I have emphasised so as to indicate what may be within the limit of legislative competence conferred by the incidental power:

> To deal specifically with named or identifiable bodies or persons independently of any objective standard of responsibility or liability might perhaps be possible under the power in the case of an actual or threatened outburst of violence or the like, but that is a question depending upon different considerations.[77]

Extrapolating for a moment from the *Communist Party case* to the present, legislation which, in the way I have annotated s 5 and s 9 of the Communist Party Dissolution Act, just named Al-Qaeda or some other religiously motivated organisation such as Islamic State might only be supported by the incidental power 'in the case of an actual or threatened outburst of violence'. Yet contemporary events instruct that neat organisational adherence or existence is apt to be elusive in relation to apparently religiously motivated violence. The Lindt Café siege offers a case in point.

During the siege, Mr Monis displayed a *shahada* flag but repeatedly sought an Islamic State flag from authorities.[78] He also sought to maintain anonymity, which accorded with a then contemporary exhortation of Islamic State in relation to acts of violence.[79] However, as noted above, the Coroner was unable to conclude whether Mr Monis was motivated by Islamic State to undertake his actions.[80] Even after his violent actions, would it therefore have been lawfully possible, according to the Dixonian conception of the reach of the incidental power,

76 Ibid 192 (emphasis added).
77 Ibid 193–4.
78 Coroner of New South Wales (n 18), Ch 10, para 40.
79 Ibid, Ch10, paras 46 and 47.
80 Ibid, Ch 10, para 88.

just to name Islamic State as a proscribed organisation under a legislative model akin to that adopted for the Australian Communist Party?

What of the position in relation to organisations similar to Al-Qaeda or Islamic State or in advance of any such act of violence in Australia?

On 12 October 2002, in Bali, Indonesia, agents of Jemaah Islamiyah detonated three bombs, two in nightspots — the Sari Club and Paddy's Bar — and one in front of the American consulate. The resultant explosions killed 202 people, 88 of whom were Australian, and wounded hundreds more.[81] Jemaah Islamiyah has never conducted an attack in Australian territory, and no Australians are known to be currently involved with it, although it is assessed by the Australian Government as 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts'.[82] Once again, the observations made by Dixon J in the *Communist Party case* sound an interrogative note about the incidental power as a valid foundation or legislation addressing threat domestically a threat from this organisation.

What further of the defence power in the *Communist Party case*? Dixon J took cognisance of then contemporary events in Korea and that Australian forces were engaged in operations there. But he also noted that Australia was not substantially on a war footing. His Honour therefore considered that the validity of the legislation necessarily fell for assessment 'upon the same basis as if a state of peace ostensibly existed'. His Honour then posed for answering the following question:

> Is it possible, however, to sustain the Act on the ground that under the influence of events the practical reach and operation of the defence power had grown to such a degree as to cover legislation providing no objective standard of liability relevant to the subject of the power but proceeding directly first by the pronouncement of a judgment by means of recitals and then in pursuance of the recitals acting directly against a body named, and bodies and persons described, in derogation of civil and proprietary rights?[83]

Again to interpolate contemporary events, notwithstanding a longstanding but concluded deployment of the ADF to Afghanistan, Australia was even then and is certainly not now on a war footing in the sense understood in the First and Second World Wars. But we live daily in circumstances where the executive has assessed the threat of religiously motivated, domestic terrorist violence as 'Probable'.

In answering, adversely, the existence of any foundation for the legislation in the defence power, Dixon J drew his discussion of that power and its limits together in this way:

> It must be evident that nothing but an extreme and exceptional extension of the operation or application of the defence power will support provisions upon a matter of its own nature prima facie outside Federal power, containing nothing in themselves disclosing a connection with Federal power and depending upon a recital of facts and opinions concerning the actions, aims and propensities of bodies and persons to be affected in order to make it ancillary to defence.[84]

81 Australian National Security, Australian Government, 'Jemaah Islamiyah' (2022) <https://www.nationalsecurity.gov.au/what-australia-is-doing/terrorist-organisations/listed-terrorist-organisations/jemaah-islamiyah-(ji) (Australian National Security, Jemaah Islamiyah) See also: National Museum of Australia, Bali bombings: https://www.nma.gov.au/defining-moments/resources/bali-bombings>.

82 Ibid.

83 (1951) 83 CLR 1, 196.

84 Ibid 202.

In relation to a period of ostensible peace, Dixon J added:

> Whatever dangers are experienced in such a period and however well-founded apprehensions of danger may prove, it is difficult to see how they could give rise to the same kind of necessities. The Federal nature of the *Constitution* is not lost during a perilous war. If it is obscured the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.[85]

The *Communist Party case* did not call into question the correctness of the upholding in the then recently decided *R v Sharkey*[86] of offence provisions in the *Crimes Act 1914* (Cth) criminalising sedition; nor did it gainsay the reference by Isaacs J in *R v Kidman*[87] to the executive government's 'inherent right of self-protection'. What it did do was to sound an interrogative note about the reach of Commonwealth legislative competence during periods of predominant domestic peace to deal with threats to national security perceived by the executive government and where the measures adopted in response confer on officers of the executive powers to interfere with civil liberties based on satisfaction as to vague and amorphous criteria.

In my respectful view, in the absence of a reassessment of a neat quadripartite division of periods in which the defence power might fall for consideration, the analysis evident in the *Communist Party case* poses real difficulties in relation to reliance on that head of power for legislative measures to address the 'War on Terror', especially in relation to persons and organisations in Australia. Overwhelmingly, at present, there is ostensible peace in Australia, but acts of religiously motivated violence can and do occur in random ways and at random times. Further, to conceive of such acts as 'lone wolf attacks' is to ignore religious motivation as a unifying theme and, also, that there exist organisations which incite such motivations, even if they do not themselves in Australia engage in organising any act of violence. It is also to ignore that, offshore, there may be both state and non-state actors which not only incite such motivations but also on occasion may organise, facilitate or harbour those disposed to commit such acts.

Yet further, one feature of the 'federal nature of the *Constitution*' is that it is the Commonwealth which, lawfully, has established and is responsible for the operations of each of the six arms of the ADF as more broadly understood. War fighting itself is the responsibility of the Commonwealth, not of the several states. Yet drawing a meaningful 'federal' distinction between war fighting and protection from domestic violence in the 'War on Terror' is not just difficult but fraught with the prospect of lines of responsibility and related capability being mismatched with the threat. A construction of the defence power so as to yield Commonwealth legislative competence to enact a valid, coherent response might, in the event of a validity challenge, require the admission of evidence in the ways described by Gageler J in *Alexander's case.*

There is nothing overtly quadripartite in the statement of the defence power in the *Constitution*. Conception of it as having that quality is, as the foregoing indicates, nothing more than the

85 Ibid 202–3.
86 (1949) 79 CLR 121.
87 (1915) 20 CLR 425, 440.

product of cases concerning the application of that head of power in circumstances where the threat to Australia and the very nature of warfare was very different to the present.

In some ways, although the underlying motivation is obviously very different, the present threat in Australia resembles that presented Great Britain, rather than Northern Ireland, over some 30 years until the Good Friday Peace Accords of 1999. It is a threat of random acts of violence by non-state actors committed in a society otherwise and usually at peace. Since then and in the aftermath of not only events in New York on 11 September 2001 but also in London on 7 July 2005,[88] the United Kingdom has faced a national security threat similar to that in Australia. Legislated measures of the United Kingdom's parliament to deal with this earlier threat,[89] and current threats[90] to UK national security might well, in light of experience of them in practice, commend themselves to our executive government and Parliament for implementation here.[91] The difference, however, is that the United Kingdom's parliament has unlimited legislative competence.[92] In contrast, the Commonwealth Parliament has only specified subjects of legislative competence. Absent an approach to s 51(vi) which recognises that 'defence' is a subject of legislative competence for the ages, not just for the circumstances of conflict as known in the 20th century, some legislated measures found effective in a kindred jurisdiction such as the United Kingdom in defending against the current threat, particularly detention by executive fiat of citizens for investigation or otherwise, may find less sure support for national legislation in s 51(vi) and even s 51(xxxix) of the *Constitution*.

So it is then that, at the end of this perhaps overlong journey through aspects of Commonwealth legislative competence a point of uncertainty is reached on existing jurisprudence as to what measures might validly be enacted by the Commonwealth Parliament to address the ongoing phenomenon of religiously motivated acts of domestic violence.

What then of direct action in the exercise of executive power? On Monday, 2 May 2011, acting on the direct orders of then United States President Barak Obama, as President and Commander in Chief, uniformed members of the United States armed forces entered Pakistan and killed Osama bin Laden.[93] Bin Laden was never tried in absentia by a court exercising the judicial power of the United States under Art III of the United States Constitution, found

88 UK Cabinet Office, Intelligence and Security Committee, *Report into the London Terrorist Attacks on 7 July 2005* (along with the government's response) <https://www.gov.uk/government/publications/report-into-the-london-terrorist-attacks-on-7-july-2005>.

89 Initially, the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) (since repealed).

90 The *Terrorism Act 2000* (UK), the *Anti-Terrorism Crime and Security Act 2001* (UK), the *Prevention of Terrorism Act 2005* (UK), the *Terrorism Act 2006* (UK) and, latterly, the *National Security and Investment Act 2021* (UK).

91 See, notably, Parliamentary Joint Committee on Intelligence and Security (PJCIS) Research Paper, 'Counter-terrorism and National Security Legislation Reviews: A Comparative Overview', 7 August 2014 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/CounterTerrorism>; and, more recently, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019* (Commonwealth of Australia, October 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CTLA2019MeasuresNo1/Report>.

92 Previously limited only by obligations arising from that country's now former membership of the European Union.

93 Macon Phillips, 'Osama Bin Laden Dead', White House Archives, 2 May 2011 <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>.

guilty on admissible evidence of complicity in the attacks which occurred on 11 September 2001 and sentenced to death. His complicity was only ever established by intelligence and then only to the satisfaction of the executive.

More recently, again on the direct orders of a United States President and Commander in Chief, on this occasion President Donald Trump, the armed forces of the United States assassinated the Iranian General Qasem Soleiman, head of Iran's Quds Force of the Islamic Revolutionary Guards Corps, by a drone strike in Iraq on 3 January 2020.[94] That assassination was explained on the basis of not only Soleiman's involvement in attacks on United States forces but also other acts of aggression by the post-1979 Iranian government. In this instance also, Soleiman's involvement was the result of an executive finding based on intelligence, not a judicial determination based on admissible evidence. Yet, if the 'War on Terror' is, as well it might, truly to be regarded as a war, the need for judicial sanction on evidence of the killing of an enemy by an officer of the executive is superfluous.

In a report delivered after Soleiman's assassination, the then United Nations special rapporteur on extrajudicial killings, Agnes Callamard, questioned the legality under international law of the assassination, observing:

> The targeted killing of a State actor in a third State has brought 'the signature technique of the so-called "war on terror" into the context of inter-State relations' and highlighted the real risks that the expansion of the "war on terror" doctrine poses to international peace.[95]

One might, with respect, wonder what the demolition by aircraft strike of the World Trade Centre towers or a wing of the Pentagon was if not a violation of 'international peace'.

The special rapporteur decried the absence of an imminent threat, as opposed to the use of past acts of aggression as justification, stating that this blurred the distinction between *jus ad bellum* and *jus in bello*.[96] Yet, with respect, the very nature of the ongoing phenomenon of religiously motivated foreign state and non-state actor sponsored or supported domestic violence has already blurred, if not rendered meaningless, the distinction between *jus ad bellum* and *jus in bello*.

This distinction apart, a recollection of history shows how nuanced, even at the height of a major conventional war, a distinction between a lawful and unlawful combatant may be. On 27 May, 1942, in Operation Anthropoid, the truly evil Reinhard Heydrich, Chief of the Reich Security Main Office and the Acting Reich Protector of the German Protectorate of Bohemia and Moravia, was attacked in Prague by a team of Czech and Slovak paratroopers, dressed

94 'Remarks by President Trump on Iran' White House Archive, 8 January 2020 <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-iran/>.

95 'A/HRC/44/38: Use of armed drones for targeted killings — Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' ('UN Special Rapporteur Drones Report'), 15 August 2020, para 62 <https://www.ohchr.org/en/documents/thematic-reports/ahrc4438-use-armed-drones-targeted-killings-report-special-rapporteur>.

96 Ibid para 61(c).

in civilian clothes, led by Josef Gabcík and Jan Kubiš.[97] Heydrich died early the following month from the wounds inflicted on him in that attack. Yet Czechoslovakia had ceased to exist as a country in 1939, prior to the outbreak of the Second World War, initially as a sequel to the Munich Agreement of 1938, then by the withdrawal of Slovakia from the rump federated state that followed that agreement and finally by the German occupation of what remained. The attack on Heydrich was one which served geopolitical ends rather than one conducted in the heat of battle. Since 3 September 1939, the United Kingdom had been at war with Germany. By May 1942, the United Kingdom had recognised a Czechoslovak government in exile under the former Czechoslovak president, Edmund Beneš, as had the Soviet Union. In contrast, full United States recognition of a government in exile for Czechoslovakia did not occur until October 1942.[98] Gabcík and Kubiš had been trained in the United Kingdom and deployed from there to the territory of the former Czechoslovakia. Few outside Nazi Germany lamented Heydrich's demise, even in 1942. As at the time of his death and although the United States was by then at war with Germany, it might nonetheless be argued that, from a then United States perspective, Heydrich died as a result of a targeted killing by state (United Kingdom) sponsored non-state actors who were unlawful combatants, just assassins. Equally, of course, one can overanalyse such actions and events and thereby do an injustice to Gabcík and Kubiš and their group of fellow, very brave men. Perhaps, with respect, one can also overanalyse the demises of Osama bin Laden and General Soleiman.

In her report, Special Rapporteur Callamard lamented the tendency of judicial branches of government to hold that targeted assassinations such as that of General Soleiman were not justiciable. She stated:

> 27. Judicial practice is not, however, yet in synch with these normative arguments. Thus far, courts have refused to oversee the use of drones to carry out targeted killings extraterritorially, arguing that such matters are political or relate to international relations between States and are therefore non-justiciable. A blanket denial of justiciability over the extraterritorial use of lethal force cannot be reconciled with recognized principles of international law, treaties, conventions and protocols, and violates the rights to life and to a remedy.[99]
>
> [Footnote reference omitted]

A case cited by Special Rapporteur Callamard as exemplifying a disposition to deny justiciability over the extraterritorial use of lethal force is *Regina (Khan) v Secretary of State for Foreign and Commonwealth Affairs*[100] ('*Khan*').

The leading judgment in *Khan* is that of Lord Dyson MR, with whom Laws and Ellas LJJ agreed. As taken from his Lordship's judgment, the factual background to the case was this. The claimant for leave to issue judicial review proceedings, Mr Noor Khan, lived in Miranshah, North Waziristan Agency ('NWA'), in the Federally Administered Tribal Areas of

97 Milan Hauner, 'Terrorism and Heroism Reflections on the Assassination of Reinhard Heydrich' (2007) *World Policy Journal*, Summer (Hauner) <https://www.academia.edu/35644386/Terrorism_and_Heroism_Reflections_on_the_Assassination_of_Reinhard_Heydrich see also Operation Anthropoid, Jewish Virtual Library: https://www.jewishvirtuallibrary.org/operation-anthropoid>.

98 ZAB Zellman and Milan Hauner, 'Czechoslovak history: The breakup of the republic' Encyclopaedia Britannica, <https://www.britannica.com/topic/Czechoslovak-history/The-breakup-of-the-republic>.

99 UN Special Rapporteur Drones Report (n 95) para 27.

100 [2014] 1 WLR 872.

Pakistan. His father was a member of the local jirga, a peaceful council of tribal elders whose functions included the settling of commercial disputes. On 17 March 2012, the claimant's father presided over a meeting of the jirga held outdoors at Datta Khel, NWA. During the course of the meeting, a missile was fired from an unmanned aircraft, or 'drone', believed to have been operated by the United States Central Intelligence Agency ('CIA'). The claimant's father was one of more than 40 people who were killed by the impact of the missile strike.

An interesting footnote to the case, and perhaps not a coincidental one, is that the general area where the drone strike occurred would once have been known as the North West Frontier of British India and familiar to LT Winston Churchill and the members of the Malakand Field Force.

Mr Khan sought judicial review of a decision by the defendant, the Secretary of State for Foreign and Commonwealth Affairs, to provide intelligence to the United States authorities for use in drone strikes in Pakistan, among other places, by way of, amongst other things, a declaration that:

> a. person who passed to an agent of the United States Government intelligence on the location of an individual in Pakistan, foreseeing a serious risk that the information would be used by the CIA to target or kill that individual (i) was not entitled to the defence of combatant immunity, and (ii) accordingly might be liable under domestic criminal law for soliciting, encouraging, persuading or proposing a murder (contrary to section 4 of the *Offences Against the Person Act 1861* (UK)), for conspiracy to commit murder (contrary to section 1, or 1A, of the *Criminal Law Act 1977* (UK)) or for aiding, abetting, counselling or procuring murder (contrary to section 8 of the *Accessories and Abettors Act 1861* (UK)).

He was refused leave by a Queen's Bench Divisional Court. From that refusal, he appealed to the Court of Appeal.

To give context to a conclusion reached by Lord Dyson, it is necessary to set out his Lordship's summary of a way in which the case for Mr Khan came to be advanced:

> It is true that, if Mr Chamberlain's construction of section 52 of and Schedule 4 to the 2007 Act is correct, the court will not be asked to make any finding that CIA officials are committing murder or acting unlawfully in some other way. Nor will the court be asked to say whether the US policy of drone bombing is unlawful as a matter of US law. As a matter of strict legal analysis, the court will be concerned with the hypothetical question of whether, subject to the defences available in English law, an UK national who kills a person in a drone strike in Pakistan is guilty of murder. The court is required to ask this hypothetical question because, if Mr Chamberlain is right, that is what the 2007 Act requires in order to give our courts jurisdiction to try persons who satisfy the 'relevant conditions' set out in paragraph 1 of Schedule 4.[101]

In rejecting an argument so grounded, his Lordship concluded:

> 37. In my view, a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US. In reality, it would be understood as a finding that (i) the US official who operated the drone was guilty of murder and (ii) the US policy of using drone bombs in Pakistan and other countries was unlawful. The fact that our courts have no jurisdiction to make findings on either of these issues is beside the point. What matters is that the findings would be understood by the US

101 Ibid [35].

> authorities as critical of them. Although the findings would have no legal effect, they would be seen as a serious condemnation of the US by a court of this country.[102]

An alternative argument for Mr Khan based on an alleged violation of international humanitarian law fared no better, and for like reasons. His Lordship stated:

> I am satisfied that the secondary claim in this case founders on the same rock as the primary claim. The claimant is inviting the court to make a finding condemning the person who makes the drone strike as guilty of committing a crime against humanity and/or a war crime. Since that person is a CIA official implementing US policy, such a finding would involve our courts sitting in judgment of the USA.[103]

As can be seen, influential to the outcome in *Khan* was that the drone strike was executed not by the British military but, rather, by an agency of the government of a foreign power, the United States of America.

Suppose, however, that, in lieu of deciding to revoke Mr Alexander's citizenship but on the same intelligence, the Australian Government had passed that intelligence to the CIA with a request that, such was the threat he posed to Australian national security, and the security of other countries engaged in the 'War on Terror', Mr Alexander should be added to a drone strike target list and, if located in Syria or elsewhere in the Middle East, killed. At common law, would an Australian court entertain a claim like that of Mr Khan's son if Mr Alexander were killed?

Although, in light of *Carter v Egg and Egg Pulp Marketing Board*,[104] it is no longer correct, as was held in *Joseph v Colonial Treasurer of New South Wales*[105] (*Joseph*) to say that the states lack legislative competence with respect to defence, the statement in *Joseph* that the 'war prerogative' vests in the Commonwealth remains good law.[106] Complementing the 'war prerogative', the *Constitution* consigns the command in chief of the ADF to the Governor-General as the King's representative.[107]

That 'war prerogative' might these days more aptly be regarded as falling within the executive power of the Commonwealth which, by s 61 of the *Constitution*, is vested in the King and exercisable by the Governor-General. Although s 61 has already been mentioned above and its interplay with s 51(xxxix) of the *Constitution* considered in relation to an exercise of legislative power, it is desirable now to set out its terms in full, because of the particular purposes for which it consigns executive power to the Governor-General:

> **Executive power**
>
> The executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General as the Queen's representative, *and extends to the execution and maintenance of this Constitution*, and of the laws of the Commonwealth.
>
> [Emphasis added]

102 *Khan* [2014] 1 WLR 872 [37].
103 Ibid [51].
104 (1943) 66 CLR 557.
105 (1918) 25 CLR 32.
106 Ibid 47.
107 *Constitution*, s 68.

In *Victoria v The Commonwealth*[108] ('*Australian Assistance Plan case*'), Jacobs J considered that the words emphasised in s 61 carried this meaning:

> Within the words 'maintenance of this *Constitution*' appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States.[109]

In this statement, one sees the notion of the executive, via s 61, having the constitutional duty of the preservation of Australia as a nation, including via the interaction of the executive with the wider world.

That this part of s 61 carries such a meaning was made explicit by Brennan J in *Davis v The Commonwealth*[110] and by Gummow, Crennan and Bell JJ in their joint judgment in *Pape v The Commonwealth*[111] ('*Pape*'). Their Honours stated:

> The *Constitution* assumes also, in s 119, the existence and conduct of activities by 'the Executive Government of the State'. The conduct of the executive branch of government includes, but involves much more than, enjoyment of the benefit of those preferences, immunities and exceptions which are denied to the citizen and are commonly identified with 'the prerogative'; the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and having regard to the spheres of responsibility vested in it.
>
> With that understanding, the phrase 'maintenance of this *Constitution*' in s 61 imports more than a species of what is identified as 'the prerogative' in constitutional theory. *It conveys the idea of the protection of the body politic or nation of Australia*.[112]

It is therefore tolerably clear that s 61 of the *Constitution* confers on the executive not only the role of waging war but also a role of protecting the nation.

As it happens and in relation to the United Kingdom, these twin responsibilities featured in an examination by the United Kingdom Parliament's Joint Committee on Human Rights of the circumstances which gave rise to *Khan*.[113] One main reason for the conduct of that inquiry was expressed by the Committee to be 'the need to provide reassurance to all those involved in implementing the Government's policy that they are not running the risk of criminal prosecution for murder or complicity in murder'.[114] The Committee apprehended that 'Where UK personnel kill another person abroad as part of a traditional armed conflict, the defence of combatant immunity applies and there is no risk of criminal liability provided the killing was in accordance with the Law of War'. One might comfortably apprehend that a similar position applies in relation to Australia.

108 (1975) 134 CLR 338.
109 Ibid 406
110 (1988) 166 CLR 79, 110.
111 (2009) 238 CLR 1.
112 Ibid [214]–[215] (emphasis added).
113 House of Lords and the House of Commons, Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing* (Second Report, Session 2015–2016, 10 May 2016) ('UK Joint Committee Report') <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/57402.htm>.
114 Ibid para 1.45.

The Committee concluded that it was 'clear that the [UK] Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes'.[115] The Committee also concluded that the execution of that policy by UK personnel was lawful, within very particular limits.

> The … use of lethal force abroad outside of armed conflict should only ever be 'exceptional'. … [We] accept that in extreme circumstances such uses of lethal force abroad may be lawful, even outside of armed conflict. Indeed, in certain extreme circumstances, human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government's policy is, however, depends on the Government's understanding of its legal basis. Too wide a view of the circumstances in which it is lawful to use lethal force outside areas of armed conflict risks excessively blurring the lines between counter-terrorism law enforcement and the waging of war by military means, and may lead to the use of lethal force in circumstances which are not within the confines of the narrow exception permitted by law.[116]

In relation to Australia, a starting premise is that 'It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer'.[117] However, having regard to the authorities just mentioned concerning s 61 of the *Constitution*, the executive power of the Commonwealth is broad enough for an Australian Government lawfully to adopt, for the protection of the Australian nation and as a matter of political value judgment, a policy like that of the UK Government, as described in the Committee's report. Further, there is no reason to think that, under the Law of Armed Conflict and International Humanitarian Law, the position in relation to the execution of such a policy would be any different for Australia to that described in the Committee's report.

Insofar as it were thought necessary or desirable to provide greater domestic law certainty for those engaged in the execution abroad of such a policy as to the lawful limits of engagement, the existing case law concerning both the defence and incidental heads of legislative power, discussed above, means that these heads of power would provide an uncertain foundation for resultant legislative validity. The position in respect of legislative competence would be more certain if the external affairs power[118] were invoked. That would engage the 'geographical externality' principle, which holds that this head of legislative power includes a power to make laws with respect to places, persons, matters or things outside Australia's geographical limits.[119]

Any endeavour to secure even declaratory relief from an Australian court in relation to conduct by an officer of the Commonwealth akin to that of UK officials in *Khan* would not necessarily see the same outcome as in that case in terms of a refusal to sit in judgment on the actions of the United States. To read the above-quoted observation by Dixon J in the *Communist Party case*, one might think that such a value judgment of the executive government was unexaminable in the courts, but several later authorities, mentioned below, suggest one should not assume there is a blanket prohibition.

115 Ibid para 2.39.
116 Ibid para 2.40.
117 (1984) 156 CLR 532, 540.
118 *Constitution*, s 51(xxix).
119 *XYZ v The Commonwealth* (2006) 227 CLR 532.

In *Re Ditfort; Ex parte Deputy Commissioner of Taxation*[120] ('*Ditfort*'), Gummow J, then a judge of the Federal Court of Australia, when considering diplomatic notes exchanged between Australia and Germany and whether false statements had been made by the Australian Government to the German Government, was of the view that, unlike in the United Kingdom, where the conduct of diplomatic relations fell within the prerogative power, in Australia the subject fell within s 61 of the *Constitution* with the result that the Court could adjudicate on matters going to restraints on and the extent and nature of the executive power as a constitutional question.[121] Justice Gummow qualified his view as to the general position in this way:

> there will be no 'matter' [on which the Court can adjudicate] if the plaintiff seeks an extension of the Court's true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions.[122]

Hicks v Ruddock[123] concerned an application by an Australian citizen who had been confined at Guantanamo Bay Naval Base in Cuba for five years after apprehension in Afghanistan for judicial review of an Australian Government decision not to request his release and return to Australia and a related application for habeas corpus. In refusing an application or summary dismissal, Tamberlin J acted on the correctness of *Ditfort* and, after discussing some United States authorities, concluded that 'neither the Act of State doctrine nor the principle of non-justiciability justify summary judgment at this stage of the proceeding'.[124]

Habib v Commonwealth (No 2)[125] was another case arising from the detention, as an alleged unlawful combatant, of an Australian citizen at Guantanamo Bay as an unlawful combatant and earlier in Pakistan and Egypt. He alleged that he was illegally detained and tortured by overseas authorities and that the Australian Government knew of this but did little or nothing to stop it from taking place, in addition to its officers themselves examining him in oppressive circumstances. His claims against the Commonwealth included a claim in respect of the tort of harassment resulting in mental or psychological shock and an alleged breach of fiduciary duty on the basis that the Commonwealth should have exercised its constitutional power to conduct foreign relations in his interests and misfeasance in public office by Commonwealth officers. Justice Perram held that the act of state doctrine did not necessarily apply to prevent the Court from examining the rights and wrongs of the acts of a foreign state, as it is arguable that there is an exception to the principle where the acts of the foreign state in question constitute grave breaches of international law.[126] His Honour considered that a claim for misfeasance could be sustained if it could be said that the provision of intelligence for use in Mr Habib's torture was contrary to Commonwealth law pursuant to the third and fourth Geneva Conventions (the *Convention Relative to the Treatment of Prisoners of War* and the *Convention Relative to the Protection of Civilian Persons in Time of War*, done at Geneva on 12 August 1949). These conclusions were reached in the context of an interlocutory application concerning the adequacy of pleadings, rather than in a final judgment. However,

120 (1988) 19 FCR 347.
121 Ibid 369.
122 Ibid 370.
123 (2007) 156 FCR 574.
124 Ibid [34].
125 (2009) 175 FCR 350.
126 Ibid [75], [78] and [81].

in later, related proceedings in the Full Court, it was held that the application of the act of state doctrine to preclude judicial determination of Mr Habib's claims would be inconsistent with the Australian constitutional framework and with Ch III of the *Constitution*, which confers jurisdiction on federal courts to review the legality of acts of Commonwealth officials under Commonwealth law.[127]

If ever at common law there were a 'domain that does not belong to it' for the judiciary, it was, and remains, acts of war. In actual or imminent contact with the enemy, a rule of necessity applies to members of the ADF, *Salus populi suprema lex*, but this immunity from scrutiny is in circumstances of emergency and necessarily transient.[128] But, even in wartime, there is a difference between operations in war and operations of war. Only the latter are not justiciable. Even to secure judicial acceptance that a present state of war existed such that this type of immunity might arise in relation to particular offshore actions might very well require singular evidence.[129]

Further, with new and evolving technologies, the longstanding experience and practice of deployment of the ADF offshore to meet particular threats may, as never before, be supplemented or in some cases replaced by weapons platforms controlled remotely from Australia. Even with such platforms, actionable intelligence may be highly time sensitive as, I should expect, was that upon which the United States acted to target and kill General Soleiman as he exited the airport in Baghdad, Iraq. Remoteness of location from a foreign target of a domestic initiator of an engagement of that target does not necessarily diminish the urgency of tactical decision that is a factor which informs why, in relation to operations of war, such decisions are not justiciable at common law.

In short, then, the Australian judiciary has not, in times of earlier conflict, approached the *Australian Constitution* as if it were a suicide pact. But they have been scrupulous in confining the extent of the remit of both the defence power and the incidental power in relation to the valid enacting laws of domestic application within the limits of wartime necessity. However, the 'War on Terror' presents a very different threat to cases which have in the past addressed these powers to legislate. The existing case law raises interrogative notes as to the limits of Commonwealth legislative competence with respect to these powers to enact measures to deal with this current threat. As to the actions of the executive government abroad, Commonwealth executive power may well be sufficient to authorise the targeted killing of non-state actors who present an imminent threat to the Australian nation, but it should not be assumed that the question of whether that killing was lawful is not justiciable in a court exercising Commonwealth judicial power under Ch III of the *Constitution*. As yet, that remains an open question and one the answer to which will probably require singular evidence to be tendered describing the nature and extent of the ongoing 'War on Terror' and of the consequential threats to Australia.

127 *Habib v Commonwealth* (2010) 183 FCR 62.

128 *Shaw Savill And Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, 354 (Starke J); 361–2 (Dixon J, Rich ACJ and McTiernan J agreeing), 367 (Williams J).

129 *Shaw Savill And Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, 356 (Starke J).

In praise, and defence, of diversity in tribunal appointments

*Janine Pritchard**

In this article I propose to address the concept of diversity as it applies to the membership of tribunals in this country. There are two aspects to this diversity on which I wish to focus. The first is diversity in the *personal characteristics* of tribunal members — matters such as their gender or gender identity, age, caring responsibilities, disability, sexual orientation, race, religion, cultural background, socio-economic background, and so on. The second aspect of diversity on which I want to focus concerns *professional qualifications* — that is, diversity in the professional background and qualifications of tribunal members — and, specifically, the appointment of non-lawyers, as well as lawyers, as members of tribunals.

In considering the question of diversity in tribunal membership, my focus is primarily on diversity in the non-sessional members appointed to tribunals, as opposed to diversity in the sessional (sometimes known as occasional) members. I do so because the non-sessional members, the large majority of whom are full time appointments, represent the core membership of tribunals and carry out most of their work.

Furthermore, my focus is on the non-sessional members of the major civil and administrative tribunals in this country, the Administrative Appeals Tribunal ('AAT') and the state and territory Civil and Administrative Tribunals ('CATs'): the New South Wales Civil and Administrative Tribunal ('NCAT'), the Victorian Civil and Administrative Tribunal ('VCAT'), the Queensland Civil and Administrative Tribunal ('QCAT'), the Western Australian State Administrative Tribunal ('WASAT'), the South Australian Civil and Administrative Tribunal ('SACAT'), the Tasmanian Civil and Administrative Tribunal ('TASCAT'), the Australian Capital Territory Civil and Administrative Tribunal ('ACAT') and the Northern Territory Civil and Administrative Tribunal ('NTCAT').

Why bother to discuss diversity in tribunal appointments? As I will shortly illustrate, the membership of the AAT and the CATs is reasonably diverse on some limited measures of diversity (gender and professional diversity). That is to be celebrated. However, there is a danger that the achievement of diversity on those measures might be viewed as an indication that there is no more work to do to achieve diversity in tribunal appointments. In my view, it is important to continue to strive for personal diversity and professional diversity in the membership of tribunals, because there exist some risks that the importance of that diversity will be overlooked or, even worse, consciously rejected.

* Janine Pritchard is the President of the Western Australian State Administrative Tribunal. This is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference in Canberra on 22 July 2022. The author gratefully acknowledges the assistance of Ms Rebecca Blott and Ms Cecilia Chipangura in collating the data discussed in this article.

With that background in mind, the objectives of this article are to:

- provide a snapshot of the membership of the major Australian tribunals — the AAT and the CATs — to highlight the criteria for the appointment of their members, consider some of the publicly available data about diversity in the non-sessional membership of those tribunals, and consider some of the implications and limitations of that data;
- identify the evidence that suggests some risk that the importance of diversity in the membership of tribunals might be overlooked or rejected;
- recall why diversity in the appointment of tribunal members is so important; and
- discuss how greater diversity in tribunal membership might be achieved.

Overview of membership of the AAT and the CATs

Criteria for appointment

At the outset, it is useful to bear in mind the legislative requirements for the appointment of members of the AAT and the CATs.

The constituting legislation of the AAT[1] and most of the CATs[2] requires that members either be qualified as lawyers (usually with a minimum period of experience, in the order of between five and eight years) or have special knowledge or skills relevant to dealing with the work of the tribunal in question. The constituting legislation for the ACAT adopts a more prescriptive approach.[3] In short, the constituting legislation of the AAT and the CATs permits diversity in terms of the professional qualifications and experience of members: not all of the members of those tribunals must be lawyers. On the other hand, with two exceptions (the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') and the *South Australian Civil and Administrative Tribunal Act 2013* (SA) ('SACAT Act')) the constituting legislation of the AAT and the CATs does not require other aspects of diversity to be taken into account in the appointment of members of tribunals. I will consider the relevant provisions of the QCAT Act and the SACAT Act later in the article.

1 *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') s 7(3).

2 *Civil and Administrative Tribunal Act 2013 No 2* (NSW) ('NCAT Act') s 13; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act') s 13, 14; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') s 183; *State Administrative Tribunal Act 2004* (WA) ('SAT Act') s 117; *South Australian Civil and Administrative Tribunal Act 2013* (SA) ('SACAT Act') s 19(3); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ('TASCAT Act') s 44(2); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) ('NTCAT Act') s 16.

3 The *ACT Civil and Administrative Tribunal Act 2008* ('ACAT Act') s 96 simply requires that the Attorney-General appoint persons they are satisfied have the experience or expertise to qualify them to exercise the functions of a senior member or ordinary member. However, r 6 of the *ACT Civil and Administrative Tribunal Regulation 2009* ('ACAT Regulations') requires the Attorney-General, considering whether to appoint a person, to take reasonable steps to ensure the ACAT has sufficient members with relevant interests, qualifications or experience to allow it to exercise its functions, and specifies a minimum number of members who must meet certain criteria in terms of qualifications or experience. The specified qualifications and experience are not confined to law but include qualifications or experience in consumer affairs, in the provision of credit, in business, in the health professions, in dealing with mentally dysfunctional people, and in dealing with the needs of people who require assistance or protection from abuse, exploitation or neglect.

With that background in mind, I turn now to consider what can be discerned from publicly available information about the diversity of the membership of the AAT and the CATs.

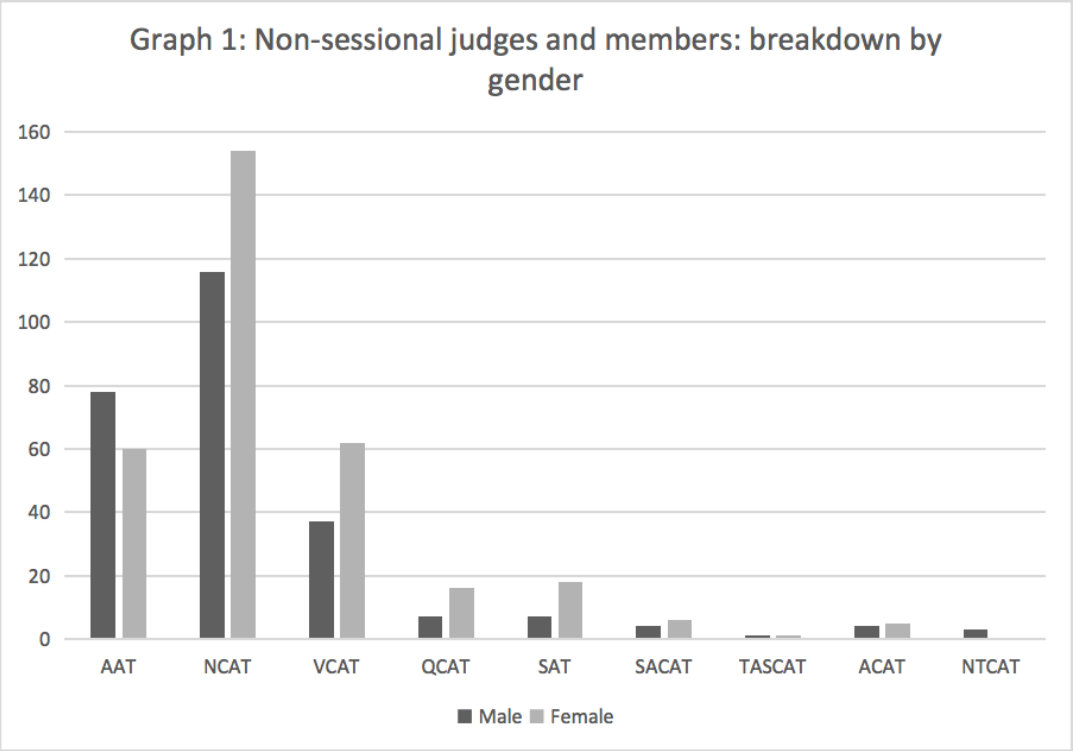
Publicly available data as to diversity in tribunal membership

What data is available to the public about diversity in the membership of the AAT and the CATs? In order to determine that question, the SAT's legislation research officers endeavoured to collate publicly available data about the current non-sessional members of Australian tribunals. (For ease of collation of the data, judges were included, as the small number of judicial appointments in each jurisdiction was not so significant as to skew the overall results.) The source material searched comprised the webpages of the AAT and the CATs, together with their most recent annual reports. The webpages and annual reports were searched for information in relation to professional diversity (for example, as to which non-sessional members were legally qualified and as to the qualifications and experience of those members who were not lawyers) and for any information in relation to diversity in the personal characteristics of the non-sessional members. In relation to gender, the gender of members was deduced solely on the basis of their names or by gleaning other information from the relevant webpage or annual report. As it can be difficult to discern gender merely from a person's name, it is possible that the data is not absolutely accurate for that reason. Furthermore, in relation to the professional diversity of members, the qualifications or expertise of non-sessional members was not always readily able to be identified from the webpages and annual reports, which in turn made it impossible to calculate the total number of lawyers and non-lawyers appointed to some tribunals or to be certain about the range of professional backgrounds of the non-legal members. In the absence of adequate data, I have endeavoured to give examples of the non-legal qualifications of the members of the relevant tribunal.

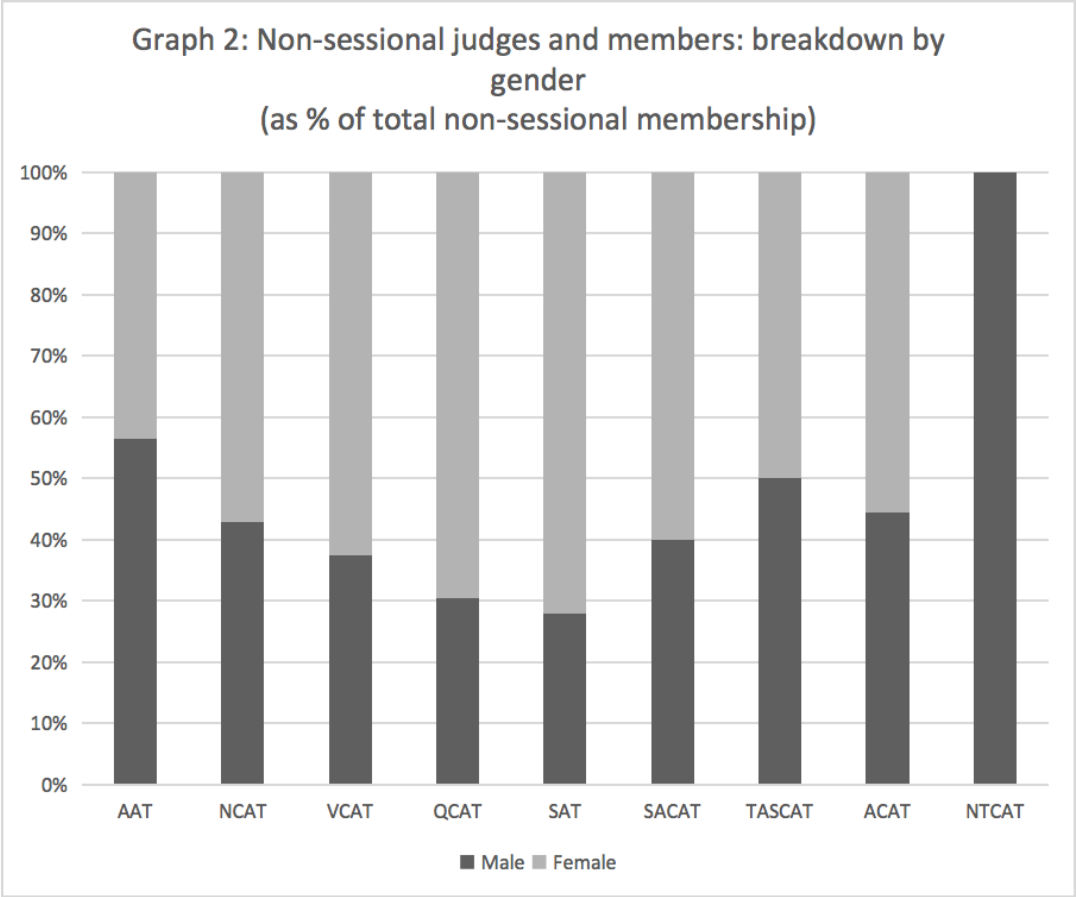
My objective in reporting on the data is not the precision of the numbers but, rather, the overall impression that can be discerned in relation to each of the tribunals.

Gender diversity in non-sessional members

Graph 1 shows the gender breakdown, by number, of the non-sessional judges and members of the AAT and the CATs.



Graph 2 represents the same data as a proportion of overall tribunal membership.

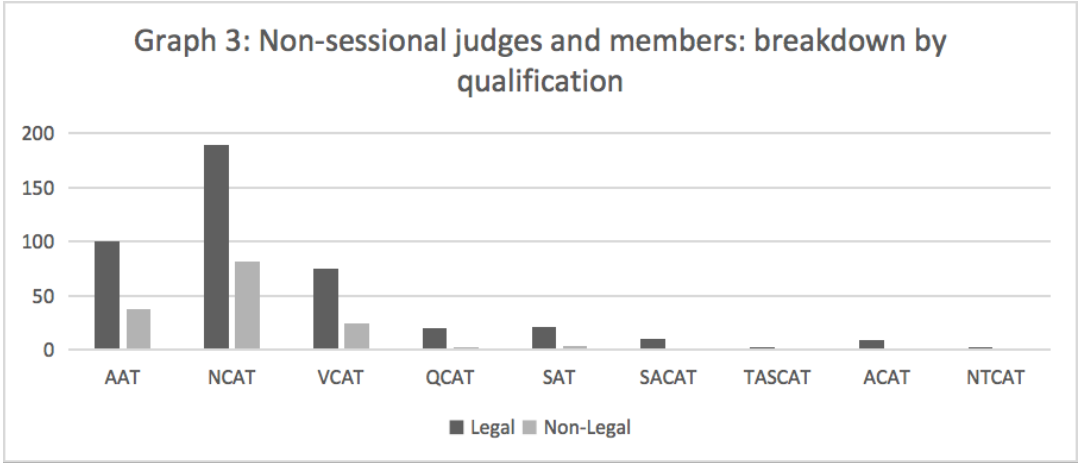


The data reveals that, in the majority of the state CATs, and in the ACAT, female judges and non-sessional members outnumber male judges and non-sessional members, and often by a quite considerable margin. In the AAT, males outnumber women but by only a modest margin. In the TASCAT the numbers are even. The NTCAT is the only CAT without any women judges or non-sessional members (three men). Women judges and non-sessional members thus make up a substantial proportion of the overall number of non-sessional members of all of the Australian tribunals apart from the NTCAT.

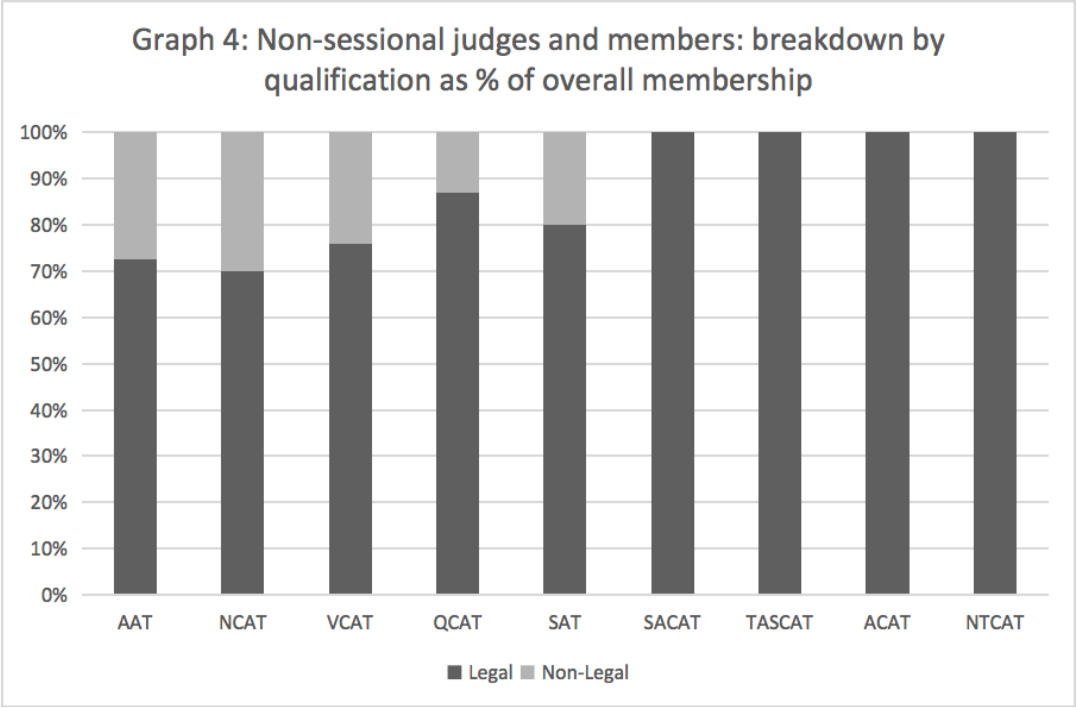
As for other aspects of personal diversity of non-sessional tribunals, there is a dearth of publicly available information in the tribunal webpages and annual reports.

Professional diversity in non-sessional members

Graph 3 depicts the professional diversity for non-sessional members — by reference to legal and non-legal qualifications and experience.



Graph 4 depicts the same data as a proportion of overall non-sessional membership.



The data reveals that, in each of the AAT, the NCAT, VCAT, QCAT and the WASAT, there is a not insubstantial number of non-sessional members who have qualifications and expertise in areas other than law. On the other hand, in the smaller tribunals, all of the non-sessional members are legally qualified. That is likely to be a consequence of the small numbers of non-sessional members in those tribunals.

As I have already mentioned, the data on which I have drawn is confined to the non-sessional members of the AAT and the CATs. Each of the CATs, in particular, has a comparatively large pool of sessional or occasional members who can be drawn on to sit on individual matters which involve specialist or technical knowledge, such as in vocational regulation matters, planning reviews or building disputes.

Accurate data in relation to the professional backgrounds of non-sessional members was difficult to locate. For that reason, for present purposes, all that can reliably be said is that the non-sessional tribunal members who are not legally trained appear, typically, to be drawn from the following professions: medical and allied health; planning, building and construction (for example, builders, architects, town planners); accounting; social work; and, in the case of the AAT, from the ranks of former public servants, politicians or political advisers, and from the defence forces.

Some conclusions from the data

What conclusions can be drawn from the data in relation to diversity in the personal characteristics of non-sessional members? In so far as gender is concerned, as institutions within the justice system, Australian tribunals may be said to have reached the 'holy grail' of gender representation, in that the number and proportion of female non-sessional members in most of those tribunals is at least equal to, if not greater than, the number of male non-sessional members. That represents a quite extraordinary achievement within the justice system, the significance of which cannot be understated.

The reasons for that achievement warrant more detailed, and separate, consideration. Three possible reasons immediately spring to mind. First, most of the CATs fill membership positions by inviting expressions of interest and/or considering applications through a merit-based recruitment process. This permits applicants who might not otherwise be identified by Attorneys-General and heads of jurisdiction to apply. I will return to the issue of appointments later in the article. A second possible reason for the larger number of female non-sessional tribunal members is one of perception — namely, an erroneous perception, held by some in the legal profession, that tribunals do not deal with serious disputes or difficult legal questions. A third possible explanation is the disparity in salary and conditions. A limited tenure combined, in many cases, with lesser salaries than are paid to magistrates may deters some candidates for appointment from applying.

Other than for gender diversity, there is no readily available public data about diversity in the personal characteristics of non-sessional tribunal members. It may be that such data is not being collected.

As for diversity in the professional backgrounds of non-sessional members, the data demonstrates that, at present, in the larger tribunals at least, the importance of that aspect of diversity in tribunal membership is accepted.

Is the importance of diversity in tribunal membership in danger of being overlooked and if so, why?

Despite the diversity which exists in the gender and professional backgrounds of non-sessional members of the AAT and the CATs, we should not become complacent about the importance of diversity. In my view, there remains a risk that the importance of diversity might be overlooked or even rejected, for two reasons.

First, the achievement of substantial gender diversity in tribunal membership risks blinding us to the absence of diversity in other respects. That conclusion derives some support from the fact that there does not appear to be any publicly available data about other kinds of personal characteristics diversity in the composition of the AAT and the CATs. As I have already observed, the absence of data suggests it may not be being collected at all or, at the least, that it is not being collected with a view to publication.

Secondly, there is a risk that the importance of diversity in professional qualifications may be overlooked or rejected in the course of the consideration of reform of the AAT.

As you will recall, in 2018, a review of the AAT was conducted by Ian Callinan AC QC for the purpose of assessing the success of the amalgamation of the various divisions of the AAT ('Callinan Review'). The terms of reference for the Callinan Review included whether the AAT met its statutory objectives, including to promote trust and confidence in the decision-making of the AAT and whether its operations and efficiency could be improved through further legislative or non-legislative amendments. In the course of the review, Mr Callinan considered the manner in which members of the AAT were appointed. He noted that:

> much of the work of the AAT is difficult, factually and legally. Capacity to undertake forensic analysis and to write reasoned judgments is essential. The better qualified, legally and otherwise, an appointee is, the more opportunity there will be for that appointee to sit in a number of Divisions and, therefore, to facilitate the amalgamation.[4]

Mr Callinan concluded that 'as conscientious and well-meaning as "nonlegal" appointees may be, they labour under the disadvantage of lacking these skills or expertise'.[5] Consequently, Mr Callinan recommended that all further appointments, reappointments and renewals of appointment to the membership of the AAT should be of lawyers, admitted or qualified for admission in one of the Australian jurisdictions, and on the basis of merit.[6]

Mr Callinan's view was that, if special expertise to assist the AAT, such as medical, aviation or education, was required then the AAT could readily gain access to it by engaging an appropriate expert witness. With the greatest of respect to Mr Callinan, that suggestion failed

4 Hon Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (Final Report, 23 July 2019) para 1.8.
5 Ibid para 7.9.
6 Ibid Measure 6.

to appreciate that the role of a nonlegally qualified tribunal member is not the same as that of an expert witness. The member does not give expert evidence or act as a substitute witness. Rather, the member brings his or her specialist expertise to bear in assisting the tribunal to quickly get to the heart of the issues in dispute, understand the evidence given by experts in a case and, in appropriate cases, appreciate the standards of conduct or the performance of work in particular professions or fields of endeavour. The importance of that role in the efficient discharge of the work of tribunals, including the AAT, is reflected in the fact that the constituting legislation for the AAT and the CATs permits the appointment of persons with special knowledge or skills, apart from law, which are relevant to the work of those tribunals.

Presumably for the same reason, Mr Callinan himself conceded the need for some exceptions to his recommendation concerning the appointment of members. He recognised that competent accountants may be suitable for appointment to the Taxation and Commercial Division and that, in respect of claims arising out of military service, the particular disciplines, traditions and risks of military service were well understood by those who had served in the military.

It cannot be disputed that in many areas of the civil and merits review jurisdiction conferred on the AAT and the CATs, it is essential that there be a large pool — probably the majority of members — who have legal training and experience. That is so in high-volume areas of jurisdiction, as much as it is in cases involving factual or legal complexity or in merits review, in which questions of statutory construction may be involved. There is no doubt that the attraction of appointing only lawyers to tribunals lies in the expectation that they will be capable of undertaking a wide variety of work. That thinking clearly underlined the recommendation of the Callinan Review. However, with respect, the difficulty with that reasoning is that it assumes that all lawyers know how to deal with all kinds of legal matters. That is no longer the case, if it ever was. Most lawyers now tend to specialise in particular areas of the law. Appointing only legally qualified members to a tribunal does not guarantee that each of those persons will be suitable and equipped to act as decision-makers in every area of a tribunal's jurisdiction. The contrary is often the case.

The report of the Callinan Review was delivered four years ago and, since then, non-legally qualified members have continued to be appointed to the AAT. From that perspective, it might be assumed that the recommendations of the Callinan Review pose no risk to the diversity of the membership of the AAT. However, reform of the AAT remains a live issue. Last year, the Senate Legal and Constitutional Affairs References Committee examined the performance and integrity of Australia's administrative review system and of the AAT's operations in particular. In its report, the Committee made some significant recommendations relating to the membership of the AAT, including that the Attorney-General 'disassemble the current Administrative Appeals Tribunal and re-establish a new, federal administrative review system, by no later than 1 July 2023'.[7] There have been reports that the federal Attorney-General, the Hon Mr Dreyfus KC MP, is considering the Committee's recommendations.[8]

7 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia*, The Performance and Integrity of Australia's Administrative Review System* (March 2022) para 7.56.

8 Paul Karp, 'Labor-led Senate Inquiry to Call for Axing of Liberal-dominated AAT', *The Guardian* (online, 29 June 2022) <https://www.theguardian.com/australia-news/2022/jun/29/labor-led-senate-inquiry-to-call-for-axing-of-liberal-dominated-aat>.

The background to the Committee's review, and to the latter recommendation in particular, included concerns about the efficiency of the AAT's operations, its backlog of cases, and a perception that the then government had appointed political advisers or former politicians to the AAT, when they were not the best qualified persons to carry out the work of the AAT.

My concern is that, in seeking to address the latter perception, the federal government may in future be tempted to decline to appoint members who are not legally qualified. One commentator[9] recently suggested that, if a new administrative review body were to be established, all of its members should be legally qualified, because that was the recommendation of the Callinan Review and it would be an easy way to avoid the problem of political appointments to that body.

I do not seek to express any view on the legitimacy of the concerns recently raised about the AAT. I have no direct knowledge or experience of its operations. The point I seek to make is simply that, if the federal government gives serious consideration to disassembling the AAT, it may have cause to reconsider the appointment of existing members to any replacement tribunal and, in doing so, there is a risk that the benefits and desirability of diversity in the professional qualifications of the members of that tribunal may be overlooked in favour of the perceived desirability of appointing only legally qualified members.

To my mind, that would be to throw the baby out with the bathwater. If a member of a tribunal is not regarded as qualified or suitable to undertake particular aspects of the work of the tribunal in question, there are other ways to address that problem, including by allocating different kinds of work to that member or by providing training and education to that member.

In my view, a decision to refrain from appointing non-lawyers as members of the AAT would represent a significant backward step for that tribunal and, given its role as one of the oldest and largest tribunals in this country, it would be a backward step for Australian tribunals generally. I turn, next, to explain why I hold that view.

Why is diversity in the appointment of tribunal members important?

In my view, there are three primary reasons why diversity in the non-sessional members appointed to tribunals is important.

First, diversity in the appointment of the non-sessional tribunal members — especially personal characteristics diversity — is essential to maintain public confidence in tribunals as decision-making bodies. As is the case in relation to the judiciary, diversity in these tribunal appointments is desirable because it helps promote public confidence in tribunals. There is no doubt that public trust and confidence in the decision-making of any tribunal depends on the appointment (as non-sessional members who make up the core of a tribunal) of people who have the necessary qualifications and skills to act as tribunal decision-makers and who are provided with sufficient tenure that they can, independently from government, apply the

9 Paul Karp, journalist with *The Guardian* Australia, appearing on the *Australian Politics* podcast: 'Dutton's move to the right, the new parliament and kingmakers: your questions answered', *Australian Politics* (The Guardian, 9 July 2022).

law in a manner which is fair, which accords with the substantial merits of the case and which is undertaken with as little formality and technicality, and with as little cost, as is possible.

However, in order to maintain public trust and confidence in the decisions of tribunals, it is also essential that the non-sessional members who are appointed to tribunals reflect the diverse society in which we live, by virtue of diversity in their personal characteristics. Decisions made by tribunal members with diverse personal characteristics carry a greater legitimacy than decisions made by members whose life experiences are entirely removed from those of the parties who appear before them. That is because members of the community see important decisions being made about their lives by non-sessional members whose backgrounds and life experiences reflect the range of backgrounds and life experiences of the members of our society. Furthermore, the development of the law is also likely to be enhanced if a tribunal's decisions are made by members with a wide variety of backgrounds and life experiences.

The second reason why diversity in appointments is important relates to the professional backgrounds of tribunal members. The appointment of specialist non-legal members of tribunals has historically been one of the key distinguishing features of tribunals. One of the reasons why decision-making functions were historically given to tribunals, rather than to courts, was that decision makers with specialist expertise relevant to the work of the tribunal were thought to be better equipped than lawyers to make decisions about the merits of certain kinds of disputes, and to do so quickly and efficiently. In short, the appointment of specialist non-legal members of tribunals has historically been seen as an integral part of the raison d'être of tribunals.

That was certainly the case for modern Australian tribunals. The genesis of the concept of amalgamated 'super' tribunals in Australia lies in the report of the Administrative Review Committee ('Kerr Committee'), published almost 50 years ago. The Kerr Committee favoured the adoption of a general policy of providing for a review of administrative decisions, which should be undertaken by one tribunal, rather than by a multitude of specialist tribunals, as had previously been the case. The Kerr Committee's attention was focused on tribunals with jurisdiction to conduct merits reviews of decisions made by government decision-makers. No doubt that reflected the fact that it was not then common for tribunals to be conferred with jurisdiction to determine inter partes disputes. The Kerr Committee report recommended that members of tribunals should be chosen for their expertise in a particular field — that is, they would be specialist members, and not necessarily lawyers — although the chair of the tribunal should be legally qualified.[10]

It is fair to say that the amalgamation of civil and administrative tribunals around Australia which occurred after the Kerr Committee report was primarily driven by the anticipated benefit of amalgamation — in practical and process terms — for government and for litigants. The primary anticipated benefits for government in amalgamating specialist tribunals into the super tribunals now represented by the AAT and the CATs lay in greater efficiency and costeffectiveness of their operations. For litigants, the anticipated benefits of the super tribunals included greater accessibility, fairness, flexibility and simplicity of procedures;

10 Commonwealth Administrative Review Committee, *Report*, Parliamentary Paper No. 144/1971 (August 1971) paras 32 and 321.

cost-effective and speedier outcomes; and better quality decisions.[11] The achievement of all of these benefits was thought likely to be assisted by the continued involvement of tribunal members with specialist, non-legal expertise. For that reason, the constituting legislation for the AAT and each of the CATs contains provisions which permit the appointment of specialist members who are not lawyers.

In a paper I gave at the conference of the Council of Australasian Tribunals ('COAT') last year, I proposed that the philosophical foundation for these super tribunals might be encapsulated in a statement along the following lines:

> [Civil and Administrative Tribunals (CATs)] exist to act as independent decision makers in any of a wide variety of roles which may be conferred on them by statute: to conduct merits reviews, to act as an original decision maker, or in adjudicative or inquisitorial roles. The legal, or other specialist, expertise of their members, and their flexible and informal processes, enable CATs to focus on achieving a just outcome, and on making decisions of the highest quality, as efficiently, simply, speedily and cost-effectively as is possible, having regard to the circumstances of each case.

In my view, diversity in the professional backgrounds and expertise of non-sessional tribunal members is a key component of that tribunal philosophy. The appointment to the AAT and the CATs of non-sessional members who are not lawyers but who are specialists in other fields related to the work of those tribunals are integral to the ability of those tribunals to undertake their work consistently with the philosophy underpinning their existence.

The third reason why personal characteristics and professional qualification diversity is important for tribunals is that it can improve the quality of the tribunal's decision-making and the litigants' experience of the process of resolving their dispute.

In some areas of tribunal jurisdiction, legal expertise is not the key expertise which is required to enable a tribunal member to reach the correct or preferable decision in a review or to speedily and efficiently resolve a dispute. There are many areas in which the nomination of a specialist member, either as the sole decision-maker or as a member of a panel of decision-makers, will benefit the determination of the dispute, assist in other ways to resolve the dispute or improve the dispute resolution experience for all involved. The following examples will suffice to illustrate the point:

- In some areas of tribunal jurisdiction — such as the vocational regulation jurisdiction of the state and territory CATs — the involvement of specialist decision-makers is mandated by legislation[12] and their involvement undoubtedly assists the tribunal to grasp the issues and evidence more quickly.
- In the protective guardianship jurisdiction, doctors, social workers and psychologists can bring both professional experience suitable to determining questions of decision-

11 These expected benefits are enshrined in the constituting legislation of the CATs, all of which are similar: see, for example, s 3 of the NCAT Act, which sets out a variety of objects, including to ensure that the NCAT is accessible and responsive to the needs of all of its users, to enable the NCAT to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and to ensure that the decisions of the NCAT are timely, fair, consistent and of a high quality.

12 See, for example, s 11 of the WASAT Act and s 204 of *the Legal Profession Uniform Law Application Act 2022* (WA).

making competency; and life experience which enables them to deal sensitively with the parties (many of whom will not be legally represented) in proceedings which are highly emotionally charged.

- The participation of specialist non-legal members in disputes involving technical subject matter (such as in the merits review of planning decisions or in building disputes) facilitates the efficient conduct of a tribunal's work: the member can immediately understand the nature of the dispute and the evidence adduced in response to it; and, in the context of facilitated (or alternative) dispute resolution, will best be able to assist the parties to explore possible compromises.
- The expertise of specialist non-legal members can also be extremely valuable in pre-hearing expert conferrals, where the specialist expertise of the member can quickly and efficiently assist to identify the areas of agreement and disagreement from complex expert reports.

Furthermore, the effect on the quality of decisions reached by panels comprised of specialist members who have expertise outside the law, together with members who are legally trained, should not be underestimated. The quality of those decisions can be enhanced by the contribution of different perspectives, not all of which are informed by legal qualifications or experience.

Having identified how and why diversity in tribunals is important to the work of tribunals, I turn now to consider what can be done to protect and increase the diversity of membership of tribunals in this country.

How can greater diversity in tribunal membership be achieved?

There are a number of ways in which greater diversity can be achieved in tribunal membership. I propose to focus on four readily achievable steps, which in my view would make a meaningful difference to greater diversity in tribunal membership:

1. Move beyond the merit versus diversity dichotomy.
2. Adopt an open and transparent appointment process.
3. Encourage people from diverse backgrounds to apply for tribunal appointment.
4. Collect and publish data about diversity in tribunal membership.

Move beyond the merit versus diversity dichotomy

There is a persistent view that pursuit of diversity in appointments to any position will be at the expense of merit-based appointment. We saw this for many years in the context of judicial appointments, where the pursuit of gender diversity in the courts was controversial because it was perceived to be contrary to the appointment of judges on merit. There continues to be some sensitivity about that issue: when a female judge is appointed, there is often an excessive emphasis on her merit to avoid any suggestion that she is being appointed because of her gender. The sensitivity of the issue has slowly decreased as more women have been appointed. However, I suspect the diversity versus merit issue would be quickly reignited if other kinds of diversity were openly acknowledged as informing the appointment of judges.

As we have seen, the major tribunals in Australia have achieved a large measure of gender diversity, but the extent to which other diversity has been achieved is unclear. The diversity versus merit issue would also likely meet resistance if the pursuit of other kinds of personal characteristics diversity was acknowledged in the context of tribunal appointments.

The problem, however, is that the merit versus diversity dichotomy is a false dichotomy. It assumes that there will be one candidate for appointment who is more meritorious than the others. That assumption ignores the reality that in any appointment process for any job there will ordinarily be a number of candidates who are meritorious but who will have other differentiating qualities. By way of example, in a tribunal context, some possible appointees may have excellent personal communication skills which will equip them to engage effectively with self-represented litigants, some may be talented mediators, and some may have technical skills or qualifications relevant to the work of the tribunal — such as in town planning, building or medicine. To suggest that those skills or qualities will, or should, be ignored in identifying the 'best' candidate for any position is wholly irrational. That being the case, why should diverse personal characteristics be any different?

In some jurisdictions, the merit versus diversity false dichotomy has been overcome through legislation. In the United Kingdom, concern about the 'pale, stale and male' composition of the courts led to a legislative response being adopted to expressly address the merit versus diversity issue. The *Constitutional Reform Act 2005* (UK) provides that, while appointments to the judiciary are to be made 'solely' on merit, the Judicial Appointments Commission is expressly required to have regard to the need to encourage diversity in the range of persons available for selection for appointments. Sections 63 and 64 of the *Constitutional Reform Act 2005* (UK) provide a useful illustration of how achieving diversity might be reconciled with merit-based appointments:

> **63 Merit and good character**
>
> 1. Subsections (2) to (4) apply to any selection under this Part by the Commission or a selection panel (the selecting body).
>
> 2. Selection must be solely on merit.

3. A person must not be selected unless the selecting body is satisfied that he is of good character.

4. Neither 'solely' in subsection (2), nor Part 5 of the *Equality Act 2010* (public appointments) prevents the selecting body, where two persons are of equal merit from preferring one of them over the other for the purpose of increasing diversity within —

   (a) the group of persons who hold offices for which there is a selection under this Part;

   or

   (b) a sub-group of that group.

64 Encouragement of diversity

1. The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

2. This section is subject to section 63.

Furthermore, the Commission and the most senior law officers are responsible for facilitating the achievement of diversity in the judiciary. So, for example, s 65 provides:

65 Guidance about procedures

1. The Lord Chancellor may issue guidance about procedures for the performance by the Commission or a selection panel of its functions of —

   (a) identifying persons willing to be considered for selection under this Part, and

   (b) assessing such persons for the purposes of selection.

2. The guidance may, among other things, relate to consultation or other steps in determining such procedures.

3. The purposes for which guidance may be issued under this section include the encouragement of diversity in the range of persons available for selection.

4. The Commission and any selection panel must have regard to the guidance in matters to which it relates.

Since 2013, there has been a similar obligation on the Lord Chancellor and the Lord Chief Justice of England and Wales:

137A Encouragement of diversity

Each of the Lord Chancellor and the Lord Chief Justice of England and Wales must take such steps as that office-holder considers appropriate for the purpose of encouraging judicial diversity.

The constituting statutes for some of the Australian CATs refer to diversity as a relevant consideration in the selection and appointment of members. Subsection 19(4) of the SACAT Act provides:

In recommending persons for appointment as members, the Minister must have regard to —

[Any selection criteria];

[Any advice provided by the selection panel appointed to assess candidates];

The following:

(i) The need for balanced gender representation in the membership of the Tribunal;

(ii) The need for the membership of the Tribunal to reflect social and cultural diversity;

(iii) The range of knowledge, expertise and experience required within the membership of the Tribunal.

Similarly, under s 183(5) of the QCAT Act, in recommending persons for appointment as members, the responsible Minister must have regard to the following:

a. The need for balanced gender representation in the membership of the tribunal;

b. The need for membership of the tribunal to include Aboriginal people and Torres Strait Islanders;

c. The need for the membership of the tribunal to reflect the social and cultural diversity of the general community;

d. The range of knowledge, expertise and experience of members of the tribunal.

However, even without such legislative endorsement, there is no reason why the desirability of diversity in a tribunal's membership cannot be taken into in account in selecting an appropriate appointment from a pool of candidates who meet all the selection criteria and are thus eligible for appointment on merit. For example, if a specialist applies for appointment and they may fit a particular need in the tribunal — whether for more decision-makers with qualifications and expertise in town planning or more decision-makers with expertise in building — then that can be taken into account. I do not see any reason why the desirability of having a diverse range of personal characteristics within the membership of the tribunal — cultural background, race, age and so on — cannot also be taken into account in appointing a person from a pool of meritorious candidates.

Adopt an open and transparent appointment process

The second way in which diversity in tribunal membership can be achieved is by the adoption of an open and transparent appointment process in which vacant positions are advertised and suitable candidates may apply for those positions and be assessed according to the same criteria. This is an easily achieved solution because the COAT has set out what such an appointment process should involve in its *Tribunal Independence in Appointments: A Best Practice Guide*. The features of that process recommended by the COAT are as follows.

Selection on the basis of merit

This requires that the appointee possess the knowledge, skills and personal attributes required to perform the duties of the position. The COAT recommends that these characteristics be assessed by reference to the competencies of tribunal members, and most tribunals have these set out in a competency framework.

An open, merit-based and transparent recruitment and assessment process

The COAT recommends open recruitment, in which the tribunal advertises positions and invites applications. The assessment of applicants should be undertaken by a panel, against the assessment criteria, and should result in a report assessing all applicants and ranking them.

Selection and nomination

The COAT recommends that once the assessment panel makes its report, the Minister should select one candidate for each position and seek Cabinet approval. Subject to good character, the COAT recommends that 'merit' should be the dominant consideration in selection but acknowledges that 'gender balance and diversity in the membership should be considered by the Minister in selecting among applicants of equal merit. Political considerations should be excluded as discriminatory and irrelevant'.[13]

Tenure, remuneration and reappointment

The COAT notes that tribunal members are normally appointed for a fixed term of years and are eligible for reappointment. Independence requires that a member's tenure and remuneration be secure for the term. The COAT notes that 'reappointment may be by way of application in an open competitive process'[14] but that it is 'also consistent with best practice to reappoint on the Head's recommendation where the member's performance demonstrates that the member meets the assessment criteria'.[15]

An appointment process by which candidates may apply for vacant positions permits a range of persons to apply. The assessment of candidates by reference to transparent criteria signals to the public that tribunal appointments will be made from a wide and inclusive pool of applicants, through a competitive, merit-based and transparent process. The adoption of an open and transparent appointment process is important in encouraging people from diverse backgrounds to be sufficiently confident in the integrity of the process as to bother applying.

Encourage people from diverse backgrounds to apply for tribunal appointment

Increasing diversity in the personal characteristics and professional backgrounds of tribunal members requires a conscious effort by heads of jurisdiction and those involved in the appointment process, such as responsible ministers.

The obligation on the Lord Chief Justice under s 137A of the *Constitutional Reform Act 2005* (UK) required that he take positive steps to encourage diversity in judicial appointments. In 2020, he launched a Judicial Diversity and Inclusion Strategy which set out practical steps

13 Council of Australasian Tribunals, *Tribunal Independence in Appointments: A Best Practice Guide* (August 2016) 10.
14 Ibid 14.
15 Ibid.

for how diversity in the judiciary might be achieved. The practical steps identified in that strategy document could easily be adopted in relation to Australian tribunals.

The aim of the strategy is to increase the personal and professional diversity of the judiciary at all levels over the five-year period from 2020 to 2025, by 'increasing the number of well qualified applicants for judicial appointment from diverse backgrounds and by supporting their inclusion, retention and progress in the judiciary'.[16] The strategy has four core objectives:

- creating an environment in which there is a greater responsibility for and reporting on progress in achieving diversity and inclusion;
- supporting and building a more inclusive and respectful culture and working environment within the judiciary;
- supporting and developing the career potential of existing judges; and
- supporting greater understanding of judicial roles and achieving greater diversity in the pool of applicants for judicial roles.

Specific actions and deadlines are set out against each of these objectives. So, for example, under the objective of creating an environment in which there is greater responsibility for and reporting on progress in achieving diversity and inclusion, some of the actions include that, by the Spring of 2022, a core group of leadership judges responsible for taking actions to achieve diversity would be established and, by the Autumn of 2022, those judges were to report the actions they had taken to support greater diversity.

Another specified action is to attract, encourage and support applications for judicial office from the widest and most diverse pool of well-qualified candidates possible. The actions to be taken include digital and face-to-face outreach to candidates from under-represented groups, using visible role models to publicise the diversity of the judiciary, and the adoption of work-shadowing and mentoring schemes so potential candidates are able to obtain a real insight into what a judicial role might involve.

Some of these strategies are probably already being pursued by the heads of Australian tribunals, albeit in an informal and less structured way. By way of example, it is not uncommon for suitable candidates for appointment to be encouraged to apply for tribunal membership. But much more can be done to target those from backgrounds who might not consider themselves suitable for appointment.

Collect and publish data about diversity in tribunal membership

Another of the ways in which people from diverse backgrounds might be encouraged to have confidence that they are suitable for appointment, and by which to support the public's confidence in tribunals as decision-making bodies, would be to publish data about the diverse characteristics and backgrounds from which tribunal members are drawn.

16 Courts and Tribunals Judiciary, *Judicial Diversity and Inclusion Strategy 2020 — 2025* (5 November 2020) available at <www.judiciary.uk> 10.

As I have already observed, trying to find data about the gender of tribunal members, much less about any other aspect of the diversity of tribunal members in this country, is extremely difficult. Such data is not published and is not easy to find in any publicly available source. The gender of non-sessional tribunal members can be surmised from their names, which are published, but that is about it.

In the United Kingdom, part of the Judicial Diversity and Inclusion Strategy for increasing diversity includes annual reporting of de-identified statistics about diversity in the personal characteristics of judges, tribunal judges, non-legal members of tribunals and magistrates. Publishing that data is designed to provide transparent reporting on whether, and how well, the aim of greater diversity in appointments is being achieved. Recognising that data cannot be reported if it is not collected, the strategy required that, by March 2021, all judicial officeholders were to be encouraged to self-classify against a wide range of diversity characteristics.

A strategy of this kind — to collect and publish data about diversity in the personal and professional characteristics of tribunal members — could easily be adopted in Australian tribunals. For the avoidance of doubt, I am not suggesting that tribunal members should be compelled to provide information about their personal characteristics or that such information be published in any way which identifies particular individuals. But it would not be difficult to invite members to provide that information and then to publish it in a de-identified form.

The voluntary collection, and de-identified publication, of this data would be a useful first step in measuring the extent of diversity in the membership of Australian tribunals. Ultimately, it would be a way of celebrating the achievement of real diversity in tribunal membership.

Conclusion

Tribunals have been at the forefront of innovation in administrative decision-making and dispute resolution in this country for almost half a century. The diversity in their membership has always distinguished tribunals from courts. Despite outstanding achievements in relation to gender diversity, much work remains to be done in achieving greater diversity in the personal characteristics of tribunal members. And the importance of diversity in the professional qualifications and backgrounds of tribunal members, by the appointment of specialist non-legal members, should not be overlooked or rejected. There is more work to be done in pursuing these important objectives and readily achievable means by which to do so.

Are expectations legitimate and, if so, do they run to international conventions?

*Dr Steven Churches**

Procedural fairness, the concept that an individual must be heard as to her or his side of a story before discretionary official action adverse to that person's interests is taken, has a long history in the common law[1] and is a key element in structuring personal autonomy as a social benefit.

The centrality of natural justice: the original extension to 'rights and interests'

Protection was traditionally expressed as extending to 'rights and interests', but they in turn were not restricted to tangible property, so that the great historical cases involved threat of termination in office. See *Bagg's case*[2] (the recalcitrant councillor Bagg, having said while presenting his posterior to the Mayor of Plymouth, Thomas Fowens, 'Come and kiss') for a ruling by King's Bench that Bagg could not be removed from office by decision of the Plymouth Corporation without a hearing. Dr Bentley's long-term litigation to retain his degrees and the position of Master, Trinity College, Cambridge, is another example.[3] Claims to existing offices may have been intangible, but they were recognised as legal rights.

The evolution to deal with modern interests that did not amount to legal rights

More complex social relations, particularly involving greater executive governmental powers, raised questions as to whether procedural fairness might be required where a body with discretionary power over status (for example, illegal or legal alien) altered the basis on which it had declared that it would decide.[4] And the status of those whose livelihoods depended on renewal of licences or permits were similarly in question. If there were to be denial of renewal, should they be assured of a hearing? It is now a little over half a century since these prospective issues came to a head and resulted in expansion of the rubric 'rights and interests' for matters that attracted procedural fairness. As Brennan J put it in *Kioa v West*[5] ('*Kioa*'):

> [Disbelieving that a legislature would intend] that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights. The protected interests which do not amount to legal rights are nowadays frequently described as 'legitimate expectations'.[6]

---

* Dr Steven Churches is an Adelaide Barrister. This article is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference, Canberra, July 2022.

1 SC Churches, 'Western Culture and the Open Fair Hearing Concept in the Common Law: How Safe is Natural Justice in Twenty First Century Britain and Australia?' (2015) 3 *Chinese Journal of Comparative Law* 28 (Oxford Journals).

2 (1615) 11 Co Rep 93b; 77ER 1271. Note that *Bagg's case* involved a power of removal under a Royal Charter granted to Plymouth, not under statute.

3 *R v Chancellor of the University of Cambridge* (1723) 1 Str 557; 93 ER 698. See Churches (n 1) 32−3 for an explanation of the context for this litigation.

4 *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 140; 143 ER 414 (*Cooper*), together with the dissent on which it was based, illustrates the boundaries of modernity: see Churches (n 1) 34−6.

5 (1985) 159 CLR 550 ('*Kioa*').

6 Ibid 616.9−617.1.

Has the phrase 'legitimate expectation' still work to do in the third decade of the 21st century?

The extension of procedural fairness to prospective 'rights' that did not amount to property rights was the point of the nomenclature, 'legitimate expectation'. But by the second decade of the 21st century it was fashionable to say that the phrase 'legitimate expectation' had no work to do and no role to play, as it was by then accepted that any discretionary decisions taken under statute that adversely affect individuals might necessitate a fair hearing, if unfairness would otherwise result. Sir Gerard flagged his considerable doubts as to the concept of 'legitimate expectation' in *Kioa*. The question in 2022 is whether the phrase still

has work to do in encompassing prospective matters that do not raise property rights but are sufficiently identifiable to require a fair hearing before they are adversely impacted.

'Legitimate expectations' spring from Lord Denning's fertile brow

Shortly before Christmas 1968, Lord Denning MR delivered an *ex tempore* judgment in *Schmidt v Secretary of State for Home Affairs*[7] ('*Schmidt*'), which concerned the power of the respondent Secretary of State to renew the right of residence of two Americans studying Scientology in the United Kingdom.

Lord Denning's judgment has become notorious for dicta[8] in which his Lordship added the concept of 'legitimate expectation' to the rights or interests that attracted a requirement of a fair hearing. Lord Denning mused that, if a student were allowed in for a particular time period and his permit were revoked prior to the termination of that period, 'he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time'.[9] But such were not the appellants' facts and, in any case, as the Master of the Rolls pointed out, the Home Secretary was open to hearing representations from the students.

Lord Denning's reasoning evolved on sketchy hypothetical facts. A legitimate expectation arose from a perception (in the context, presumably subjective) that a state of affairs pertained into a future now being altered by official decision-making; and, secondly, the decision-maker could (presumably if not prohibited by statute) alter the terms of the application of a discretionary power — for example, cancel a visa even though it had been granted for a longer period. Such alteration, against the interests of the affected party, might raise a need for procedural fairness because of a legitimate expectation held by the affected party as to continuity of a reasonably expected application of the discretionary power.

7 [1969] 2 Ch 149 ('*Schmidt*').
8 Ibid 170−1.
9 Ibid 171 A−B.

'Legitimate expectations' come to Australia

That set the scene for the first run of 'legitimate expectations' in the High Court of Australia: *Salemi v MacKellar (No 2)*[10] ('*Salemi*'). Ignazio Salemi was an overstayed alien (as non-citizens were then designated) in Australia and subject to deportation under the *Migration Act 1958* when, in the period January to April 1976, the Minister for Immigration published public statements to the effect that an amnesty would exist for overstayed aliens who made themselves known before the end of April 1976 so long as they met health and good character criteria. Salemi met these criteria and applied for the amnesty. He was refused by the Minister and ordered to be deported.[11] He applied to the High Court to challenge the Minister's order for having been made with a lack of procedural fairness.

The competing arguments set the scene for much of what was to follow. Mr AR Castan for Salemi said:[12]

> The news releases created in the plaintiff a 'legitimate expectation' that he would be entitled to remain. That expectation could only be taken away by a procedure which complied with the requirements of natural justice.

The riposte from Mr MH Byers QC SG referred to the informality of the amnesty offer (it 'requires a formal document') and then continued:

> Whether a person in exercising statutory powers must comply with the requirements of natural justice depends on the construction of the provisions in question.[13]

The reasoning of the naysayers in *Salemi*: note the context in which they wrote

Perhaps emblematic of the path of legitimate expectations in Australian jurisprudence, the High Court in *Salemi* split 3:3 on the issue of whether the Minister needed to afford a hearing to Salemi before making the order for removal. Barwick CJ's casting vote, with the judgments of Gibbs and Aickin JJ, denied the need for a hearing. Of the 'statutory' majority, the Chief Justice alone explored legitimate expectations in any depth, and Aickin J not at all. As had been the case in *Schmidt*, the reasoning against any requirement of natural justice was made good irrespective of any reference to legitimate expectations, so what was said about them was strictly obiter.

Salemi, like *Schmidt*, was decided by reference to the grey no-man's land between the trenches of administrative law in the first half of the 20th century (discretionary decisions by the executive did not require natural justice, as not judicial) and the upland that emerged

10 (1977) 137 CLR 396.

11 Salemi was a member of the Italian Communist Party and an agitator in industrial affairs in Australia: see S Battiston, '*Salemi v MacKellar* Revisited: Drawing together the Threads of a Controversial Deportation Case' (2005) 28 *Journal of Australian Studies* 1−10. The Minister plainly felt antagonistic to Salemi's presence in Australia: Commonwealth, *Parliamentary Debates*, House of Representatives, 8 August 1977, 898.

12 (1977) 137 CLR 398.5. Castan relied specifically on Lord Denning in *Schmidt* and later cases.

13 Ibid 399.3. Byers QC referred to *Cooper* — a seminal case, but perhaps containing Delphic reasoning. *Cooper* provided slender support for the Byers argument (see Churches (n 1) 35−6). The war over the basis for natural justice was ultimately futile and is glossed over below.

with *Ridge v Baldwin*[14] in which the description 'quasi-judicial decision-making' was swept away as the basis for a fair hearing. What now mattered was whether an individual's rights or interests (query his/her legitimate expectations) were to be adversely impacted by a discretionary decision, usually pursuant to statutory power. Avoiding the repercussions of *Ridge v Baldwin*, in *Salemi* the Chief Justice denied any need for natural justice because

'It cannot be said that the power to order deportation is a power to affect a right of the prohibited immigrant'.[15]

That assumption would be undone only eight years later in *Kioa*[16] by reference to the impact of the *Administrative Decisions (Judicial Review) Act 1977* and other, then recent, legislation.[17]

In *Salemi* Barwick CJ despatched 'legitimate expectations' with some asperity.[18] The Master of the Rolls' 'eloquent phrase' had more 'literary quality' than 'precise meaning and the perimeter of its application'. The Chief Justice, after surveying Lord Denning MR's case law on the subject, appeared to allow for a 'right' that would attract a hearing for a licensee or permittee who had fulfilled all conditions and could reasonably expect renewal, if the grantor determined to refuse the renewal: 'Such a person might be said to have a lawful expectation'.[19] But his Honour was vehemently opposed to any obligation to afford a hearing arising in the context of government policy dealing with discretionary powers.[20] The attack on the policy front was, however, couched in terms of the subject matter of the Migration Act and the power of deportation:

> We are not here dealing with the administration of a statute or statutory instrument which on its proper construction involves judicially recognizable limitations upon the discretion confided to the body or official. We are dealing with the exercise of a fundamental national power exercisable according to government policy, for which ultimately there is responsibility to the Parliament.[21]

The amnesty offer was no more than a statement of policy, and such statements do not create legal obligations 'though they may understandably excite human expectations as distinct from lawful expectations'.[22]

The minority view in *Salemi*

The leading judgment is that of Stephen J, Jacobs J adding briefly on the critical matter, and Murphy J focusing on the concept of 'amnesty'. Justice Stephen agonised over whether the Minister, in exercising deportation power under s 18 of the *Migration Act 1958* (as then

14 [1964] AC 40.
15 (1977) 137 CLR 404.4.
16 (1985) 159 CLR 550.
17 See eg ibid 578−9 (Mason J).
18 (1977) 137 CLR 404−6.
19 Ibid 405.8.
20 Ibid 405.9−407.3.
21 Ibid 403.6.
22 Ibid 406.9.

numbered) was required to provide a hearing to the affected party. However, his Honour, having reflected on the impact of *Ridge v Baldwin*, thought it 'by no means clear' that the Minister could summarily deport an alien without a hearing.[23]

In the context of the Minister's amnesty offer,[24] Stephen J observed the birth pangs of legitimate expectations in *Schmidt* and later English cases, and then suggested that the basis upon which the possession of a legitimate expectation gave rise to a right to be accorded natural justice stemmed 'from the same fertile source as has nourished the concept that those who possess rights and interests should not, in the absence of express enactment, be deprived of them by the exercise of an arbitrary discretion and without observance of the rules of natural justice'.[25]

Legitimate expectations might be based in assumptions of non-revocation or past behaviour of renewal, but also express assurances (in the context of government, policy announcements)

The concept of legitimate expectation (and its possible differing bases) was then set out in terms of renewal of licences but then, recognising that Salemi's claim was of a different nature, resting on a ministerial assurance:

> as in the *Liverpool Corporation Case* [(1972) 2 QB 299], it is upon an express assurance that the expectation is based: an assurance given by a Minister of the Crown as to the way in which the discretionary power conferred upon him by statute would be exercised.[26]

Talk of 'assurances' given by the Crown raised the matter of policy change. Policy was a matter for executive government, but departure from policy required that those affected by change be allowed to make representations.[27]

The building blocks of the requirement of a hearing in this matter were set out:

i. Salemi's status was transformed by the amnesty: he went from being under threat of deportation to havin a belief that he would be granted lawful resident status;

ii. given the terms of the amnesty, since he was not in ill health, deportation carried the imputation that he was of bad character or a criminal; and

iii. the nature of the sanction, deportation, applied to a person who apparently satisfied the terms of the amnesty, called for a hearing.[28]

23 Ibid 436.3.
24 Ibid 436.5.
25 Ibid 438.9.
26 Ibid 439.3 and 439.6.
27 Ibid 440.4.
28 Ibid 441−2.

Legitimate expectations attract procedural rights only, not substantive rights

Critically, Stephen J then set out the limitation on impact of a legitimate expectation: it might attract a fair hearing, but it did not confer substantive rights. The Minister could not be prevented from exercising his powers of deportation by reference to the policy expressed in the amnesty, providing procedural fairness was afforded.[29] As Jacobs J put it:

> a person may have … a 'legitimate expectation'. That does not mean that the expectation is itself the right. The right is the right to natural justice in certain circumstances and a 'legitimate expectation' is one of those circumstances.[30]

Salemi as template for the ensuing 45 years

The Court divided 3:3, but the statutory majority (in the shape of Barwick CJ on the subject of legitimate expectations) was writing in a backward-looking context: the deportation power was too 'special' to be subject to procedural fairness, and the relevant legislation showed no intention of requiring natural justice. The first of these limbs was swept away eight years later in *Kioa*,[31] and the statutory intention argument dragged on to a stalemate, exhausted by the futility of the fight.

The battle lines over legitimate expectations

The possibilities arising from *Schmidt* and *Salemi* were twofold: extinguish legitimate expectations as a jurisprudential obfuscation; or explore their possibilities. The outcomes in English and Australian jurisprudence over 50 years have been utterly contrary, although the divergence is arguably only over nomenclature. This article has space and time only to cover the Australian aspect of the story: the English and New Zealand evolution has been very different, allowing for legitimate expectations to found judicial review — that is, attract substantive as opposed to merely procedural relief.[32]

Suffice it to say that the two cases provided battlefields on which the contending arguments for and against legitimate expectations were first drilled:

1. *What is a 'right' that necessitates procedural fairness*: Lord Denning MR in *Schmidt* dealt only with permittees; in *Salemi* Barwick CJ restricted such 'rights' to permittees; while Stephen J plainly extended to those reliant on policy.

2. *Does a legitimate expectation require a subjective appreciation of the expectation, or will an objective requirement be adequate*: the facts in *Schmidt* and *Salemi* did not attract general comment on this issue, but in *Salemi* Stephen J addressed the expectation as subjective.

29 Ibid 443.1 and 443.6.
30 Ibid 452.4.
31 See n 5 above.
32 An early illustration in *New Zealand Maori Council v Attorney-General* [1994] 1 AC 466; [1994] 1 NZLR 513 (PC) ('assurance' given by the Solicitor-General). Most recently, and reflecting the hold of substantive relief in New Zealand jurisprudence, received through the Privy Council, see *Te Pou Matakana Limited v Attorney-General* [2021] NZHC 2942; [2022] 2 NZLR 148 (obligations arising from te Tiriti: the Treaty of Waitangi).

3. *Does a legitimate expectation require a formal statement to the public — for example, in a Gazette*: in *Salemi* Byers QC SG submitted that a 'formal document' was required: press statements were inadequate to found an expectation with procedural consequences; Barwick CJ thought that mere policy statements had no legal consequences; and Stephen J plainly thought that ministerial assurances attracted consequences in administrative law.

4. *Do legitimate expectations attract legal sanctions beyond the procedural — that is, natural justice*: in *Salemi* Stephen J and Jacobs J were decisively clear that such expectations attracted procedural rights only, not substantive rights.

The immediately subsequent High Court decisions on this matter

Heatley: what is a protected right?

Two months after handing down *Salemi* the High Court delivered judgments in *Heatley v Tasmanian Racing and Gaming Commission*[33] — a case involving the appellant being 'warned off' all Tasmanian racecourses, a statutory power available to the respondent. Query whether the Racing and Gaming Commission had to give Mr Heatley a hearing before giving him notice of his exclusion.

Chief Justice Barwick adhered to his stance in *Salemi*. Entitlement to a fair hearing arose only from association with a legal right.[34] Heatley's claim to a legitimate expectation that, upon paying the entry fee, he could enter racecourses was denied by the Chief Justice by analogy with a frequent visitor *chez* Barwick. Such a visitor might have a human and reasonable expectation of entry, but it will not be a lawful expectation. There is no right of entry to the Barwick residence or to a racecourse,[35] and hence no legitimate expectation of such entry.

Justice Murphy again avoided analysis of legitimate expectations, but Stephen J and Mason J agreed with Aickin J, who ventured into the fray. His Honour crisply identified the nature of the 'right' that attracted a fair hearing. Seeing beyond the Chief Justice's homely analogy, Aickin J noted that racecourses were open to the public on payment of a fee, and thus Heatley had an expectation of entry. Justice Aickin carefully circumscribed the bounds of such an expectation: 'It is of course only an opportunity or an expectation and not a legally enforceable right'.[36] His Honour observed the two differing bases for admitting a legitimate expectation:

i. the expectation that a governmental authority will exercise its powers in a particular manner; and

ii. the expectation of the continuation of a customary activity.

33 (1977) 137 CLR 487.
34 Ibid 491.8.
35 Ibid 492.3.
36 Ibid 508.7.

Heatley's matter fell in the second.[37] Having determined the necessity of a hearing by the Commission, Aickin J also noted the impact of the 'warning off' on Heatley's reputation.[38]

FAI Insurances Ltd: annual licensees may have a right; and the basis for necessitating natural justice may lie in statutory construction

FAI Insurances Ltd v Winneke[39] (*'FAI'*) concerned the *Workers Compensation Act 1958* (Vic), which provided that companies offering workers compensation insurance required the approval of the Governor in Council. Approvals were for one year and might be renewed if the Governor saw fit. With only Murphy J dissenting, the other six members of the Court determined that, if the government was minded to refuse a renewal of approval to the appellant company, natural justice must be provided.

Chief Justice Gibbs noted the commercial realities of running an insurance company[40] which is not set up a business of insurance in the expectation that it will last for only one year. Consequently[41] a company classified as an approved insurer would have a legitimate expectation that its approval would be renewed absent reason existing for refusing to renew it. The requirement for procedural fairness follows at that point.

Justice Stephen agreed in the reasons of Mason J, which explored whether an annual approval raised a legitimate expectation analogous to a licence renewal. The answer was yes.[42]

Justice Wilson provided lengthy reasons to the same effect, leaving Brennan J writing the final judgment.

Justice Brennan and the ultra vires paradigm

Justice Brennan agreed with the majority in the result but unveiled an analysis that was, briefly, the nemesis of legitimate expectations, at least in the eyes of its opponents. This approach may be summed up in the sentence 'The cases earlier cited [the standard repertoire extending back to *Cooper v Wandsworth Board of Works*] show legislative intention to be the foundation upon which a requirement to apply the principles of natural justice rests',[43] followed by:

> The common law attributes to the legislature an intention that the principles of natural justice be applied in the exercise of certain statutory powers, and the legislature's intention provides the sole and sufficient warrant for judicial review of the exercise of those powers when an applicable rule of natural justice is not observed.[44]

37 Ibid 509.5.
38 Ibid 512.3.
39 (1982) 151 CLR 342.
40 Ibid 348.4.
41 Ibid 348.6.
42 Ibid 369.6.
43 Ibid 409.2.
44 Ibid 409 5.

This is now described as 'the ultra vires paradigm' for discerning the requirement or not of natural justice. It is distinguished from its rival theory, 'the common law paradigm', pursuant to which it is said that discretionary decisions that may adversely impact personal interests require a fair hearing, unless the relevant statutory power is expressed in terms of clarity as nullifying any need for natural justice.

The adverse impact of the ultra vires paradigm on legitimate expectations results from that paradigm's hostility to any factors external to the text of the statute itself being allowed to affect the construction of the legislation. The subjective expectations of a licensee for renewal consequently fall away. Similarly, on this analysis, reference to government policy asserted to channel discretionary powers under a statute is an external factor which should not affect the assessment of whether the statute allows or, indeed, requires natural justice to be provided.

The basis for requiring natural justice not further pursued in this article, as ultimately a red herring; in any case, natural justice as a 'free standing right' is recognised by the principle of legality

Chief Justice French, writing extrajudicially, commented, 'It may be that the distinction between the common law and a common law rule of statutory implication approaches a distinction without a real difference'.[45] In *Commissioner of Police v Tanos*[46] ('*Tanos*') Dixon CJ and Webb J had relied on *Cooper v Wandsworth Board of Works* in enunciating a classic 'principle of legality' statement, in the context of the requirement for a hearing. Natural justice as 'free-standing right' theory (the common law paradigm) is assumed to be good law, outside the Kabbalistic debate that marks modern Australian administrative law.

The High Court case law over the next decade: 1982 to 1992

Kioa*: *Mason J plumped firmly for 'legitimate expectations' having utility beyond simple 'rights and interests'

Kioa[47] was the next cab off the rank, determining that the Minister of Immigration was required to provide a fair hearing before making a decision to deport. There was some discussion of legitimate expectations, most pertinently by Mason J, who expressed the general common

45 Robert French AC, 'Procedural Fairness — Indispensable to Justice?' (2010) Sir Anthony Mason Lecture, the University of Melbourne Law School, p 16; and see pp 16−18 for references to the High Court grappling with 'the distinction'. The lack of real difference has not prevented consequential doctrinal dispute over the existence of legitimate expectations.

46 (1958) 98 CLR 383, 395. The joint judgment not only relied on *Cooper* but also, at 396, on *In re Hammersmith Rent Charge* (1849) 4 Ex 87 at 97; 154 ER 1136 at 1140, the dissent of Parke B upon which *Cooper* built.

47 (1985) 159 CLR 550. The case is famous for the battlelines drawn between Mason J and Brennan J over the basis for requiring procedural fairness, not further pursued in this article, although Brennan J's theory of statutory intent was used to undercut the use of legitimate expectations.

law rule in terms of potential deprivation of benefit from an individual of some right, interest or legitimate expectation (relying on the usual suspects from then recent case law) and then said:

> The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.
>
> The reference to 'legitimate expectation' makes it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest.[48]

Importantly, in the realm of government policy and behaviour, Mason J noted the extension to expectations beyond enforceable legal rights; 'The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision', and some of the Court in *Salemi* thought that the amnesty constituted such an undertaking.[49]

A recognition of the utility of legitimate expectations as extending from traditional rights and interests

In *Kioa* Deane J wrote, affirming the need for natural justice for the applicants, of 'an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity'.[50]

Three of the Kioa majority expand their views on legitimate expectations in O'Shea: Mason CJ and Deane J now firmly in support of 'legitimate expectations', while Brennan J deepens his animus

Mr O'Shea was a paedophile unable to control his sexual instincts. Under South Australian law, a recommendation for his release from prison, made by a medical panel, had to be agreed in by the Governor — that is, the Cabinet: the decision or not for release was nakedly political. The medical panel recommended release, and the Cabinet refused to follow the recommendation. O'Shea sought relief on the ground that he was entitled to a hearing by the Cabinet before they could refuse to follow the medical panel's recommendation.

In *South Australia v O'Shea*[51] Mason CJ referred in general terms to what he had said in *Kioa*[52] but refused O'Shea relief, as he was guaranteed a fair hearing by the medical panel under the relevant statute. The Cabinet had access to his submissions. Justice Brennan also referred to his views in *Kioa*, saying:

> The procedural requirements affecting the exercise of the Governor's power should not depend on whether a favourable recommendation has created a 'legitimate expectation' in the offender. I have elsewhere stated my view about this notion: see *Kioa v West*, at pp 617−622. *It is a notion which, if taken as a criterion, is apt to mislead for it tends to direct attention on the merits of the particular decision rather than on the character of the interests which any exercise of the power is apt to affect.*[53]

48 Ibid 582.9.
49 Ibid 583.3.
50 159 CLR 632.7.
51 (1987) 163 CLR 378.
52 See n 47 above.
53 (1987) 163 CLR 411.3 (emphasis added).

A champion for expanding the nomenclature of rights and interests that attract natural justice

Justice Deane had been almost mute on the subject of legitimate expectations in *Kioa* but now expressed unabashed approbation. His Honour conceded that 'legitimate expectation' was an 'unsatisfactory phrase' but then said:

> the common law requirements of procedural fairness cannot, in any event, properly be confined, in a case involving the exercise of government power or authority, by reference to some formula framed in terms of 'rights' or of some rigid view of 'legitimate expectation'. … [In *Kioa*] I was led to use the words 'rights ... or legitimate expectations' by the strong support which their use derives from modern authority. I added the words 'interests' and 'status', which I consider to be words of wide and flexible connotation, to cover other cases in which the effect of the exercise of public power or authority on the person, affairs or aspirations of another, in his individual capacity as distinct from merely as a member of the general public, is such that minimum standards of fairness demand that consideration be given to his particular position and circumstances.[54]

Quin and *Haoucher*: the former an unsuccessful claim based in a continuation in office expectation; the latter a successful application in the context of expectation based in stated policy

On the same day in June 1990, the High Court delivered two judgments in the relevant field: *AG (NSW) v Quin*[55] ('*Quin*') and *Haoucher v Minister for Immigration and Ethnic Affairs*[56] ('*Haoucher*'). *Quin* involved all 100 serving magistrates in New South Wales being dismissed pursuant to statute, with 95 of them being reappointed. Quin was one of the five non-appointees and succeeded in his claim in the New South Wales Court of Appeal that he was entitled to a fair hearing before being rejected. But the State's appeal succeeded by 3:2 in the High Court, Mason CJ and Brennan J agreeing in that result through different reasoning.

Chief Justice Mason rejected Quin's submissions on the basis that the statutory mechanism and the executive functions of judicial appointment countered any requirement of natural justice. His Honour also examined at length the need for legitimate expectations to have only procedural effect, not the substantive impact suggested by English judges at the time (and later actually acted on in English cases).[57]

Justice Brennan also dealt with this latter topic,[58] but his Honour's references to legitimate expectations in *Quin* remained bound by his 'statutory power' ultra vires paradigm approach.[59]

Haoucher was pre-eminently a policy case. The Minister for Immigration detailed a policy to Parliament covering his deportation power. A deportee would have the right to appeal to the Administrative Appeals Tribunal ('AAT'), and a recommendation overruling the Minister's decision was only to be overturned by the Minister 'in exceptional circumstances' and on

54 (1987) 163 CLR 417.5−418.1.
55 (1990) 170 CLR 1.
56 (1990) 169 CLR 648.
57 (1990) 170 CLR 1, 21−3.
58 Ibid 39.5.
59 Ibid 39.3.

'strong evidence'. The appellant was subject to a ministerial deportation order, successfully appealed to the AAT, and the Minister then overturned the AAT ruling, reinstating the deportation. The appellant sought relief on the basis that he was entitled to a fair hearing by the Minister as to the exceptional circumstances and the strong evidence relied on by the Minister. Haoucher succeeded by 3:2.

Utility expressed for expanding the categories of rights and interests that attract natural justice; affirmation of the common law theory of procedural fairness; and the nature of a stated position by government

Justice Deane, in the majority, had no truck with the ultra vires assumption that a requirement of a fair hearing must be found in the statute. His Honour said of the Minister's overturning of the AAT[60] (employing his expanded suite of categories that might attract natural justice), in the light of 'a published, considered statement of government policy':

> It directly affected the appellant's rights, interests, status and legitimate expectations in his individual capacity. … *In those circumstances, the justice of the common law demanded that the appellant be accorded an opportunity of being heard* on the questions whether the 'recommendations of the ... Tribunal should be overturned' by reason of 'exceptional circumstances' and whether 'strong evidence can be produced to justify' such an overturning of the Tribunal's recommendation.[61]

As to the impact of policy and the creation of the legitimate expectation referred to above (which included 'reputation'[62]), Deane J said:

> For so long as that published policy was operative, a deportee would reasonably be expected to see it as providing a critical reference point in determining the desirability and effectiveness of an application to the Tribunal for review of a deportation order.[63]

Justice Toohey went further in directly controverting the Brennan J ultra vires paradigm,saying:

> As a matter of construction of the relevant provisions of the *Migration Act*, the Minister may not have been bound to afford the appellant a further hearing merely because, in reconsidering his earlier decision, he decided to affirm it. However, in the present case, there is another question — whether an entitlement to a further hearing arose as a matter of construction of the criminal deportation policy.[64]

The ministerial policy, external to the text of the statute, could be construed as to whether a post-AAT hearing was required. Justice Toohey rounded his judgment with a statement as to the requirement of natural justice in the context of ministerial policy:

> If, as here, the Minister asserts that the reconsideration was in accordance with the criminal deportation policy, the deportee is entitled to know what were the circumstances said to be 'exceptional' and what was the evidence said to be 'strong', and to be heard in answer. Procedural fairness requires that much.[65]

60 (1990) 169 CLR 655.5.
61 Ibid 654.9 (emphasis added).
62 Ibid 655.6 — the ministerial statement 'would almost inevitably be damaging to the appellant's reputation'.
63 Ibid 655.2.
64 Ibid 670.4.
65 Ibid 671.2 and see also 671.5.

Justice McHugh examined the arrival of legitimate expectations and their utility:

> *Before Lord Denning's judgments in* Schmidt *and* Breen*, the common law rules of natural justice only protected a person's existing rights and interests.* … The introduction of the concept of legitimate expectation into public law extended the range of protection given by the common law rules of natural justice. *Prospective, as well as existing, rights, interests, privileges and benefits are now within the domain of natural justice.* … *[T]he common law now gives a person the right to be heard before the exercise of a statutory power prejudices some right, interest, privilege or benefit which that person can legitimately expect to obtain or enjoy in the future*.[66]

McHugh J had complemented Deane J's addition of status and legitimate interests as categories that attracted natural justice, with privileges or benefits which might legitimately be expected to obtain or be enjoyed in the future. Turning to statements of government policy and decision making which thwarted expectations raised by such policy, McHugh J said:

> A legitimate expectation may arise from the conduct of the person proposing to exercise the power or from the nature of the benefit or privilege enjoyed: *Kioa*, at p 583. [See n 47 above] In *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, the Privy Council held that a policy announcement that illegal immigrants would be interviewed and their cases considered on their merits gave rise to a legitimate expectation that an immigrant would not be deported without the policy being implemented. *Ng Yuen Shiu* is an illustration of an undertaking giving rise to a legitimate expectation.[67]

Justice McHugh concluded that procedural fairness was owed to the appellant/applicant on the same basis as that found by Deane J and Toohey J.[68]

Annetts v McCann

In *Annetts v McCann*[69] ('*Annetts*') a majority (Mason CJ, Deane and McHugh JJ in joint judgment) relied on simple *Tanos* principle of legality assumptions to find that the Western Australian Coroner owed the parents of a dead teenager a right to make submissions as to his good character before making any findings adverse to the parents or the deceased:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment …[70]

Justice Brennan dissented at length, explaining his distrust of legitimate expectations in the light of the ultra vires/statutory power paradigm.

66 Ibid 679.9−680.4 (emphasis added).
67 Ibid 681.5.
68 See nn 61 and 64 above.
69 (1990) 170 CLR 596.
70 Ibid 598.2; 603.9.

Ainsworth v Criminal Justice Commission

Ainsworth v Criminal Justice Commission[71] resulted in a unanimous vindication of Mr Ainsworth's claim that he was entitled to procedural fairness in the preparation of a report by the Queensland Criminal Justice Commission under statutory power, as his reputation was at stake in the report to be tabled in Parliament. The plurality (Mason CJ, Dawson, Toohey and Gaudron JJ) quoted the pithy statement from the majority in *Annetts*[72] and left no doubt that a finding in the report adverse to Mr Ainsworth would damage his reputation. Hence he was entitled to a fair hearing.

Justice Brennan also quoted the summation from *Annetts* and went on to observe that the Act did 'not exclude the implied requirement that the rules of natural justice be observed in the preparation of a report'.[73] So far so agreeable with the plurality, but in what must pass as dicta (since his Honour thought the potentially damaged reputation did not require to be classed as raising a legitimate expectation), Brennan J said, immediately prior to his affirming words above:

> For reasons which I have expressed elsewhere [inter alia *FAI*, *Kioa* and *Quin*] I do not find the concept of 'legitimate expectations' illuminating of the circumstances which attract the obligation to accord natural justice.[74]

Into the vortex: *Teoh* as the focal point for criticising legitimate expectations

Minister for Immigration and Ethnic Affairs v Teoh[75] ('*Teoh*') concerned a Malaysian citizen, Ah Hin Teoh, who sought review of the decision of a ministerial delegate, based in the reasoning of an Immigration Review Panel. Mr Teoh's application for an extension to his entry permit had been refused, following his conviction, after his application, of importing heroin for his wife's use. The impetus for the review sought was that Mr Teoh had seven children in his care, as his wife, the birth mother of all seven, had been declared an unfit mother by the Western Australian Government. If he were refused an entry permit extension, he would be an illegal alien, and subject to immediate removal. The result was that the seven children would be split up and fostered out or placed in orphanages.[76]

71 (1992) 175 CLR 564.
72 See n 69 above.
73 (1992) 175 CLR 592.1.
74 Ibid 591.9.
75 (1995) 183 CLR 273.
76 The CLR summary of arguments, and the judgments, do not make the position of the children clear, but in argument in the Full Federal Court they were clearly understood to be in jeopardy. The decision in *Teoh* raised a political and media storm. Federal governments of both persuasions mounted a total of three legislative attempts to overrule the High Court, but each failed in the Senate. South Australia, not known for the impact of Conventions on its decision-makers, passed the *Administrative Decisions (Effect of International Instruments) Act 1995*, which provided in s 3(2) that 'an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that — (a) administrative decisions will conform with the terms of the instrument; or (b) an opportunity will be given to present a case against a proposed administrative decision that is contrary to the terms of the instrument'. The conservative arms of the print media were outraged by *Teoh* — see eg PP McGuiness over many years in *The Australian* (his initial attack, on the Full Federal Court decision, was in the *Sydney Morning Herald*).

The argument in the High Court revolved over whether the *Convention on the Rights of the Child* ('CROC'), ratified by and then entered into force for Australia, carried consequences in decision-making. The Convention provided in Art 3(1): 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The Panel said:

> It is realised that Ms *Teoh* and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency.[77]

This reasoning did not give the children 'a primary consideration' as prescribed by the Convention. The Convention had not been enacted into law in Australia. Did a failure to adhere to its precepts in administrative decision-making matter?

The argument that the Convention raised a legitimate expectation

Both Teoh (respondent after succeeding in the Full Federal Court) and the Human Rights and Equal Opportunity Commission, intervening, argued that, if the Panel/delegate proposed to act inconsistently with Art 3, Teoh should have been informed so that he had the opportunity for making submissions as to why the Convention standard should be adhered to. The obligation for procedural fairness arose from a legitimate expectation based in the Convention, that the decision-making process would be consistent with its terms.[78] Teoh referred on this aspect to *Haoucher* and *Quin*, while the Commission referred to *Haoucher* and *Tavita v Minister for Immigration*[79] — a New Zealand case which inveighed against ratification of Conventions becoming mere 'window-dressing'.

Mason CJ and Deane J wrote the leading judgment, stating:

> The critical questions to be resolved are whether the provisions of the Convention are relevant to the exercise of the statutory discretion [to deny an extension of a residency permit] and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention.[80]

Ratification of a Convention as a positive statement by the Executive to the Australian people

Noting the context of the Convention in dealing with basic human rights affecting the family and children, their Honours stated (in what might be termed 'the Positive Statement paragraph'):

> *ratification of a Convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation*,

77 (1995) 183 CLR 281.1.
78 Ibid 277−8.
79 [1994] 2 NZLR 257.
80 (1995) 183 CLR 288.7.

> absent statutory or executive indications to the contrary, *that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'*. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.[81]

No reliance was made on 'policy' cases such as *Haoucher*, but the Convention as 'positive statement' was treated in similar vein. And their Honours were clear that a legitimate expectation arose on an objective basis: it did not require an affected party to hold a subjective expectation.

The behaviour of the executive raises the expectation on an objective basis: it will not have to be perceived at a personal level

Justice Toohey reasoned in similar style. His Honour cited[82] his views in *Haoucher* as to a legitimate expectation arising on an objective basis, that is, the claimant for a hearing did not have to have had a subjective expectation at the relevant time. His views were summarised:

> It follows that while Australia's ratification of the Convention does not go so far as to incorporate it into domestic law, it does have consequences for agencies of the executive government of the Commonwealth. It results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course.[83]

No reference was made to the 'policy' cases. Justice Toohey rested on an assumption that Australia's ratification of the Convention resulted in an expectation that relevant decision makers would adhere to the 'primary interests' standard for children. Since the children (and their parents) did not have to have a subjective expectation, such expectation must have arisen on the 'positive statement' approach of the joint judgment, and that in turn accords with the reasoning of the majority in *Haoucher* concerning non-adherence to policy in that case.

A general approach to procedural fairness being necessitated by the relevant issue: the best interests of children raise such necessity absent the Convention

Justice Gaudron wrote briefly to the point that the Convention embodied standards that ought to be applied by government and courts of a civilised democratic society. She agreed generally with the reasoning of the joint judgment, but her Honour laid down a marker as to the need for procedural fairness, absent any reference to 'legitimate expectation', by reference to reasonable assumptions arising from the best interests of children, irrespective of CROC.[84]

81 Ibid 291.3 (authorities removed, emphasis added).
82 Ibid 301.5.
83 Ibid 302.5.
84 Ibid 305.3.

The dissent

Justice McHugh dissented, trenchantly. His Honour accepted that an undertaking by a public official had procedural consequences. Referring to *AG (Hong Kong) v Ng Yuen Shiu*[85] and *Haoucher*, McHugh J observed that the High Court accepted that:

> if a public official had undertaken to exercise a power only when certain conditions existed, a person affected by the exercise of the power had a right to be informed of the matters that called for the exercise of the power.[86]

Natural justice as a free-standing right culminated in the broadest reach of 'rights and interests', so 'legitimate expectations' have no role to play

His Honour then moved to deploy the common law paradigm for the requirement of natural justice in a devastating manner. He reasoned that after *Kioa* and *Annetts* a question arose as to whether the doctrine of legitimate expectations had any role to play. Those cases accepted procedural fairness as a 'free-standing right' (neither they nor McHugh J employed that phrase, but it summarises the situation). A hearing was now required where a statute empowered a public official to make an administrative decision that affects a person, so that, absent a statutory indication to the contrary, the question is not whether natural justice is required but merely what will be the nature of the procedural fairness on offer.[87]

Justice McHugh jettisoned (without reference) his acceptance in *Haoucher*[88] that legitimate expectations had work to do in dealing with prospectivity issues: decisions being taken with a view to interests not yet in existence but discernible in the future. His Honour now rested entirely on the general requirement in the common law for natural justice where administrative decisions might have impact on individuals.[89]

The rejection of procedural fairness where a decision-maker not bound by, undertaken nor asked to apply a standard

The dissenter then moved[90] to his point of rejection of Teoh's claim: legitimate expectations had hitherto rested on express or implied undertakings to affected persons that benefits or privileges would continue into the future.

Justice McHugh's denial of reliance on the Convention to raise a legitimate expectation was then expressed:

> As long as a decision-maker has done nothing to lead a person to believe that a rule will be applied in making a decision, the rules of procedural fairness do not require the decision-maker to inform that person that the rule will not be applied. Fairness does not require that a decision-maker should invite a person to make submissions about a rule that the decision-maker is not bound, and has not undertaken or been asked, to apply. Indeed, in those circumstances, a person cannot have a reasonable expectation that the rule will be applied.[91]

85 [1983] 2 AC 629.
86 (1995) 183 CLR 311.4.
87 Ibid 311.6.
88 See n 66 above.
89 (1995) 183 CLR 311.9.
90 Ibid 312.4.
91 Ibid 313.5.

His Honour provided no explanation as to how the Convention differed in theory from the policy statement to Parliament in *Haoucher*, a policy that McHugh J had found to anchor a legitimate expectation. The difference can only be that the *Haoucher* policy had political impact having been made to Parliament, while the Convention was corralled in the fantasy land of diplomacy, where statements of intent were mere 'window-dressing'. The policy had no more legal impact than the Convention. Neither was required by law to be observed. The majority in *Teoh* merely determined that procedural fairness was required prior to any departure from the Convention standard, as had been the case regarding the policy in *Haoucher*.

Legitimate expectations under siege

Legitimate expectations were now subject to minimisation under the Brennan J ultra vires / statutory power approach, while caught in the twofold pincers of McHugh J's insistence on subjective appreciation of an expectation (that is, the government had to indicate that it would be bound by its statement of offer and claimants had to have a personal understanding of their expectation), coupled with expansion of the common law / free-standing approach under which natural justice was so organic that it naturally extended to prospective events, so that legitimate expectations were an otiose category. The latter proposition was to receive expanded explanation in the next instalment of what was to become the *via crucis* of legitimate expectations: *Re Minister for immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[92] ('*Lam*').

Re Minister for immigration and Multicultural and Indigenous Affairs; Ex parte Lam

Lam arose from visa cancellation for a failure to pass the 'character test', as had also been the case for Mr Teoh, the test then in an earlier iteration. Mr Lam was informed of the Minister's intention to cancel his visa, and he was invited to make submissions. He replied, pointing out that he had two children, Australian citizens, whose best interests would be damaged if his visa was cancelled. He annexed a letter from the children's carer. The department wrote back asking for the contact details of the carer, stating that the department wanted to contact the carer to assess the impact that cancellation would have on the children. Mr Lam provided the contact details, but no departmental officer ever contacted the carer.

The Minister cancelled the visa, and Lam applied to cancel the decision, claiming a denial of natural justice resulting from the department's failure to contact the carer, after it represented that it would, and further failure to notify the applicant that it would not contact the carer. The decision of a unanimous High Court in four judgments condensed to a ruling that procedural fairness was required where otherwise a procedure adopted would be unfair and, further, a representation that engendered an expectation that was then disappointed did not attract the necessity of a fair hearing, in the absence of unfairness.

92 (2003) 214 CLR 1.

Coughlan as bogeyman/strawman: procedural fairness relates to procedural matters, not substantive merits of a case

Haoucher and *Teoh* were two decisions of the Court that became measuring sticks for the reasoning in *Lam*. And in the background lurked the bogeyman case of *R v North and East Devon Health Authority; ex parte Coughlan*[93] ('*Coughlan*') in which the English Court of Appeal gave effect to substantive, not merely procedural, expectations. The reaction to this case in *Lam* revolved around concern to ensure that judicial review in Australia dealt only with the legality of the decision under review, not with the merits of the review and, in a broader sense, to ensure that the courts did not concern themselves with a supervisory jurisdiction aimed at 'abuse of power'. The joint judgment of McHugh and Gummow JJ damned the English approach:

> The notion of 'abuse of power' applied in *Coughlan* appears to be concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards now identified by the English common law. These standards fix upon the quality of the decision-making and thus the merits of the outcome. As was indicated in *Coughlan* itself, this represents an attempted assimilation into the English common law of doctrines derived from European civilian systems.[94]

A *tour d'horizon* followed of the authorities in New Zealand and Canada, affirming that they had also eschewed the heresy of judicial review of 'abuse of power' — all prelude to an examination of the role of legitimate expectations[95] but suspiciously in the form of a straw man designed to direct legal obloquy onto such expectations.

Legitimate expectations said to have no role

The joint judgment drew on McHugh J in *Teoh*[96] and Brennan J in *Quin*[97] for the claim that there is no further need for any doctrine of legitimate expectation. It was said[98] that this was now the law in Australia and that *Teoh* provided nothing to the contrary. Nothing was said of the reasoning of Brennan J and McHugh J being contradictory: McHugh J's adoption of the common law approach to natural justice had (perhaps unintended) long-term consequences for preserving rights to procedural fairness in decision-making regarding non-property status such as citizenship classification.

Teoh deconstructed in record length dicta: an objective expectation allowed for renewals; denied for prospectivity claims based in governmental statements as to future behaviour

Note that the entire attack that followed on *Teoh* was dicta, as the decision in *Lam* went off on there being no practical unfairness to the applicant in the failure to adhere to a stated intention to contact a person involved with the applicant's children: all knowledge from such a person had already been collected.

93 [2001] QB 213.
94 (2003) 214 CLR [73] 23.9.
95 Ibid [81]ff 27.4.
96 See concepts referred to at n 87 above.
97 (1990) 169 CLR 39.
98 (2003) 214 CLR [83] 28.3.

The joint judgment analysed propositions in *Teoh* said to support the idea of legitimate expectations being objectively based — that is, the claimant for procedural fairness did not have to show a personal knowledge or reliance on, for example ratification of a Convention.[99] Justice McHugh's dissent in *Teoh*, attacking legitimate expectations on the 'objective' front was advanced, but then it was asserted that a legitimate expectation did not hang on an 'actual or conscious appreciation' as to the conferral or continuation of a privilege or benefit.[100] *FAI* was the example: there was a 'natural expectation' that an insurance company would run on from year to year. The discrimen was, apparently, that a legitimate expectation could be inferred in the case of insurance company operators and paying members of the race-course-entering public (*Heatley*), which inference did not arise in the case of those arguably within the terms of a Convention:

> It is one thing for a court in an application for judicial review to form a view as to the expectations of Australians presenting themselves at the gates of football grounds and racecourses. It is quite another to take ratification of any Convention as a 'positive statement' made 'to the Australian people' that the executive government will act in accordance with the Convention and to treat the question of the extent to which such matters impinge upon the popular consciousness as beside the point.[101]

Haoucher, Teoh and what constitutes a 'positive statement'

It is obvious that *Haoucher*, dependent on a statement of government policy that did not raise an *FAI* self-executing inference, and McHugh J being part of the majority, presented a major hurdle for the joint judgment in *Lam*. McHugh and Gummow JJ said:

> *Haoucher* does not stand beside *Teoh*. In the former case there was a statement made in the Parliament bearing immediately upon the exercise of the particular power in question. In *Teoh* there were in the Convention various general statements and there was no expression of intention by the executive government that they be given effect in the exercise of any powers conferred by the Act. The decision-maker in *Teoh* had acted in accordance with a specific policy which made 'good character' requirements the primary consideration, yet the result was reviewable error.[102]

The antagonism between the joint judgments in *Teoh* and *Lam* condensed to what constituted a 'positive statement' sufficient to raise a legitimate expectation. The implicit charge that failure to accept a Convention's administrative impact left the Convention as 'window-dressing' 'does not necessarily mean that the executive act of ratification is to be dismissed as platitudinous; an international responsibility to the contracting state parties or other international institutions has been created'.[103]

What use this responsibility might be, regarding a Convention aimed at the welfare of children, was not made clear.

The joint judgment in *Lam* referred to the CROC as not being self-executing and as creating, according to *Teoh*, a mandatory relevant consideration for judicial review for want of procedural

99 Ibid [87]ff 28.9ff.
100 Ibid [91] 30.5.
101 Ibid [95] 31.9. The reference to a Convention as a 'positive statement' lies inside the quotation from Mason CJ and Deane J in *Teoh* at n 81 above.
102 Ibid [96] 32.2 (citation removed).
103 Ibid [98] 32.8.

fairness.[104] Presumably the policy statement in *Haoucher* had also raised such a 'mandatory relevant consideration' for assessing natural justice requirements, in the context that Conventions were said in *Teoh* not to be allowed to raise relevant considerations generally.

The other judgments in Lam to similar effect

Chief Justice Gleeson's judgment in *Lam* evinced the same antipathy to *Coughlan*, but, as a route to undermine *Teoh*, it is ineffectual. His Honour set off after another strawman — that of reliance on a statement of intention.[105] This had been dealt with in the joint judgment even more openly as creating an analogue to estoppel,[106] with a view to showing why the claimant for a legitimate expectation had to have subjective knowledge of the basis for the claim, that being fundamental to estoppel. The separate judgments of Hayne J and Callinan J were to similar effect, particularly questioning the need for a doctrine of legitimate expectations at all and emphasising what was seen as the anomaly in *Teoh* that there was no subjective knowledge by the applicant of the ratification of CROC.

The more recent developments in *Plaintiff S10/2011* and *WZARH*

Plaintiff S10/2011 v Minister for Immigration and Citizenship[107] ('*Plaintiff S10/2011*') involved applications for procedural fairness to be mandated when the Minister was called on to exercise ministerial dispensing powers regarding the 'lifting of the bar' on repeated applications for protection visas. The decision of the High Court rested on the fact that the relevant decisions had to be taken in the public interest, and the personal factors related to each applicant were not 'mandatory relevant considerations'.[108] In such a context, the glancing references to legitimate expectations were strictly dicta. The joint judgment of Gummow, Hayne, Crennan and Bell JJ noted:

> for the reasons given in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* by McHugh and Gummow JJ, Hayne J and Callinan J, the phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded. The phrase, as Brennan J explained in *South Australia v O'Shea*, 'tends to direct attention on the merits of the particular decision rather than on the character of the interests which any exercise of the power is apt to affect'.[109]

Legitimate expectations were doubly damned in this dicta: first for posing questions and being an unfortunate expression; and, secondly, because it was said that they tended to focus on merits when judicial review in Australia must be scrupulously restricted to issues of the legality of the decision.

Minister for Immigration and Border Protection v WZARH[110] ('*WZARH*') arose from a finder of fact (an Independent Merits Reviewer) enquiring into the respondent's refugee claim and that, the reviewer not being able to complete the process, a second reviewer took up the work. In

104 Ibid [99], [101] 33.1 and 33.9.
105 Ibid [36]ff 13.6ff.
106 Ibid [62] 20.8.
107 (2012) 246 CLR 636.
108 Ibid [99] 667.8.
109 Ibid [65] 658.4 (citations removed).
110 (2015) 256 CLR 326.

the Full Federal Court Flick and Gleeson JJ observed that the respondent had a legitimate expectation that the original interviewer would be the person to make the recommendation to the Minister and that, further, he believed that he would have an opportunity to make oral submissions to the decision-maker, which opportunity the second reviewer denied him.[111]

The High Court, in two judgments, upheld the decision of the Full Court below, but in dicta attacked the use made by that court of legitimate expectations. Natural justice was mandated by the factual matrix in which unfairness arose if the second reviewer did not allow for the oral submissions agreed in by her/his predecessor, but legitimate expectations were an unnecessary ingredient in the assessment.

The plurality, Kiefel, Bell and Keane JJ, purported to put legitimate expectations to the sword with selective quotes from High Court decisions.[112] Acceptance of this judicial execution is tempered, however, on noting that the references to Deane J[113] and Dawson J[114] are totally out of context, Deane J writing in *O'Shea* enthusiastically of legitimate expectations, and Dawson J writing in *Quin* acknowledging the utility of the doctrine. But on drove the plurality, observing the trajectory of 'legitimate expectations' in Australia[115] from tentative acceptance (*Teoh*) to rejection for the according of natural justice (*Lam* and *Plaintiff S10/2011*). Pronouncing the lack of utility of the doctrine (and hence its jurisprudential death), the plurality said:

> It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions. Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.[116]

It is difficult not to observe the qualified success of legitimate expectations in the High Court pre-*Teoh*, allowing for the incessant concerns of Brennan J as to the ambit and utility of the concept. But a new generation, two decades on from *Teoh*, was having none of it, and the enthusiasm for this new tool from Mason CJ and Deane, Toohey and even McHugh JJ (the last pre-*Teoh*) was swept away.

What has the Federal Court made of all this?

A number of single Judge decisions prior to 2020 referencing* Teoh*: Poroa an example

In *Poroa v Minister for Immigration and Border Protection*[117] ('*Poroa*'), Perry J dealt with a claim that a failure by the Minister to revoke a visa cancellation (as allowed for under the byzantine 'character' provisions associated with s 501 of the *Migration Act 1958*) was invalid for failure to provide a hearing to the applicant to take account of his (apparently thwarted)

111 (2014) 230 FCR 130, [17] 137 and [24]−[25] 141.
112 (2015) 256 CLR [28] 334.8.
113 At n 32.
114 At n 33.
115 (2015) 256 CLR 335.4 [30].
116 Ibid.
117 (2017) 252 FCR 505.

legitimate expectations arising from the *International Covenant on Civil and Political Rights* ('ICCPR'), which provided in Art 23 for the right to have a family. If the applicant were removed to New Zealand, his partner would not, for extreme psychological reasons, be able to join him. They had been trying for over a decade to start a family.

Justice Perry accepted that *Teoh* had not been overruled[118] and applied *Teoh*, accepting that Australia's ratification of the ICCPR gave rise to a legitimate expectation that the right to found a family would be taken into account.

Her Honour then dismissed the application on the basis that the Minister had in fact expressly taken account of the problem facing the applicant and partner, that she would not be able to join him, and they would then be severed as a couple, and never start a family.

Two decisions from 2020 accepting the demise of legitimate expectations, but nonetheless requiring procedural fairness based in the existence of CROC

Justice Perry's acceptance of *Teoh's* authority (admittedly delivered in the context that the Minister did not contest it) emerged as an example of its continued relevance in *DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[119] ('*DXQ16*'). Justice Steward dealt with a claim that the Minister, while cancelling visas of a family, owed them a hearing in respect of the apparent failure in the decision-making process to take account of, and accord a primacy, to the best interests of the two school-aged children of the family.

His Honour reflected on the appellants' submissions at length, observing that the appellants understood that the nomenclature of 'legitimate expectation' had, since *Teoh*, fallen out of favour in this country: see *Lam*. The appellants submitted that *Teoh* remained good law and that its reasoning might now be seen through the lens of Gaudron J's judgment, reliant on what was a reasonable assumption as to matters that should be in issue in the decision-making.[120] Various other Federal Court decisions were referred to on the continuing utility of *Teoh*, including a very long analysis of *Vaitaki v Minister for Immigration and Ethnic Affairs,*[121] a majority Full Court decision which arguably had expanded the *Teoh* envelope.

Justice Steward said, 'I am clearly bound to follow and apply the expression of the rule in *Teoh*, as formulated in *Vaitaiki* and followed by subsequent decisions of this Court'.[122] His Honour observed that the Minister's submissions correctly referred to the nature of natural justice being shaped by the statutory framework in issue, but he did not agree in the claim that the sections in issue here destroyed the requirement for a fair hearing (presumably as to at least the Gaudron J 'reasonable assumptions' of matters that should be addressed by a decision-maker) and, if not, a hearing was required allowing the affected party to put on a case addressing such matters.

118 Ibid [51] 517.8.
119 [2020] FCA 1184.
120 Ibid [27], Gaudron J set out at n 84 above.
121 (1998) 150 ALR 608.
122 [2020] FCA 1184 [37] and see [53].

Later in 2020, Allsop CJ was faced with another visa cancellation in which the tribunal had not given proper consideration to the primacy of an affected child's interests, and hence was revealed on review as delinquent for not having offered procedural fairness to the applicant in respect of the (imputed) intention not to provide natural justice: *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[123] ('*Promsopa*'). The Chief Justice followed Steward J's reasoning closely, and as with the reasoning in *DXQ16*, 'legitimate expectations' are mentioned only in reference to submissions of the appellant's counsel, both cases observing that the nomenclature of 'legitimate expectation' has fallen out of favour and looking to the more general expression of the requirement of natural justice found in Gaudron J's judgment in *Teoh*.

DXQ16 and *Promsopa* bear direct applications of *Teoh* in the *ratio* of each case, where the decisions subversive of *Teoh* present their attacks in dicta.

Two Full Court decisions from 2021

Finally, in the past 12 months, the Full Federal Court has had two occasions to review *Teoh's* status. In *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[124] the Court heard argument on the relevance of *Teoh* and associated cases but in the context of a contested strike-out, which succeeded. However, O'Bryan J (with whom Katzmann J agreed) observed the facts in *Teoh* and then said (in the context of CROC):

> The concept of 'legitimate expectation' as a necessary criterion of an entitlement to procedural fairness has since been rejected by the High Court [his Honour referred to *WZARH*]. However, that does not undermine the conclusion reached by the High Court in *Teoh* that a breach of the requirements of procedural fairness may occur if a decision to refuse to grant, or to cancel, a visa is made without considering the best interests of a child affected by the decision as a primary consideration, and without giving the applicant an opportunity to be heard on that matter.[125]

The above is a clear statement of the requirement flowing from CROC, irrespective of the concept of 'legitimate expectations'.

And in *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[126] ('*Ratu*') the joint judgment of Farrell, Rangiah and Anderson JJ dealt with an argument that the appellant had been arbitrarily deprived of his right to remain in Australia, contrary to Art 12(4) of the ICCPR.[127] The Court pursued the reasoning in, and fate of *Teoh* at considerable depth,[128] but this penetrating analysis was rendered as dicta by the finding that the relevant sections of the Migration Act, ss 501(3A) and 501CA(4), were inconsistent with any obligation of procedural fairness regarding Art 12(4) of the ICCPR and that the regime created by these provisions was quite different from the broad discretion that supported the ministerial power in *Teoh*.[129]

123 [2020] FCA1480.
124 [2021] FCAFC 125.
125 Ibid [177]. And see Derrington J at [60] on 'the High Court's flirtation with the now abandoned or moribund concept of "legitimate expectation"'.
126 [2021] FCAFC 141.
127 Ibid [34]ff.
128 Ibid [37]−[47].
129 Ibid [54].

But the dicta in *Ratu* makes for uncomfortable reading for those who support the ongoing application of *Teoh*. Portions of the joint judgment in *Teoh* were set out,[130] with emphasis on the 'Positive Statement paragraph' to describe the impact of ratification of a Convention.[131]

But then the Court in *Ratu* noted[132] that the doctrine of legitimate expectations had been rejected by obiter dicta statements in the High Court, and:

> In addition, to the extent that *Teoh* suggests as a general principle that the ratification of an international treaty gives rise to a presumption or expectation that the executive government will act consistently with the treaty, even in the absence of legislation adopting the treaty as part of domestic law, that reasoning was strongly doubted by a majority of the High Court in *Lam* at [95]−[96], [98] [see nn 110−112 above], [120]−[121] and [147].[133]

O Precedent, what crimes are committed in thy name?

The Court went on to note that the High Court had not directly overturned *Teoh* but then said, 'there is some difficulty in identifying the *ratio* of *Teoh*'.[134] The difficulty lay, apparently, in the references in *Teoh* to 'a Convention' in a general context, contrasted with specific references to 'the Convention', being the CROC. Reference was made above to the Kabbalah which is modern Australian administrative law, but the *Ratu* hair-splitting argument defied the plain intention of the majority judgments in *Teoh*. However, the angels on a pinhead were supported by reference to Edmonds J in *Amohanga v Minister for Immigration and Citizenship*[135] ('*Amohanga*'), the Court in *Ratu* observing that[136] Edmonds J considered that the *ratio* of *Teoh* was restricted to a legitimate expectation arising from CROC. *Teoh* did not extend to a legitimate expectation arising from the ICCPR.

Note the differing ambit accorded *Teoh* in *Amohanga* compared with *Poroa*, decided four years later. The acceptance of *Teoh* as governing decisions under the ICCPR in *Poroa* (per incuriam) is plainly at odds with the earlier view.

To read the majority judgments in *Teoh* as restricted in their reasoning to CROC is to say that *Donoghue v Stevenson* enunciated a principle that applied only to Scottish widows finding decomposed snails in ginger beer bottles. The reasoning of the *Teoh* majority Justices, while emerging in the emotive environment of child welfare, did not depend on the particular nature of CROC. The reasoning is general in the light of the operation of Conventions across the board. The treatment of *Teoh*, beginning with later High Courts, is reflective of Bentham's attack on the doctrine of precedent generally: 'Follow it unless it is most evidently contrary to what you like'.[137]

130 Ibid [39].
131 See n 81 above.
132 [2021] FCAFC 141 [42].
133 Ibid [43].
134 Ibid [45].
135 (2013) 209 FCR 487.
136 [2021] FCAFC 141 [46]−[47].
137 Quoted in HK Luecke, 'Ratio Decidendi: Adjudicative Rational and Source of Law' (1989) 1 *Bond Law Review* 36, 40.

Amohanga reflected a perception of High Court antagonism to *Teoh*, but that death of a thousand cuts by dicta was merely continued, as the decision in *Amohanga* itself rested on a statutorily based lack of requirement for procedural fairness by the Minister with respect to the ICCPR. Justice Edmonds' *obiter* reasoning as applied by *Ratu* reflects the skill set of tax lawyers in its intense parsing of definite and indefinite articles, but indifference to the sweep of the words: 'ratification of a Convention is a positive statement'. These words plainly embraced a general intention to cover all Conventions, but the academic assessment emerged to the contrary, *Teoh* being restricted in its impact to CROC.[138]

Are 'expectations legitimate' in 2022 in Australia?

Apparently not. The academic overview, in the light of the High Court's attitude this century may be seen in the following:

1. Professors Matthew Groves and Greg Weeks said, 'Whatever happens in the UK, it seems clear that the legitimate expectation zombie will not rise again in Australia'.[139]

2. The same authors, as two of the triumvirate writing *Judicial Review of Administrative Action and Government Liability*,[140] noted that the lead author, Professor Mark Aronson, had been 'an early attendee at the funeral of legitimate expectations', while they merely continued to 'feast on the decaying corpse' of the concept.

3. Professor Groves finished off the assault in the 7th edition of Aronson's *Judicial Review of Administrative Action and Government Liability*,[141] writing 'legitimate expectation is now doctrinal roadkill in the Australian story of procedural fairness'.

Teoh *still lives, but whether it applies beyond CROC to Conventions generally is in contention*

In the midst of death, there is life,[142] and while legitimate expectations will apparently not spring phoenix-like (or even zombie-like) from the ashes in this country (the position in England is very different[143]), a general underlying issue remains dealt with. Lord Denning and others employed the then new phrase to deal with prospective discretionary decisions affecting non-property rights that were thought not covered by the rubric 'rights and interests'. But the old phraseology has now been accepted as all-embracing, including decisions affecting prospective non-property rights.

138 A Edgar and R Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19(1) *Melbourne Journal of International Law* 24 n 93.

139 Editorial, 'Decline of Legitimate Expectations', (2017) 24 *Australian Journal of Administrative Law* 71, 72.

140 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2016) 425 n 163.

141 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2021) 424 [8.90].

142 The authors of *Judicial Review of Administrative Action and Government Liability* apparently hope that *Teoh* will dematerialise if they ignore it: the 5th edition (2013) carried 13 references to the case and the 6th edition seven references, while the 7th is down to three.

143 Eg *R (Sargeant) v First Minister of Wales* [2019] 4 WLR 64, in which a Divisional Court determined that a legitimate expectation arose from a press statement made by the First Minister providing undertakings as to how an enquiry would be conducted. The Court gave substantive relief, not merely procedural, for the breach of the expectation.

The arguments for tearing down legitimate expectations as a verbal construct have succeeded in Australia, that battle being over, while the war of attrition against *Teoh* merely continues. The doctrine of 'legitimate expectations' may now be only a jurisprudential ghost, but its utility, stamped onto prospective and abstract expectations as to status and privilege, lives on.[144] The charges purportedly undermining the requirement of procedural fairness regarding legitimate expectations have fallen away in respect of *Teoh's* continued authority, even as the nomenclature of 'legitimate expectations' evaporated.

The areas of contest as to applying procedural fairness from the times of *Schmidt* and *Salemi* were listed above[145] — for example, what is an appropriate 'right'; does the claimant for procedural fairness have to have a subjective appreciation of a procedural obligation owed; and does a requirement for procedural fairness only spring from a formally documented offer. With breadth and elasticity the majority implicitly determined in *Teoh* that ratification of a Convention was a 'positive statement' by the executive government sufficient to attract the requirement of procedural fairness if the Convention standards were to be ignored. The nature of the 'right' and whether there was a subjective appreciation of a Convention standard were bundled up into the obligation that flowed from the act of ratification.

The acceptance of a Convention as a 'positive statement' was picked up in *Acting MICMSMA v CWY20*[146] ('*CWY20*') per Besanko J in the lead judgment for a five-member court. His Honour recited the Positive Statement paragraph from Mason CJ and Deane J in *Teoh*.[147] *CWY20* engaged issues removed from those in *Teoh*, but the utilising of the Positive Statement concept, contrary to McHugh and Gummow JJ in *Lam*, illustrates the beating heart of *Teoh.*

Conclusion

The onslaught on *Teoh* sought to subvert the authority of its reasoning by destroying 'legitimate expectations', but the spirit of the common law saw natural justice evolve to embrace the 'Positive Statement' perceived in Convention ratification.[148] The specific attack in *Lam* as to why a Convention did not express an intention by government[149] has been lost in the general references to High Court dicta being unfavourable to *Teoh*.

144 The latest word, at time of writing (17 July 2022) is from Professor Allars, 'Exceptionalism and Formalism: A Study of the Implication of Procedural Fairness' in B McDonald et al. (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022). Allars generally agrees (88) with the thesis of this article that the phrase 'legitimate expectation' has become redundant, as the requirement of procedural fairness has extended to 'application cases'.

145 See list at text above after n 32.

146 [2021] FCAFC 195 [168].

147 See n 81 above.

148 See *Tohi* at n 124 above. A reader may survey this article for competing and complementary concepts as to what action by government might induce the need for procedural fairness: from 'formal document' (Byers QC SG in *Salemi*); 'assurances ' from the Solicitor-General in the course of litigation (*New Zealand Maori Council*, n 32 above); ministerial press releases/statements (*Salemi* and *Sargeant* n 142 above); policy tabled in Parliament (*Haoucher*); to ratifying Conventions, and decision-making under the Treaty of Waitangi (*Te Pou Matakana Limited v Attorney-General* [2021] NZHC 2942; [2022] 2 NZLR 148, n 32 above).

149 See n 102 above.

However, while *Teoh* still stands, there now exist dicta in both the Federal Court and the Full Federal Court purporting to restrict the application of *Teoh* to CROC alone. A definitive decision from the High Court is required as to whether such restriction of reasoning to the specific facts of a case is appropriate.

It remains the view of this author that Conventions in general are markers that Australian decision-makers must (absent statutory provision to the contrary) take account of, or offer procedural fairness relating to any intended failure to apply to individuals the standards embodied in such Conventions.

Family violence and women on temporary visas: the case for reform

*Glen Cranwell**

In its *Path to Nowhere* report,[1] the National Advocacy Group on Women on Temporary Visas Experiencing Violence ('National Advocacy Group') noted that women on temporary visas and their children experiencing domestic and family violence often face significant barriers to seeking support. These barriers include the following:[2]

- Women fear losing the right to remain in Australia. Perpetrators of domestic and family violence use the threat of losing the right to remain in Australia as a means of controlling women and compelling them to stay in violent relationships.
- For some culturally and linguistically diverse women, returning to their countries of origin carries the threat of strong disapproval and even violence from their families and communities.
- Other women fear having to leave Australia will result in losing custody of their children.

My focus in this article is on partner visa applications.[3] The *Migration Regulations 1994* ('Regulations') provide that a partner visa may still be granted despite the partner relationship ceasing in circumstances where the sponsoring partner has committed family violence against the visa applicant or a dependent child. However, there are significant limitations in the family violence provisions that pose serious risks for harm to women on temporary partner visas and their dependents who experience family violence.

I will begin by outlining the family violence provisions contained in the Regulations. I will then discuss the limitations of the family violence provisions, which arise from the application of the provisions often being incompatible with the reality faced by women on temporary partner visas experiencing family violence. Finally, I will set out proposals for reform developed by the National Advocacy Group, many of which were previously made by the Australian Law Reform Commission as far back as 2011.

I have used the term 'victim' in this article to reflect the language of the Regulations. However, I recognise that women who have experienced domestic and family violence are courageous and successful survivors. I have also referred to 'women' for simplicity, because men are the main perpetrators of domestic and family violence. This is not to diminish the seriousness of domestic and family violence against men.

* Glen Cranwell is a member of the Queensland Civil and Administrative Tribunal. He is a former member of the Migration Review Tribunal and the Refugee Review Tribunal, and the Migration and Refugee Division of the Administrative Appeals Tribunal. The views expressed are his own.

1 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Path to Nowhere: Women on Temporary Visas Experiencing Violence and Their Children* (2018) 10.

2 Department of Social Services, *Hearing Her Voice: Report from the Kitchen Table Conversations with Culturally and Linguistically Diverse Women on Violence Against Women and Their Children* (2015) 25.

3 Other visas subclasses to which the family violence provisions currently apply are dependent child visas (subclass 445) and distinguished talent visas (subclass 858).

Types of partner visas

Partner visas are designed for people who are spouses, de facto partners and fiancé(e)s of Australian citizens, Australian permanent residents and eligible New Zealand citizens who seek to enter and remain in Australia temporarily or permanently.

There are two types of partner visas prescribed by the Regulations:

- partner visas — subclasses 820 and 801 (onshore) and 309 and 100 (offshore); and
- prospective marriage visas — subclass 300.

Generally, there is a two-stage process before a permanent partner visa is granted. First, a temporary visa is granted and then, usually after two years, if the relationship is ongoing the permanent visa may be granted.

For prospective marriage visas, there is effectively a three-stage process. An applicant applies offshore for a temporary prospective marriage visa and then, after entering Australia and marrying their prospective spouse, applies for a partner visa onshore in accordance with the two-stage process.

Outline of the family violence provisions

Definition of family violence

The term 'relevant family violence' is defined in reg 1.21 of the Regulations to mean:

> conduct, whether actual or threatened, towards:
>
> (a) the alleged victim; or
>
> (b) a member of the family unit of the alleged victim; or
>
> (c) a member of the family unit of the alleged perpetrator; or
>
> (d) the property of the alleged victim; or
>
> (e) the property of a member of the family unit of the alleged victim; or
>
> (f) the property of a member of the family unit of the alleged perpetrator;
> that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

The definition refers to conduct rather than 'violence'. The conduct may be in the form of actual or threatened physical violence, economic or psychological harm.[4] The focus in the definition is on whether the conduct reasonably causes the alleged victim to reasonably fear or be apprehensive about his or her wellbeing or safety.

4 See *Sok v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 56.

The alleged perpetrator must be the sponsoring partner

In relation to partner visas, the alleged perpetrator must be the sponsoring partner. The applicable visa criteria refer to family violence 'committed by the sponsoring partner' or 'committed by the sponsor'.[5] The alleged victim can be the visa applicant, or a member of the family unit/dependent child of the visa applicant and/or the sponsoring partner.[6]

The family violence must have occurred during the course of the relationship

Regulation 1.23 explicitly requires the family violence to have occurred when the married or de facto relationship was still in existence.

In relation to the subclass 100 visa, the family violence must also have occurred after the visa applicant's entry into Australia as the holder of a subclass 309 visa.[7]

An assessment of whether there was ever a partner relationship is required

Before considering a claim of family violence, a decision-maker is required to consider whether the partner relationship existed prior to the claimed family violence. The requirement in each of the partner visa subclasses containing the family violence exception is that 'the relationship between the applicant and sponsoring partner has ceased'.[8] The relevant partner relationship must therefore have existed before it can be determined that the relationship has 'ceased'. There is no requirement that the family violence must have caused the cessation of the relationship.

Evidence of family violence

Regulation 1.23 provides for two categories of situation in which a person is taken to have suffered or committed family violence. The first may be termed 'judicially determined' family violence. There are three kinds of acceptable evidence of a judicial determination of family violence that may be provided:

- an injunction under s 114(1)(a), (b) or (c) of the *Family Law Act 1975* granted on application by the alleged victim, against the alleged perpetrator;[9]
- a conviction of the alleged perpetrator, or finding of guilt against the alleged perpetrator, in respect of an offence of violence against the alleged victim;[10] or
- a court order under state or territory law against the alleged perpetrator for the protection of the alleged victim from violence made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise make submissions.[11]

5 Clauses 820.211(8)(d), 820.211(9)(d), 820.221(3)(b), 801.221(6)(c) and 100.221(4)(c) of Schedule 2 to the Regulations.
6 Ibid.
7 Clause 100.221(4)(c) of Schedule 2 to the Regulations.
8 Clauses 820.221(3)(a), 801.221(6)(b) and 100.221(4)(b) of Schedule 2 to the Regulations.
9 Regulation 1.23(2).
10 Regulation 1.23(6).
11 Regulation 1.23(4).

In Queensland, for example, a court order would include a protection order or a temporary protection order made under the *Domestic Violence Family Protection Act 2012* (Qld).[12] Note that temporary protection orders made ex parte may not comply with reg 1.23(4).

The second category is where a person makes a 'non-judicially determined claim' of family violence. Regulation 1.23(10) provides that in these cases the decision-maker is required either to be satisfied that the alleged victim has suffered relevant family violence or to take as correct an opinion of an 'independent expert'[13] that the alleged victim has suffered relevant family violence.

The Regulations set out the various combinations of evidence which may be supplied in order to make a valid claim of non-judicially determined family violence:

- a joint undertaking to a court made by the alleged victim and alleged perpetrator in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim;[14] or
- a statutory declaration under reg 1.25 by or on behalf of the alleged victim, and the type and number of items of evidence specified in an instrument under reg 1.24.

The statutory declaration under reg 1.25 must set out the allegation of relevant family violence as defined in reg 1.21 and name the person alleged to have committed the family violence.

The current instrument[15] under reg 1.24 specifies that a minimum of two different types of evidence must be given. These include certain evidence from:

- a registered medical practitioner or nurse;
- a police officer;
- a witness other than the alleged victim or a police officer;
- a child welfare authority officer or a child protection authority officer;
- a women's or a domestic and family violence crisis centre;
- a social worker who has provided counselling to the alleged victim;
- the alleged victim's treating registered psychologist;

12 See also *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Family Violence Act 2004* (Tas); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Restraining Orders Act 1997* (WA); *Domestic and Family Violence Act 2007* (NT); *Domestic Violence and Protection Orders Act 2008* (ACT).

13 'Independent expert' is defined in reg 1.21 to mean a person who is suitably qualified to make independent assessments of non-judicially determined claims of family violence and is employed by, or contracted to provide services to, an organisation that is specified by a *Gazette* notice.

14 Regulation 1.23(8).

15 IMMI12/166.

- a family consultant by a family consultant appointed under the *Family Law Act 1975* or a family relationship counsellor who works at a Family Relationship Centre listed on the Australian Government Family Relationships website; or
- a school counsellor or principal.

For each type of evidence, the instrument specifies the information that must be included. Note that the information must include sufficient 'details' of the claimed family violence, and that the requirements will not be satisfied by evidence which is in 'essentially conclusory terms'.[16]

Limitations of the family violence provisions

While the family violence provisions enable some women on temporary partner visas to proceed with their application for a permanent visa, a number of the requirements set out above place practical limitations on the protection available to many victims of family violence. These include the following.

The requirement to prove the existence of the partner relationship

The requirement to prove the existence of the partner relationship does not account for the complex dynamics of domestic and family violence. Domestic and family violence can greatly impact the nature of the relationship and the types of evidence that may be available.[17]

In essence, the definitions of 'spouse' and 'de facto partner' are satisfied where the couple have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, and they live together or do not live separately and apart on a permanent basis.[18] When considering whether the requirements for a spouse or de facto are satisfied, the decision-maker must consider all of the circumstances of the relationship, including the following matters:[19]

- the financial aspects of the relationship;
- the nature of the household;
- the social aspects of the relationship; and
- the nature of the persons' commitment to each other.

16 See *Fu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 161 [50].

17 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019) 3.

18 'Spouse' is defined in s 5F and 'de facto partner' is defined in s 5CB of the *Migration Act 1958* (Cth).

19 See regs 1.15A(3) and 1.09A.

The visa applicant is therefore required to produce evidence of matters such as joint assets and liabilities, the sharing of day-to-day household expenses and responsibilities, the undertaking of joint social activities and the opinion of friends and family about the nature of the relationship.

The Immigration Advice and Rights Centre has noted that the sorts of abuse it encounters daily include denying independent access to bank accounts and/or the freedom to earn an income, and restrictions on contact with people outside the perpetrator's family. Such abuse inevitably means there is great difficulty producing the necessary evidence to satisfy the requirements that the relationship was genuine and continuing.[20]

The requirement for the family violence to have occurred during the course of the relationship

The requirement that the family violence must have occurred during the course of the relationship does not reflect the reality of relationships, where violence may escalate or begin at the point at which the relationship ends.

Prior to 9 November 2009, there was no requirement that the family violence occur before the spousal relationship had ended. In *Muliyana v Minister for Immigration and Citizenship*, Siopsis and Edmonds JJ (with whom Moore J agreed) referred to the 'obvious policy' behind the legislation as it was then expressed, and stated:

> In short, the policy is intended to cover both situations: not to force a person to stay in an abusive relationship; and not to force a person to go back into an abusive relationship, in either case without compromising his or her immigration status. If that is the correct identification of the policy, then it matters not whether the domestic violence occurred before or after the cessation of the spousal relationship; just that the domestic violence occurred and the spousal relationship has ceased …[21]

The requirement that the sponsor be the perpetrator

A further limitation of the family violence provisions is that violence that is perpetrated by family members other than the sponsoring partner is not recognised. This fails to recognise that living with extended family is the norm for some cultural groups, and it is often the sponsor's family that is perpetrating family violence. For example, a woman subject to dowry abuse by family members other than the sponsor may be compelled to stay in a violent situation when it is neither safe nor appropriate to do so.[22]

20 Immigration Advice and Rights Centre, Submission No 98 to House of Representatives Standing Committee on Social Policy and Legal Affairs, I*nquiry into Family, Domestic and Sexual Violence* (24 July 2020) 8.

21 [2010] FCAFC 24, [34].

22 See Senate Legal and Constitutional Affairs Committee, *Practice of Dowry and the Incidence of Dowry Abuse in Australia* (2019).

Evidentiary requirements for family violence

The rigidity of the evidentiary requirements can be a substantial barrier to accessing the family violence provisions, particularly for women who cannot speak English. Other barriers include social isolation, lack of financial resources, and difficulties in accessing services and support in remote and regional areas.

An example of the difficulties in obtaining evidence faced by women who do not speak English can be found in *Applicant SIL v Scheme Manager, Victim Assist Queensland, Department of Justice and Attorney-General,*[23] a decision I made as a member of the Queensland Civil and Administrative Tribunal. In that case, the applicant called the police to report that her husband wanted to kill her. When the police arrived, they asked the applicant a single question: whether she could speak English. The applicant answered words to the effect of 'yes, but not very well'. The police did not speak to her any further, and at no point was she asked whether she wanted an interpreter. As I wrote in my decision:

> [I]t appears to me that the applicant was effectively denied a voice … due to her very limited English skills. In particular, the Queensland Police Service did not speak to her, but their report of the incident nevertheless proceeded to characterise her as 'the offender'. While Logan Hospital obtained an interpreter to interview the applicant, key elements of the information contained in the discharge letter were drawn from information provided by the Queensland Police Service and not from the applicant.[24]

The absence of a family violence provision for subclass 300 holders

There is no family violence provision for subclass 300 visa applicants. For example, if a subclass 300 visa is granted and the visa holder fiancée suffers family violence before the partner visa application is made, she has no recourse to the family violence provisions. She would need to go through with the marriage and wait to lodge a partner visa application onshore (subclasses 820 and 801) before being able to access the family violence provisions.

This can effectively compel women to remain in those relationships, at significant risk to their own wellbeing and that of members of their family unit. In many cultures, once a woman leaves her family she is expected to stay with her partner and his family, and to return if the marriage does not take place is to bring shame to her family.

Reform of the family violence provisions

The National Advisory Group has developed a *Blueprint for Reform* ('Blueprint')[25] of the family violence provisions. The Blueprint is endorsed by over 50 state and national peak bodies, service providers and other organisations working to address violence against women across Australia.

23 [2021] QCAT 237.
24 Ibid [33].
25 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019).

Relevant to the issues raised in this in this article, the Blueprint made the following recommendations:[26]

- The definition of family violence should be broadened to include violence perpetrated by a family member other than the sponsoring partner.
- The Regulations should require family violence to be determined prior to assessing the existence of a partner relationship, and ensure that the evidence required is capable of being reasonably provided in the context of a violent relationship.
- The family violence provisions should be expanded to include any person experiencing family violence on a prospective marriage visa (subclass 300) who does not marry the sponsor prior to the relationship breakdown, and their children.

In 2011, the Australian Law Reform Commission previously recommended that:[27]

- The Regulations should be amended to allow prospective marriage visa (subclass 300) holders to have access to the family violence exception.
- The relevant provisions contained in reg 1.23 requiring that the violence must have occurred while the relationship existed should be repealed.
- The Regulations should be amended to provide that any form of evidence can be submitted to support a non-judicially determined claim of family violence.

The Blueprint also recommends the introduction of a new subclass of temporary visa for any survivor of domestic and family violence to allow them time to access support services and decide how to proceed without fear of removal from Australia. The National Advisory Group stated:

> Such a visa would provide for a limited period (three years) to allow time for Family Court and other matters to be addressed and to reduce the administrative burden. In this time, the victim/survivor could be supported to make the necessary arrangements for their own and their family's protection and security. The visa would not entitle the holder to a permanent visa, but would permit them to apply for any further visa for which they were eligible. It should include for the holder work, study, Medicare and social security rights. This visa should be able to be extended for a further period if there are ongoing matters in the Family Court related to children. Any final orders issued under the Family Court jurisdiction in relation to a child's residency in Australia should provide a permanent residency pathway.[28]

While making a similar recommendation, I note that the Australian Law Reform Commission did not express a view as to the appropriate period of time for which such a visa should be granted.[29]

26 Ibid 4. The Blueprint also contains other important recommendations beyond those canvassed in this article, including for secondary visa applicants who have applied onshore for permanent residency.

27 See also Australian Law Reform Commission, *Family Violence and Commonwealth Laws — Improving Legal Frameworks* (2011) Recommendations 20-1, 21-1 and 21-3.

28 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019) 5.

29 Australian Law Reform Commission, *Family Violence and Commonwealth Laws — Improving Legal Frameworks* (2011) Recommendation 20-3.

Conclusion

The family violence provisions contained in the Regulations are in need of long-overdue reform. This article has identified significant limitations in the application of the existing provisions, together with practical and realistic measures to address these issues. The recommendations contained in the Blueprint are not new and reflect the views of countless practitioners and experts working in the field of domestic and family violence. Reforming the Regulations is necessary to ensure that all women and their children have the right to be safe from domestic and family violence in Australia, regardless of visa status.

Of course, reforming the Regulations is only the first step contained in the Blueprint. Other steps — such as ensuring access to housing, health, legal, social security, education and interpreting services — are beyond the scope of this article.[30]

30 National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019) 6–9.

The 'second actor problem' — a Chapter III twist?

*Emily Hammond**

This article addresses a practical legal issue for regulatory systems that arises when official actions are based on a prior official decision purporting to determine individual rights or obligations. If that first official decision lacks legal force due to jurisdictional error, is there a 'domino effect' on legal authority for the secondary acts based on that decision?

More particularly, the aim of the article is to analyse a constitutional dimension to this problem in the Australian context, flowing from the constitutional structure laid down in the judiciary chapter of the *Constitution* ('Ch III'). I will provide an argument that Ch III can be read as constraining legislative power to authorise action based on invalid executive decisions. The constraint can be formulated as follows:

> No Australian legislation can authorise official action on the basis that rights or obligations are as specified in an invalid decision by a non-court, where to do so would be inconsistent with the safeguards inherent in Ch III's prescription that judicial power in federal matters is exclusive to courts.

This is dense, and the work of the article is to unpack and explain it. It is work worth doing, as it indicates an implication from Ch III prescriptions denying the exercise of judicial power in federal matters to non-courts, one that is plausible on current case law. My argument here is motivated by the view that there is a discernible scheme, within Ch III, that safeguards the governed in their relationship to governing power in federal matters; and that the constraint I have indicated preserves the integrity of that scheme.

I will begin by describing the established orthodox approach to 'second actor' problems, which operates entirely in the register of statutory interpretation. I will then provide the argument for recognising an additional element — a constitutional constraint on legislative power to authorise action on the basis of invalid executive decisions in federal matters. That is, I will explain why I think this may be warranted with reference to Ch III's prescriptions for the exercise of governing powers in federal matters. Finally, I will indicate in broad terms how this might impact on second actor powers in Australian polities.

The practical implications of this constraint on legislative power are difficult to predict, given the evaluative nature of a criterion of 'substantial compatibility' between specific legislated consequences or effects of invalid decisions (on the one hand) and the abstract principles and values advanced by the Ch III scheme (on the other). In this article, I will seek to emphasise key features of this constraint that may bear on its application. This work will show that the constraint, being closely tailored to the Ch III scheme, will not drastically disrupt the range of legal consequences that can validly flow from an invalid executive decision. However, it may require some reconsideration of legislation that authorises secondary action which subjects individuals to the very same liabilities that an invalid executive decision purports to impose.

* Emily Hammond is Associate Lecturer in Law, the University of Sydney Law School. The working version of this article was the basis for a presentation at the Australian Institute of Administrative Law National Conference in Canberra on 22 July 2022. My thanks to the Forum's referees for their review and helpful comments.Compare *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671 [53]–[54] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

This is not to say that any such legislation will necessarily be constitutionally invalid. The important point is that the Ch III scheme produces a criterion for constitutional validity that must be met in *substance*, not merely form.[1]

The 'second actor problem' and the orthodox solution

The 'actor' in my title is a repository of a legal public power. For convenience, I will call them an 'official'[2] and assume that their legal power is conferred by statute.[3] They are a 'second' actor in that they act in reliance on a prior official decision. This can occur in various legal and factual contexts. For reasons that we will come to, it is useful to identify two types of scenario:

1. The second actor bases their decision on an assumption that legal rights or obligations are as specified in the prior decision.

2. The second actor bases their decision on findings of fact or policy determinations (evaluative judgment) made in a prior assessment or evaluation.

The 'problem' arises if the first decision is *not* a judicial order of a superior court and *is* impaired by jurisdictional error. The source of the problem lies in the legal principle that invalid decisions by inferior courts or non-courts have no legal force. That being the case, on what basis does the law — including the law that confers powers on secondary actors — attribute legal consequences to an invalid inferior court or non-court decision?

Refining the 'problem' — consequences of jurisdictional error in inferior court and non-court decisions

Some reference to doctrinal detail may be helpful at this point, to clarify the precise legal problem. As a preliminary matter, we should note that the problem addressed here emerges when the first decision is impaired by jurisdictional error. That term refers to a legal error of a particular kind — material breach of a legal condition on decision-making power.[4] It is a term of conclusion, application of which requires an evaluation that the decision is affected by breach of a legal principle or requirement, compliance with which is a condition

1 Compare *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671 [53]–[54] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

2 I should not be taken to suggest that the analysis would differ when public power is reposed in a 'private' actor. The critical inquiry is whether action draws legal force from a polity's public power *over* the legal rights of the governed. The identity of the repository of power may be a factor in deciding this point, but it cannot be the sole criterion: cf adjudicators' determinations of liability to make progress payments under security of payments legislation as considered in, for example *Chase Oyster Bar v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393.

3 The critical consideration is whether the action asserts the polity's public power *over* the legal rights of the governed. Such power is typically found in statute, but the analysis should in principle apply to any prerogative power over the subjects' rights or obligations — that is, any prerogative in the Blackstone sense that is capable of unilateral legal effect on subjects' rights or obligations. For discussion of the scope of this category of prerogative, see Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020), 24−9.

4 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 135 [31] (Kiefel CJ, Gageler and Keane JJ), adopting *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 32 [23] (Gageler and Keane JJ).

on decision-making power. As is well understood, reaching this conclusion in relation to a given decision can call for close evaluative judgment on issues of law and fact. The details and controversies involved in distinguishing jurisdictional from non-jurisdictional error need not concern us here, because our topic relates to the consequences of a jurisdictional error.

On this topic, recent High Court authorities make three relevant points. First, *all* jurisdictional errors result in 'invalidity': a decision impaired by jurisdictional error is *necessarily* 'invalid'. The law does not recognise the possibility of a 'jurisdictional error' that does not invalidate.[5] As the Court explained in *Hossain*, this is an analytic impossibility because 'jurisdictional error' is a functional label for those legal errors, the occurrence of which take a decision-maker outside the scope of their legal authority. In a precise formulation (to which we will return), the Court explains that the essence of a jurisdictional error is that it deprives a decision of 'the characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it'.[6]

Secondly, an invalid decision of an inferior court or non-court is 'lacking in legal force'.[7] On first consideration, it might seem that this repeats the point already made about the 'essence' of jurisdictional error: a decision impaired by jurisdictional error is not given force and effect by the statute pursuant to which it was purported to be made. However, on closer inspection we can see it combines that with a distinct proposition — the decision does not derive any legal force from any *other* source distinct from the statute pursuant to which it was purported to be made.

Thirdly, the invalid decision of an inferior court or non-court is lacking in legal force *whether or not the decision is set aside*.[8] This is a significant point. It rejects an hypothesis — sometimes referred to as a 'relative theory of invalidity' and attributed to William Wade — that official decisions have legal force and effect unless or until set aside.[9] That hypothesis is accurate for judicial orders of superior courts.[10] Its application to invalid *executive* decisions has always been contentious and has never taken root in Australian case law. Recent High Court statements make clear that it is inapplicable to invalid decisions of inferior courts and non-courts.[11]

These three interrelated points bring out the problem that arises when second actors rely on a decision of an inferior court or non-court that is impaired by jurisdictional error. That invalid purported decision is 'wholly lacking in legal force', whether or not it has been put aside; and yet the law may authorise some secondary official action on the basis that the purported

5 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [26] (Kiefel CJ, Gageler and Keane JJ).

6 Ibid 133 [24] (Kiefel CJ, Gageler and Keane JJ).

7 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [48] (Kiefel CJ, Bell, Gageler and Keane JJ).

8 Ibid; *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590; [2021] HCA 17, [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

9 See, for example, Christopher Forsyth, 'The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Fosyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord — Essays on Public Law in Honour of Sir William Wade* (Clarendon Press, 1998) 141, 143−4.

10 *Cameron v Cole* (1944) 68 CLR 571, 590−1; *New South Wales v Kable* (2013) 252 CLR 118, 140 [56] (Gageler J).

11 Presumably the same would be said of executive orders of superior courts.

decision exists in fact. What principles help us to understand whether the legal authority for secondary action is unaffected by invalidity of the first decision?

Orthodox resolution to the problem

The orthodox resolution to the 'second actor' problem is well-established and will be familiar to readers. It begins by making a distinction between a decision's legal force and its existence in fact:

> [A] thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences.[12]

Having made this distinction, the orthodox approach frames the problem as one of statutory interpretation, focusing on the legal powers of the second actor:

> The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself. For example, ... the exercise of a statutory power might in some circumstances be authorised by statute, even if the repository of the power acted in the mistaken belief that some other, purported but invalid exercise of power is valid.[13]

In this way, the answer to the second actor problem is to be discovered through a process of statutory construction, in which the critical inquiry is whether legislation authorises the second actor to proceed on the basis of a purported decision that exists *in fact*, irrespective that it is invalid in point of law.

Elements adopted from Forsyth's 'second actor theory'

The orthodox Australian doctrine adopts key elements from Christopher Forsyth's 'second actor theory'.[14] Forsyth provided[15] a conceptual move that explains second actor's authority *without* conceding 'legal force' to an invalid administrative decision: the invalid administrative act has an 'existence in fact' despite its 'non-existence in law'. Drawing on this observation,

12 *New South Wales v Kable* (2013) 252 CLR 118, 138 [52] (Gageler J). See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; [2021] HCA 19, [20] (the Court); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [50] (Kiefel CJ, Bell, Gageler and Keane JJ) and [94] (Edelman J).

13 *New South Wales v Kable* (2013) 252 CLR 118, 139 [52] (Gageler J).

14 Forsyth's theory is cited in *New South Wales v Kable* (2013) 252 CLR 118, 138 [52] (Gageler J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; [2021] HCA 19, [20] (the Court); and *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [50] (Kiefel CJ, Bell, Gageler and Keane JJ) and [94] (Edelman J) for example. Forsyth's influence on Australian doctrine is discussed and evaluated in, for example, Ethan Heywood, 'Second Actor Theory: A Principled and Practical Resolution to the Legality of Domino Effect Administraive Decision-making' (2019) 97 *AIAL Forum* 103; Benjamin Coles, 'The Effect of Legally Infirm Administrative and Judicial Decisions' (2017) 24 *Australian Journal of Administrative Law* 158, 162.

15 Forsyth 'The Metaphysic of Nullity' (n 9); 'The Theory of the Second Actor Revisited' [2006] *Acta Juridica* 209. 'Showing the Fly the Way Out of the Fly Bottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66(2) *Cambridge Law Journal* 325, 341.

Forsyth sought to explain the observable reality that invalid administrative decisions have *some* legal consequences without thereby compromising the foundational precept that

invalid administrative decisions do not determine rights or obligations by force of law: 'The invalid decision's factual existence is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'[16]

It is worth emphasising that, in proposing this resolution, Forsyth insisted on the importance of recognising that unauthorised administrative acts are void. He proposed his second actor theory as an alternative to a theory that unauthorised administrative acts are 'voidable' in the sense that they have legal force unless and until set aside.[17] Forsyth rejected this as an 'inherently authoritarian approach' — 'no one, I believe, asserts that legal force is or should be given to the decisions of any person, just because he is an official — but that is what is being required'.[18]

It also bears emphasising that Forsyth's theory provides a formal rationale for legal consequences and effects attaching to invalid decisions. That is, Forsyth's theory can justify *any* legal authority to take action based an invalid decision provided that in *form* the law operates on the purported decision's existence in fact.[19] Forsyth was clear that his theory does no more than indicate *where* we are to look to identify the powers of a second actor. His second actor theory does not 'lay down what the powers of the second actor are' and 'provides no specific guidance as to how the powers of the second actor are to be determined when not expressly laid down in statute'.[20] Forsyth was, of course, writing in the context of an unwritten and flexible constitution, in which there are no recognised legal limits on the sovereign parliament's power to define the scope of the second actor's powers.[21] That there may be limits on legislative power to authorise secondary action is — unsurprisingly — entirely absent from Forsyth's account.

It can be seen that the Australian doctrine (described above) has broadly adopted Forsyth's theory — at least in relation to decisions of inferior courts and non-courts. Specifically, Australian authorities endorse the premise that invalid inferior court and non-court decisions are not legally effective unless or until set aside. Australian doctrine would also seem to accept parliaments' essentially plenary power to attach any legal consequences to the fact of an invalid inferior court or non-court decision.[22] There are numerous judicial statements that legislative power in this regard is unqualified.[23]

16 Forsyth (n 9), 147.
17 Forsyth (n 9) 141−2; Forsyth, 'Theory of the Second Actor Revisited' (n 15), 210−13.
18 Forsyth, 'Theory of the Second Actor Revisited' (n 15) 211.
19 Forsyth argued in response that 'conceptual reasoning' is not 'sterile formalism' but 'crucial to the rule of law': Forsyth, 'The Theory of the Second Actor Revisited' (n 15).
20 Forsyth, 'Formalism and Conceptual Reasoning' (n 15), 341. See further Forsyth, 'The Theory of the Second Actor Revisited' (n 15), 219−23.
21 Forsyth did, however, call for a principled approach to judicial construction of statutes authorising official action on the basis of an administrative decision, see Forsyth, 'The Theory of the Second Actor Revisited' (n 15), 221.
22 Albeit tempered by a presumption against legislation giving administrative decisions greater force or effect than strictly necessary, see eg *Minister for Immigration v Bhwardwaj* (2002) 209 CLR 597, 614 [48] (Gaudron and Gummow JJ); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [100] (Edelman J).
23 As discussed in Heywood (n 14) 103; Coles (n 14) 158.

Incremental evolution in Australian doctrine?

There is one aspect of Australian doctrine that bears emphasis if we are to explore a potential constitutional dimension to 'second actor' problems. This aspect is how — precisely — we think about the 'legal force' that is absent from an invalid inferior court or non-court decision.

To repeat a recently favoured judicial formulation, a void decision of an inferior court or non-court decision does not attract the operation of the statute under which it was purported to be made such that 'the rights and liabilities of the individual to whom the decision relates are as specified in that decision'.[24] This provides a precise, sharply rendered, interpretation of 'legal force' — contrasting it with other legal consequences or effects a decision may have. This careful elaboration on 'legal force' lends emphasis to a key insight, namely that 'legal effects' or 'legal consequences' are not an undifferentiated class. There is an important distinction between 'legal force' (specifying rights or obligations by force of law) and *other* legal effects or consequences.

The formulation used in Australian cases emphasises a precise diagnosis of what is *absent* from an inferior court or non-court decision impaired by jurisdictional error[25] — this is 'legal force' precisely defined, as specification of rights or obligations by force of law. This precision helps us to see that certain legal consequences can be attached to a purported decision without, in substance, treating the decision as if it had legal force. For instance, it might help us to appreciate why conferring rights to review invalid decisions should not be controversial. Recognising that a decision in fact enlivens a review authority does not *in substance* treat the decision as effective in law to specify rights or obligations. That is because exposing the decision to review does not rely on or give effect to the decision's purported determination of rights or obligations. Instead, it enables examination of whether the decision is made according to law (in the case of judicial review) or whether the decision is the correct and preferable decision (in the case of merits review).[26]

Australian law's elaboration of 'legal force' in distinction from *other* legal consequences of effects elaborates on Forsyth's blunter distinction between a decision's existence 'in fact' and its existence 'in law'. As such, it provides a more nuanced analytical lens on second actor powers that may prove useful in thinking through any implied constraints on legislative power to authorise secondary action.

To be clear, I do not suggest that the emergence of this 'Australian twist' on Forsyth's second actor theory necessarily leads to qualifications on legislative power to authorise acts based on an invalid administrative decision. Even in commentary that illuminates the specificity of

24 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46] (Gaudron and Gummow JJ).

25 A point made in, for example, Melissa Perry, 'The Riddle of Jurisdictional Error: Comment on Article by O'Donnell' (2007) 28 *Australian Bar Review* 336, 341.

26 Cf *M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, [12] (Gageler, Keane and Nettle JJ), stating that it was unnecessary to decide the extent to which Commonwealth legislation may require 'a decision to refuse to grant a visa which is ineffective in law to achieve that result' to be treated as 'a valid decision' because the case at hand concerned a statutory provision for merits review, and in this context 'the requisite analysis can proceed sufficiently on the basis that an [invalid decision] is a decision that is made in fact.'

'legal force' in contrast with other legal consequences, it is assumed that secondary action can be authorised on the basis of an invalid purported decision provided that it is treated as 'part of the factual criteria on the basis of which a valid decision may be made by another'.[27] My point is simply that the Australian distinction can assist when we turn to analyse the implications to be drawn from Ch III prescriptions for the exercise of public powers in federal matters. If 'invalidity' implies a bundle of legal consequences,[28] this precise rendering of 'legal force' may help to sort the bundle.

A constitutional dimension to 'second actor' problems in Australia?

When the official decision in question is a non-court exercising executive power in a subject-matter within the ambit of federal jurisdiction,[29] it is worth considering the possibility that there is a constitutional dimension to second actor powers. My aim in this part is to explain why. My argument rests on a premise that there is a discernible scheme laid down in Ch III for the exercise of governing powers in federal matters, which contains significant safeguards for individuals which should be upheld in substance, not just form. Ordinary legislation authorising official actions based on executive decisions should not be permitted to 'do an end run' around the safeguards achieved by making judicial power in federal matters exclusive to courts. For this reason, it is arguable that Ch III denies legislative power to authorise official action on the basis that rights or obligations are as specified in a purported but invalid decision of a non-court in a federal matter in certain circumstances — namely, where to do so would be substantially incompatible with the safeguards for individuals in their relationship with governing power that are delivered through the Ch III scheme.

Ch III scheme for the exercise of judicial power in federal matters

The argument proceeds from an understanding that Ch III lays down systemic safeguards for legality, fairness, impartiality and transparency in the exercise of a distinctive public power of the state ('judicial power') in the subject-matters that lie within federal jurisdiction ('federal matters'). Ch III does this by making the exercise of judicial power in those subject-matters exclusive to a class of institutional repositories ('courts') whose orders are subject to the system of appeals established by and under the *Constitution*, s 73;[30] and denying legislative power to impair the essential characteristics of courts or judicial power,[31] or the defining

27 Perry (n 25) 341.

28 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters (Professional) Australia Limited, 6th ed, 2017) 732.

29 There is some contention about the meaning of 'matter' in the context of state legislative power to confer rights-determining powers on non-courts. See n 48 below. I here assume that the limit is engaged when a rights-determining power is exercised in a subject-matter within ss 75 and 76. Whether this assumption is sound does not affect the fundamentals of this article's argument: if a narrower understanding of 'matter' is required, this would narrow the potential application to decision-making in state non-courts.

30 This is the combined effect of two limits on legislative power recognised in High Court authorities some 100 years apart. *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 established that Commonwealth judicial power is exclusive to courts within the meaning of Ch III. In *Burns v Corbett* (2018) 265 CLR 304 four members of the Court further recognised that Ch III denies state legislative power to confer *state* judicial power in federal matters on non-courts: 355−61 [41]−[55] (Kiefel CJ, Bell and Keane JJ), 355−60 [94]−[106] (Gageler J).

31 Cf *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26−7 (Brennan, Deane and Dawson JJ) for uncontentious statement that Commonwealth legislative power does not extend to making laws inconsistent with the essential character of a court or with the nature of judicial power.

features of courts — including institutional and decisional independence and impartiality, and adherence to fair process, open court principles and reason-giving.[32]

This institutional context for the exercise of judicial power (in federal subject-matters) is an important safeguard for individuals subject to any exercise of that form of public power over rights and obligations identified as 'judicial power'. From this, we can infer that it is important to understand what it is that is distinctive about what can be done in exercise of judicial power, so as to better understand what it is that warrants this intricate constitutional scheme for its exercise in federal subject-matters. It does not seem controversial to think that, if there is a distinctive potential of 'judicial power' that warrants the institutional arrangements prescribed by Ch III, this will have a bearing on the implications of Ch III for legislative power. Would it not be odd if ordinary legislation could in substance undermine a purpose of the scheme by treating executive decisions as if they were endowed with the very same potential that inheres in judicial power?

A quality inherent in judicial power and exclusive of executive power?

To follow this line of inquiry, we need to identify the distinctive potential that is inherent in judicial power but denied to executive power. Here I make a proposal that picks up on patterns in Australian case law and a discernible logic to recent judicial statements on the nature of executive and judicial power over the governed.[33]

One way of thinking about the separation of judicial power is by reference to functions that have been identified as exclusively judicial — for example, the adjudication and punishment of criminal guilt.[34] But this cannot be the only way of thinking about the separation of judicial power, because many functions are innominate — that is, capable of being performed through an exercise of 'executive' or 'judicial' power.[35] It is therefore helpful to also consider what can permissibly be achieved through judicial performance of an innominate function that cannot result from an executive performance of the function.

32 Cf *North Australia Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 579, 594−5 [39]−[40] (French C, Kiefel and Bell JJ) for a distillation of the evolving 'Kable doctrine' that denies state legislative power to make laws that substantially impair the institutional integrity of state tribunals that are 'courts' within the meaning of Ch III.

33 I analyse this idea and its implications for other facets of judicial review elsewhere — see Emily Hammond, 'Chapter III and Legislative Competence to Stipulate that a Material Legal Error is Non-jurisdictional' (2021) 28 *Australian Journal of Administrative Law* 177; 'Materiality and Jurisdictional Error: Constitutional Dimensions for Entrenched Review of Executive Decisions' (2021) 6 *UNSW Law Journal Forum* 1; 'The Constitution's Guarantee of Legal Accountability for Jurisdictions' (2021) 49 *Federal Law Review* 528; 'The Duality of Jurisdictional Error: Central (to Justifying Entrenched Judicial Review of Executive Action) and Pivotal (to Review Doctrine)' (2021) 32 *Public Law Review* 132.

34 Noting that Ch III denies Commonwealth legislative power to repose an exclusively judicial function in a non-court *even if* that non-court is exercising executive power — see *Alexander v Minister for Home Affairs* (2022) 401 ALR 438; [2022] HCA 19, [93] (Kiefel CJ, Keane and Gleeson JJ).

35 Examples include determining new statutory rights or liabilities according to justiciable criteria, as in the termination of statutory status with consequent loss of property (eg *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1); imposition of liability to involuntary hardship or detriment *other than* as punishment for criminal guilt (eg *Thomas v Mowbray* (2007) 233 CLR 307; *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1; [2021] HCA 4) or to make payments or not exercise property rights as ordered (eg *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542).

I suggest that, in this regard, it is productive to recognise one simple marker — namely, an invalid purported exercise of executive power *cannot* have legal force unless and until set aside. I use 'legal force' here in the sense discussed earlier — the capacity to specify a subjects' rights or obligations by force of law attributable to an exercise of public power over the governed. My suggestion is that an invalid *executive* decision cannot have *any* legal force, not even a provisional legal force ('unless and until set aside'). This quality (having legal force unless and until set aside) *can* inhere in a purported exercise of judicial power but cannot be conferred on a purported exercise of executive power. Recognising this confirms the importance and value of the evolving Ch III institutional safeguards on the exercise of judicial power in federal matters. Those constitutional constraints operate on the form of state power ('judicial power') that carries the 'authoritarian'[36] potential Forsyth spoke of — that is, the constitutional authority to bind by compulsive force of law *even though impaired by invalidating (jurisdictional) error*.

Does the case law support this account of a definitive constitutional boundary between judicial and executive power? The idea that there is a definitive constitutional demarcation may at first seem at odds with established ways of thinking about Ch III's prescriptions. The definition of judicial power is 'elusive'[37] and 'it has never been found possible to frame a definition that is at once exclusive and exhaustive'.[38] My argument does not deny this. It does not propose a comprehensive definition of judicial power. What it requires is recognition that there is a quality that *can* inhere in a judicial order but *cannot* inhere in an executive determination — in other words, a quality that, if present in an exercise of state power over the governed, conclusively indicates that the category of public power engaged is 'judicial power'. Recognising that this quality is exclusive of executive power resonates with the institutional arrangements laid down in Ch III. We see that Ch III's prescriptions for the exercise of judicial power (in federal matters) ensure that this category of power with its unique 'authoritarian' potential is exercised in an institutional context with certain inbuilt safeguards for the governed.

Constitutional characteristics of executive power

First and foremost, this account rests on the executive's inherent incapacity to unilaterally alter subjects' rights or obligations. By this I mean simply that executive action has no *intrinsic* authority to unilaterally affect the legal position of the subject — to affect the subjects' rights or liabilities 'in invitum' (by force of law irrespective of consent).[39] The executive does not possess intrinsic state authority over subjects' rights or obligations. On the contrary: executive action cannot have a unilateral 'non-optional' effect on rights or obligations *unless* and *to the extent* that the executive action attracts the operation of a common law prerogative or statute.

36 See text at n 18 above.

37 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (2nd ed, Lexis Nexis, 2020) 103.

38 *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J).

39 The terms can be slippery, but in essence the quality is distinctive to state power over the governed and lies in the ability to alter legal rights or obligations irrespective of consensual submission to jurisdiction. See, with reference to judicial power, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 452 (Barton J); *TCL Airconditioner v Federal Court* (2013) 251 CLR 533, 554 [28] (French CJ and Gageler J).

It is, of course, true that Australian legislators routinely enact statutes which provide that rights or liabilities are to be as specified in administrative decisions made under the statutes. Administrative decisions made in this way can have a legal effect on rights when the law identified in the *statute* — operating on the fact of the decision — has this legal effect. The important point is that an administrative decision manifesting 'unilateral' state power over rights does so as a *factum* by which statute or common law prerogative operates to affect rights.[40] The executive action of 'deciding' in and of itself — separate from a common law prerogative or statute operating through it — cannot unilaterally affect the subject's rights. Unless executive action engages a prerogative or statute, in the sense of being directly legally authorised by one or the other, executive action without more simply cannot 'dispense from the general system of law'.[41]

Relatedly, this inherent incapacity means that an invalid decision made by a repository constitutionally incapable of exercising judicial power cannot have *any* legal force — that is, it cannot specify subjects' rights or obligations by force of law. The result is a combination of two factors:

i. an invalid decision is one that, being unauthorised, does not attract the operation of the prerogative or statute pursuant to which it was made;[42] and

ii. the underlying inherent executive incapacity to unilaterally affect the legal position of the subject.

This point is also made, indirectly, in the Court's identification of a separation of powers mandate for judicial review of invalid decisions by non-courts incapable of exercising judicial power: such non-courts cannot validly be authorised to determine the limits of their own jurisdiction over subjects' legal rights or obligations.[43]

Constitutional characteristics of judicial power

Turning from the inherent limit on executive power to the contrast with judicial power, it is recognised that there is a potential inherent in judicial power to support orders that have legal force *unless and until set aside*. This quality is seen in judicial orders of superior courts of record. Examples can be found in cases considering judicial orders imposing liabilities under statutes subsequently held unconstitutional, or otherwise affected by jurisdictional

40 An executive decision made in exercise of statutory authority is viewed as 'adjunct to legislation', a 'factum on which the operation of [statute] depends' / 'the factum by reference to which the Act operates to alter the law in relation to the particular case': *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 371 (McTiernan J), 378 (Kitto J). See also *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 577−9 [94]−[97] (Hayne J).

41 *A v Hayden* (1984) 156 CLR 532, 580 (Brennan J); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98−9 [135]–[136] (Gageler J), 158–159 [373] (Gordon J, dissenting).

42 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 132−3 [23]–[24] (Kiefel CJ, Gageler and Keane JJ) quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46] (Gaudron and Gummow JJ).

43 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484 [9] (Gleeson CJ), 505 [73], 511−12 [98] (Gaudron, McHugh, Gummow, Kirby, Hayne JJ); *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J), 426–8 (Deane and Dawson JJ).

error.[44] To put it another way, even a purported (invalid) exercise of judicial power can manifest the polity's state power to determine rights. The reason is that, in constitutional terms, the judicial power of a polity exists to provide a final arbiter of rights. A necessary cost of finality is that judicial orders can have intrinsic efficacy to render a determination of rights or liabilities conclusive and binding unless and until set aside — even if invalid.

Invalid judicial orders of inferior courts

There is a wrinkle in the Australian authorities. As previously mentioned, Australian authorities hold that invalid judicial orders of inferior courts and others are, like executive decisions, wholly lacking in legal force and effect.[45] However, the argument that there is a quality that *can* be conferred on judicial orders and *cannot* be conferred on executive powers is not denied by Australian doctrine on the status of invalid judicial orders of inferior courts and tribunals. Two points can be made here.

The first and most important is that any distinction made between categories of judicial order (according to the identity of the repository of power) does not deny the constitutional proposition that an invalid purported exercise of *executive* power cannot determine the subject's legal rights or obligations. The constitutional characteristics of executive power make clear that executive action can only affect the legal status of subjects if it draws legal force from a statute or prerogative, which requires that it is authorised by the statute or prerogative. The quality of specifying the subjects' rights or obligations unless set aside *can* be conferred on invalid judicial orders but *cannot* be conferred on executive decisions.

The second point is that Australian doctrine withholding this quality from judicial orders other than those of superior courts is not referable to the text and structure of Ch III. The status of judicial orders of inferior courts and tribunals may be best understood as an aspect of Australian common law, perhaps even one that has 'small c' constitutional status. From what has been judicially revealed to date, it is difficult to see that the Ch III scheme requires that invalid judicial orders of inferior courts in federal matters should be wholly lacking in legal force until set aside — which is to say that Australia's unentrenched doctrine concerning the status of inferior court orders in federal matters does not operate in the same universe as the entrenched doctrine concerning the status of non-court decisions in federal matters.

Summary — why contemplate the constitutional dimension to 'second actor' problem?

In this section, I have outlined a reason for thinking that Ch III *should* have a bearing on how we think about legislative power to authorise secondary action on the basis of invalid executive decisions. In essence, I've suggested that we can read Ch III as a scheme to create a distinctive institutional context for that class of governmental power that can have compulsive legal force on the rights or obligations of subjects *despite* jurisdictional error.

44 See for example *New South Wales v Kable* (2013) 252 CLR 118; ***Re Macks; Ex parte Saint*** (2000) 204 CLR 158.

45 As recently reaffirmed by the High Court: in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [48] (Kiefel CJ, Bell, Gageler and Keane JJ); *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1; [2022] HCA 16, [27] (Kiefel CJ, Gageler, Keane, Steward and Gleeson JJ).

That this potential inheres in judicial power is not a merely technical point of doctrine. It is an animating purpose that underlies the specific careful provisions laid down in Ch III to safeguard the exercise of judicial power in federal matters. A significant purpose of the whole Ch III enterprise would be undermined if Australian parliaments retained legislative power to enact a prospective rule[46] that that rights or obligations are as specified in an invalid non-court order unless and until it is set aside.

Implications for second actor authorities?

The argument in the section above indicates why we might seriously consider that Ch III bears on how we think about legislative power to authorise action on the basis of invalid non-court decisions in federal matters. It suggests that there is a constitutional dimension when Australian legislation authorises action on the basis of non-court decisions in federal matters. And it helps us to formulate two more productive contentions: first, contrary to current orthodoxy, the *Constitution* may constrain ordinary legislative power to authorise action on the basis that rights or obligations are as specified in an invalid non-court decision. Secondly, the criterion for validity is whether a law authorising secondary action is substantially compatible with the safeguards that Ch III provides for individuals affected by governing power in federal matters. In this section, I will sketch out some preliminary observations on what recognising this constraint would mean for the handling 'second actor' powers in Australian law.

As indicated at the outset, the constraint on legislative power identified can be formulated along these lines: no Australian legislation may authorise official action on the basis that rights or obligations are as specified in an invalid decision by a non-court, where to do so would be inconsistent with the safeguards inherent in Ch III's prescription that judicial power in federal matters is exclusive to courts.

This constraint is closely tailored to the Ch III scheme for adjudication in federal matters. Much of the detail of how such a constraint would operate in practice will therefore depend on the meaning and application of constitutional concepts descriptive of the Ch III scheme. Within the scope of this article, I will offer some observations on four features of this constraint that may affect its application, as follows.

First decision is made by a 'non-court' and on a subject-matter within ss 75 and 76

Most obviously, the constraint only applies if the first decision is made by a non-court constitutionally incapable of exercising judicial power — namely, a non-court[47] exercising governmental power over rights in a subject-matter that lies within the ambit of federal

46 Distinguishing here, authorities recognising legislative power to retroactively enact the purported legal force of invalid administrative action.

47 On the characterisation of tribunals as courts for the purpose of Ch III, see, for example, Rebecca Ananian-Walsh, 'CATs, Courts and the Constitution: The Place of Super-Tribunals in the National Judicial System' (2020) 43(3) *Melbourne University Law Review* 852.

jurisdiction.[48] The constitutional concepts at play here reflect the source of the constraint — in the *Constitution*'s provisions that deny any Australian parliament legislative power to confer judicial power on non-courts in the subject-matters that lie within the ambit of federal jurisdiction.[49]

First decision purports to specify rights and obligations of subjects

Next, the constraint applies when the first decision is one that purports to have 'legal force' in the sense that engages the relevant constitutional marker that is exclusive of executive power. That is, it engages the constitutional incapacity of executive power to unilaterally affect the legal status of the governed. In essence, this means that the first decision is one that purports to determine rights or obligations, as an exercise of state power over the governed[50] — to provide that the subjects' rights or obligations are to be as specified in the decision.

Arguably, then, the 'big-C' constitutional limit I propose here would not be engaged if the first decision purports to determine issues of ordinary[51] fact or policy alone, whether as a standalone decision[52] or even as a preliminary step in a statutory process to determine rights or obligations.[53] The separation of judicial power does not deny legislative power to make a non-court executive decision conclusive as to ordinary facts or permissible policy choices on which a non-court executive actor will base their decision.[54] That the fact-finding or policy determination is distributed between different decision-makers and stages in a decision-making process should not change this point. In such cases, the critical question remains one of statutory construction: does the legislation authorise a final decision based on the findings or policy choices arrived at in a manner impaired by material breach of conditions on the decision-making power?

48 *Burns v Corbett* (2018) 265 CLR 304, 360 [105]−[106] (Gageler J). It is noted that Kiefel CJ, Bell and Keane JJ state that Ch III denies state legislative power to confer judicial power in relation to the 'matters' described in ss 75 and 76. It has been suggested that their Honours' reasons might therefore imply that state legislative power extends to conferring judicial power on non-courts on any subject-matter, provided that it is not conferred in a 'matter': see *Attorney General for NSW v Gatsby* (2018) 99 NSWLR 1, 47−59 [229]–[274] (Basten JA). If that is correct, it would reduce the impact of the constraint on *state* legislative power (eg to those instances where non-courts are exercising governmental power to issue a remedy to enforce a right, duty or liability), rather than alter the fundamental analysis.

49 See n 30.

50 Contrast through private arbitration, see *TCL Airconditioner v Federal Court* (2013) 251 CLR 533.

51 Constitutional facts require separate analysis, which I do not attempt here. It may be relevant to note that an executive decision does not purport to 'determine' the constitutional validity of a law's application to the case at hand.

52 Such as the public report of a statutory agency in *Ainsworth v Criminal Justice Commission* (1992) 125 CLR 564 or of the ombuds in *Kaldas v Barbour* (2017) 350 ALR 292; [2017] NSWCA 275; *King v Ombudsman* (2020) 137 SASR 18.

53 Such as the recommendations to final decision-makers considered in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149; and *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480.

54 This reading of legislation will not be lightly reached. Further, the final decision may itself be invalid if it is based on findings or policy choices that do not comply with such standards of legal rationality and reasonableness as condition the final decision-making power: compare *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 341 (Mason CJ).

Secondary action is based on rights or obligations being as specified in the first decision

Relatedly, the constraint on legislative power could only be invoked for secondary action that is based on rights or obligations being as specified in the invalid first decision. (Because this is the 'legal force' that engages the quality exclusive of executive power).

This clarification provides some assurance that the proposed constraint would not impose drastic limits on legislative power to authorise action following invalid executive decisions. To return to an earlier-mentioned example, the constraint would not be engaged if the second action involves a judicial review of the first decision or a redetermination on its merits. And this is for a substantial reason: in a judicial review or a merits review, the reviewer does not proceed on the basis that rights or obligations are as specified in the decision under review. Rather, that is put in issue by the review.

Similarly, a legislative provision that an administrator is not to reopen a decision-making process unless a purported decision in fact is set aside — a possibility conceded in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[55] — may not offend the constraint on legislative power. This too, is for a substantial reason: a provision of this kind does not require the administrator (or anyone else) to treat the purported decision as legally effective to specify the subjects' rights or obligations until set aside. If we assume that the decision in fact made was in purported performance of a statutory duty to consider and decide then the effect of such a provision could be thought of as something in the nature of a qualified 'no consideration'[56] clause — the decision-maker is bound to consider as required by law (and that duty is enforceable by mandamus if a court determines it remains unfulfilled in law), but a purported consideration in fact fulfils the duty unless redetermination is ordered by a superior court.

On the other hand, the proposed constraint on legislative power would do some work. It would, for example, require *some* reconsideration of established ways of thinking about judicial enforcement of liabilities imposed by executive order. The constraint I have outlined would preclude a court determining that an offence has been committed by contravening a liability specified in an *invalid* executive order in a federal matter. This would qualify the orthodox assumption that administrative determinations (in federal matters) are only open to collateral review by a court *in the absence of legislative provision to the contrary*.[57]

55 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 616 [54] (Gaudron and Gummow JJ).

56 That is, a clause providing that there is no legal duty to consider the exercise of a power on application or request or otherwise. The High Court has upheld the constitutionality of such clauses, explaining that '[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise': *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 347 [57].

57 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 108 [36] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See generally Jules O'Donnell, 'Re-evaluating the Collateral Challenge in the Era of Statutory Interpretation' (2020) 48 *Federal Law Review* 69.

Recognising this qualification need not have drastic practical implications for the present system of Commonwealth enforcement of liabilities imposed by executive order. This is because substantial incompatibility could be avoided in multiple ways. Most straightforwardly, there would be no substantial incompatibility with the Ch III scheme where the invalidity of the administrative act is able to be insisted upon collaterally in the court adjudicating on the alleged contravention.[58] But this may not exhaust the possibilities. Compatibility with Ch III may also be secure if, collateral challenge being unavailable in a court exercising federal jurisdiction,[59] there is an effective means to ensure that no liability or penalty will be judicially imposed absent opportunity to insist on validity in in a superior court with review authority.[60]

Ultimate question is whether legislated consequences of an invalid purported decision are, in substance, compatible with the Ch III scheme

A final point takes us back to the overarching question: are legislated consequences of an impaired executive decision compatible with the Ch III scheme? Answering the question will necessarily require attention to features of the Ch III scheme, itself subject to iterative case law development. To make a trite point, there will be some legislated consequences that are compatible with the Ch III scheme, as described in the authorities. For instance, the Ch III scheme does not deny legislative power to confer immunity from liability for unauthorised executive contravention of individual legal rights. Detention pursuant to an executive decision provides a case in point. An invalid executive determination imposing liability to detention cannot, in federal matters, provide lawful authority for detention until set aside. However, as authorities recognise, a statute may validly immunise officers from liability in tort for unlawful detention et cetera.[61]

A more controversial case could arise if a law purports to authorise enforcement of liabilities specified in an administrative decision (without collateral challenge) after a superior court with full authority to review for jurisdictional error has declined to determine its validity — for instance, if the court has declined to determine an application for judicial review on discretionary grounds or because the court refused leave to apply for review out of time. In such cases, a law that requires or authorises action on the basis that rights or obligations are as specified in the impugned decision might conceivably be upheld as compatible with the Ch III scheme. The court's refusal to review the decision may be considered conclusive that secondary action giving effect to liabilities specified in the decision is consistent with

58 See *Ousley v The Queen* (1997) 192 CLR 69, 100 (McHugh J); *Attorney-General Commonwealth v Alinta Ltd* (2008) 233 CLR 542, 579 [100] (Hayne J).

59 For reasons of legislative policy such as those defended in Jules O'Donnell, 'Re-evaluating the Collateral Challenge in the Era of Statutory Interpretation' (2020) 48 *Federal Law Review* 69, 88−90.

60 There are likely multiple ways this could be provided — for example, discretionary authority to stay proceedings to enable a review application (or to refer the question of law to a superior court); or a right of appeal against any liability or penalty imposed by an inferior court denied collateral review authority to a superior court where validity can be insisted on collaterally, cases evaluating whether laws modifying principles of fair process are compatible with the institutional integrity of courts — for example, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

61 See, for example, the immunity provision considered in *Little v Commonwealth* (1947) 75 CLR 94, distinguished in *Ruddock v Taylor* (2005) 222 CLR 612.

Ch III's provisions for realising the ideal of government under law[62] — although it would be hoped that, should this outcome be possible, it would be a strong factor *against* discretionary refusal to determine the review application.

The inevitability of difficult cases

What I have said to this point highlights that there will inevitably be difficulties in applying a Ch III constraint on 'second actor' powers. On the one hand, Ch III implications for legislative power should be upheld in *substance*. It would be unsatisfactory if the constitutional scheme ultimately *only* dictates the *form* of legislation addressing the legal consequences of invalid executive decisions in federal matters. On the other hand, it would be naive to think that answering the question of substance will be uncontroversial. There will inevitably be difficult cases, where statutes authorise action that is not *in form* based on rights or liabilities being as specified in an invalid decision; and yet there is a sense that the action is *in substance* based on the earlier purported (but ineffective) specification of individual rights or liabilities. In some such cases, it might be concluded that there is a real substantial distinction between the basis for the secondary action and the earlier decision.[63] However, this resolution is not readily available if, for instance, if legislation authorises action that harms individuals in much the same way as they would have been harmed had the purported specification of rights or liabilities been legally effective, based on a second actor's 'reasonable suspicion' about those rights or liabilities attributable to the purported decision's existence in fact. In such scenarios, there may be no easy answer to the question of substantive compatibility with the Ch III scheme.

The case of immigration detention based on a 'reasonable suspicion' that a person is an unlawful non-citizen comes readily to mind. To briefly elaborate: the *Migration Act 1958* (Cth), s 196, mandates (and authorises) immigration detention of any non-citizen who is present in, or seeking entry to, Australia without a visa until they are granted a visa or removed from Australia. Section 189 requires (and authorises) an officer to detain an individual if the officer 'knows or reasonably suspects' that they are an unlawful non-citizen — that is, a citizen present in Australia without a visa. *Ruddock v Taylor*[64] ('*Taylor*'), recently reaffirmed in *Thoms v Commonwealth*[65] ('*Thoms*'), establishes that s 189 confers power to detain — it is *not* an immunity provision; rather, it authorises detention. Further, the 'reasonable suspicion' that enlivens the power can exist even if it is based on facts which are not legally effective to render the person an unlawful non-citizen: the 'reasonable suspicion' referred to in s 189 reaches cases where an officer 'is subjectively convinced that a person is an unlawful non-citizen but later examination reveals that opinion to have been legally flawed'.[66]

62 Compare *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400, 413 (Finkelstein J). I emphasise the point is debateable. Discretionary orders dismissing an application for review need not mean that the decision has legal effect or that the person affected cannot bring other proceedings to vindicate their rights: *Lansen v Minister for the Environment* (2008) 174 FCR 14, 49 [166] (Moore and Lander JJ).

63 Cf the meaning given to 'removed' in context of the statutory criterion for refusing a special entry visa to a 'behaviour concern non-citizen': *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; [2021] HCA 19.

64 (2005) 222 CLR 612.

65 [2022] HCA 20.

66 *Ruddock v Taylor* (2005) 222 CLR 612, 622 [27] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also 674−5 [228]−[229] (Callinan J). Although McHugh J dissented on the interpretation of s 189, he did so on the basis of the 'principle of legality' and conceded that parliament *could* legislate a power of detention exercisable on the basis of an opinion that is legally flawed (at [109]).

If legislative power is constrained in the way I have proposed, it may prompt some reconsideration of extent of legislative power to authorise detention on the basis of a reasonable but mistaken opinion that a purported visa cancellation renders a person an 'unlawful non-citizen'.[67] We might well think it is quite unlikely that the reconsideration would result in any qualification to the *Taylor* and *Thoms* reading of s 189. Further, any reconsideration would be in limited compass: it would not deny the legality of detention that is independently authorised by s 196 — such as where detention follows the invalid refusal of a visa *application* or the invalid refusal of an application for *revocation* of a visa cancellation.[68] And it would not deny legislative power to enact immunity from liability for wrongful detention.[69]

The operation of s 189 is a salient reminder that the application of the constraint on legislative power I have proposed in this article will not be uncontroversial. It might appear that *Taylor* and *Thoms* show that the constraint I have proposed will ultimately have *no* substantive bite: that legislators can, so long as they are careful about the form of the secondary authority, authorise action identical to what could be done if the invalid purported decision had legal force until set aside.

However, before we draw that conclusion, we should recognise that the inevitable tussle between form and substance in Ch III jurisprudence does not deny the value of the principles and prescriptions for governing power that Ch III lays down. Starting points matter. If a Ch III constraint on legislative power is recognised, it means that the validity of a law like s 189 cannot be upheld *simply* because it adopts a criterion that is formally distinct from the objective legal status of the person detained. If the operation of s 189 is upheld, it must be because it is *in substance* compatible with the Ch III scheme (read purposively — to ensure that the state power with potential to determine rights or obligations despite jurisdictional error is, in federal matters, only exercised by courts). Whether any reconsideration would result in any different understanding of the valid reach of s 189 — and whether that different understanding would have a radical impact on mandatory detention regime — does not determine the value of the reconsideration. There is value in recognising that a criterion of substantial compatibility with the Ch III scheme is at stake.

67 *Taylor* and *Thoms* did consider constitutional validity, but only through the lens of a head of power characterisation — is there a sufficient connection to Commonwealth power to legislate with respect to 'aliens' if the person is *not* an alien? The Court was not considering any implications flowing from Ch III's separation of judicial power in federal matters.

68 There would be no effect on the legality of detaining an alien non-citizen whose application for a visa is invalidly refused (because that person's detention is required by s 196 until a visa is granted, and invalidity of the purported refusal does not establish that the person is entitled to a visa). Nor would it affect the legality of detaining an alien non-citizen whose application for *revocation* of a (valid) visa cancellation is invalidly refused (because that person's detention is required by s 196 until the automatic cancellation is revoked, and the invalidity of the purported refusal does not establish that the person is entitled to the revocation).

69 See n 61. Additionally, the constraint in this article may not preclude recognising as 'reasonable' a suspicion based on a misapprehension that a non-citizen is an 'alien' (as in *Thoms*). This may be a separate issue, because the constitutional validity of legislation's application to a non-citizen is *not* something that is purported to be determined by an executive official exercising statutory power to cancel the non-citizen's visa.

Looking ahead?

The orthodox approach to 'second actor' problems proceeds on the basis that ordinary legislation can validly authorise secondary official action on the basis of a purported (but invalid) official decision, provided that the legislation authorising the secondary action clearly operates on the factual existence of the decision. This approach is well-supported by authority. And yet, at the same time, there is something troubling about the orthodox approach in its application to governing power in federal matters. The orthodox approach seems to imply that all purported decisions that exist in fact are interchangeable artefacts for legislation to handle as legislators deem fit. However, this way of thinking sits oddly with the careful, principled and purposive Ch III constitutional scheme that makes judicial power in federal matters exclusive to courts.

In this article I have analysed the possibility that there is a constitutional dimension to the problem in Australia due to Ch III's framework for governing power in federal matters. My aim has been to demonstrate that this is an idea that we might take seriously. At core, my argument entails a reading of Ch III, in which it is understood to provide a distinctive institutional context for the exercise of that form of governing power which has what Forsyth calls an 'authoritarian' aspect — a potential to sustain a unilateral (non-optional) determination of subjects' rights or liabilities that has legal force *despite* jurisdictional error unless or until set aside. By making judicial power in federal matters exclusive to 'courts', Ch III provides significant constitutional safeguards against arbitrary, unfair or unlawful exercise of this, the type of state power over subjects which carries this quality. And the courts will enforce such implied limits on legislative power as are necessary to preserve the integrity of the Ch III scheme. Arguably a necessary step is to ensure that *executive* (non-court) decisions in federal matters are *not* treated as possessing the specific quality of conclusiveness that is exclusive to judicial power. In this space, the orthodox approach to statutory construction of second actor powers will continue to apply, but the ultimate question will not be (simply) whether legislation authorises secondary action on the basis of a purported decision in fact. Rather, the ultimate question will be whether any legislation authorising secondary action on the basis of a purported decision in fact is compatible, in substance, with the constitutional safeguards that Ch III affords for individuals affected by governing power in federal matters.