

UTILISATION OF NATIONAL INTEREST CRITERIA IN THE *MIGRATION ACT 1958 (Cth): A THREAT TO RULE OF LAW VALUES?*

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In Australia, the Commonwealth executive enjoys significant power to make decisions applying a national interest criterion in Commonwealth statutes. Ultimately, this paper argues that the utilisation of such a criterion by the Commonwealth executive in the Migration Act 1958 (Cth) undermines the rule of law doctrine in Australia. A fundamental tenet of the rule of law is the idea that the law is clear, identifiable and consistent in its approach. Given the imprecise and vague nature of a national interest criterion, it is argued that the notion is often far from clear and identifiable. The net result has meant that aggrieved litigants have had significant difficulties in both understanding and enforcing their rights, given the ambiguity associated with a national interest criterion in the Migration Act. Further, an examination of various Australian cases demonstrated a lack of consistency in the interpretation of a national interest criterion in the Migration Act. This lack of consistency led to a deficiency of clarity in the operation of particular Australian laws, especially in the context of the Migration Act.

I INTRODUCTION

One of the most significant threats to the rule of law in Australia in modern times is the utilisation by the Commonwealth executive of a ‘national interest’ criterion in Commonwealth legislation. This paper argues that the invocation of such a criterion by the Commonwealth under the *Migration Act 1958 (Cth)* (‘MA 58’) arguably undermines rule of law values in Australia.

First, this paper provides a broad overview of the operation of a national interest criterion in Commonwealth legislation. As will be demonstrated, a great array of Commonwealth statutes includes a national interest criterion to regulate various subject matters in Australian law. More specifically, this section also carefully examines the utilisation of the national interest criterion in the *MA 58*.

Second, having provided a discussion on the context and operation of national interest criteria in Commonwealth legislation and the *MA 58* specifically, this paper will then consider domestic and international scholarship on the rule of law topic. This section of the paper will examine the seminal work of Albert Venn Dicey and more recent scholarship on the rule of law topic.

Third, the balance of the paper will explore more closely the relationship between how utilisation of a national interest criterion in the *MA 58* (by the Commonwealth executive) has tended to undermine rule of law values in Australia. Evidently, various Australian cases that have engaged with a national interest criterion in the *MA 58* will be considered.

The cases examined collectively demonstrate that where a national interest decision is made under the *MA 58*, Australian courts (in judicial review applications) have adopted a position of *substantial deference* in Ministerial decision-making. In many instances, the judiciary has not actively engaged in applying principles of statutory interpretation to explore the legislative limits of applying a national interest criterion.

The net result has been the advancement of exceptional executive statutory power vested in Commonwealth Ministers and significant abrogation of any meaningful prospect of judicial review for an aggrieved party. It is not only the national interest criterion in the *MA 58* that has eroded the practical application of rule of law values in Australia, but also paradoxically, the judiciary who have contributed to

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that process. This paper argues that Australian courts need to adopt a ‘broader approach’ in the judicial review of decisions that concern the application of a national interest criterion. Courts need to assume a method that does not adopt any level of deference to Ministerial decision-making. Indeed, such an approach is not expressly mandated in the *MA 58*.

Otherwise, to further expand and protect rule of law values, Australian courts need to more closely examine the limits of national interest criteria in the *MA 58* by reference to the relevant statutory context and purpose.

II NATIONAL INTEREST CRITERIA IN COMMONWEALTH LEGISLATION

A survey of Commonwealth statutes and delegated legislation in Australia demonstrates extensive references to the Commonwealth executive being able to invoke a national interest criterion to regulate various subject matters. For example, Commonwealth legislation grants the executive the power to make decisions in accordance with a national interest criterion in the areas of Business,¹ Defence,² the Economy,³ Education, the Arts and Communication,⁴ the Environment,⁵ Health,⁶ International Affairs⁷ and Native Title.⁸

Where a definition of the national interest is provided in Commonwealth legislation, it is clear what matters need to be considered by the executive in applying a national interest criterion. However, only a small number of Commonwealth statutes and delegated legislation either expressly⁹ or implicitly¹⁰ provide a statutory definition of the national interest criterion.

¹ *Autonomous Sanctions Regulations 2011* (Cth) regs 5D, 18(3)(a), 19(3)(a); *Automotive Transformation Scheme Regulations 2010* (Cth) regs 2.8(1), 2.8(2), 2.25(1), 2.25(2); *Banking Act 1959* (Cth) ss 9A(1)(b), 9A(2)(b), 11AB(1), 11AB(2), 63(3A); *Competition and Consumer Act 2010* (Cth) ss 10.45(2)(a), 10.53(2)(a), 10.62(a)(iv), 10.72B(1); *Export Finance and Insurance Corporation Act 1991* (Cth) ss 29(1), 29(4), 27(1), 27(3); *Financial Sector (Shareholdings) Act 1998* (Cth) ss 14(1), 15(4), 17(3), 17(6), 18(1)(a), 23(1)(b), 23(1)(c); *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 18(2), 18(4), 19(2), 19(4), 20(2)-(3), 21(2), 21A(2), s 21A(4); *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) regs 3(e)(ii), 3(h)(i), 3(r)(ii); *Insurance Act 1973* (Cth) ss 15(1)(b), 16(1)(b), 17(4)(c), 21(1)(b), 22(1)(b); *Mutual Assistance in Business Regulation Act 1992* (Cth) s 8(2)(a); *National Measurement Act 1960* (Cth) s (7)(b); *Telecommunications Act 1997* (Cth) ss 367(1)(a), 367(1)(c), 367(2)(e)(v), 577A(6)(aa).

² *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18(1), 18(3)(b); *Customs Act 1901* (Cth) s 112(2AB)(d); *Customs (Prohibited Imports) Regulations 1956* (Cth) sch 13 pt 1 cl 10.2(a), sch 13 pt 2; *Geneva Conventions Act 1957* (Cth) sch 4; *Maritimes Powers Act 2013* (Cth) ss 75F(1), 75F(5), 75D(4), 75H(6); *Radiocommunications Act 1992* (Cth) s 152; *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) ss 13(1)(d), 13(3); *Weapons of Mass Destruction Regulations 1995* (Cth) regs 4(e), 5(1)(b).

³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 40(b), 47(1)(e), 47(3)(b), 48C(1)(b); *Dairy Produce Act 1986* (Cth) s 126A(1)(a)(i); *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) ss 266(1), 438(1); *Seas and Submerged Lands Act 1973* (Cth) sch.

⁴ *Australian Broadcasting Corporation Act 1983* (Cth) ss 78(1), 78(3A); *Broadcasting Services Act 1992* (Cth) sch 2 pt 3 div 1, sch 2 pt 4 cl 8(1)(d), sch 2 pt 5 cl 9(1)(d), s 121F; *Coal Research Assistance Act 1977* (Cth) s 8D(1)(b); *Forestry Marketing and Research and Development Services Act 2007* (Cth) s 13(1)(a)(i); *Horticulture Marketing and Research and Development Services Act 2000* (Cth) s 29(1)(a)(i); *Special Broadcasting Service Act 1991* (Cth) ss 12(1), 12(4A); *Wool Services Privatisation Act 2000* (Cth) s 33A(1)(a)(i).

⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 133(4)(b), 143(6)(b), 146B(6), 158(4); *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.18(2)(b)(iii); *National Environment Protection Measures (Implementation) Act 1998* (Cth) ss 11(1)(b)(i), 13(5), 16(1)(b)(i), 18(5), 32(2), 37(2).

⁶ *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 10(4); *Australian Meat and Livestock Industry Act 1997* (Cth) ss 69(1), 69(4)(a); *Egg Industry Service Provision Act 2002* (Cth) s 9(1)(a)(i); *Pig Industry Act 2001* (Cth) s 12(1)(a); *Sugar Research and Development Services Act 2013* (Cth) s 11(a)(i); *Therapeutic Goods Act 1989* (Cth) ss 18A(2), 32CB(2), 32CB(2)(b), 41GS(2).

⁷ *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) ss 6(3), 7(1), 9(1)(b)(i), 11(1)(d)(i), 13(1), 14(2)-(3); *International Monetary Agreements Act 1947* (Cth) s 8D(1); *International War Crimes Tribunals Act 1995* (Cth) ss 26(3), 33(2)(a), 35(2)(a), 36(1), 36(4)(a), 40(2)(a), 44(3)(a); *Migration Act 1958* (Cth) ss 145(1)(b), 146(2)(b), 176, 198AB(2), 339, 411(3), 473BD(a)-(b), 501(3), 501C(2), 501A(2)-(3), 501B(2)(e), 501BA(2) and 502(1)(b); *Migration Regulations 1994* (Cth) sch 2 regs 785.227, 790.227, 866.226; *Mutual Assistance in Criminal Matters (Sweden) Regulations 2001* (Cth) sch 1 art 4(1)(g).

⁸ *Native Title Act 1993* (Cth) s 36A(2)(c)(i), 42(2)(a), 43(2)(i).

⁹ *Automotive Transformation Scheme Regulations 2010* (Cth) regs 2.8(4)(a)-(h), 2.25(4); *Broadcasting Services Act 1992* (Cth) ss 121FL(8)-(9); *Competition and Consumer Act 2010* (Cth) ss 10.67, 10.72B; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 133(4)(b), 146B(6), 158(5); *Migration Act 1958* (Cth) ss 5(1), 198AB(3); *National Environment Protection Measures (Implementation) Act 1998* (Cth) s 5; *Radiocommunications Act 1992* (Cth) s 152.

¹⁰ *Appropriation Act (No 1) 2012-2013* (Cth) sch 1; *Appropriation Act (No 3) 2012-2013* (Cth); *Appropriation Act (No 1) 2013-2014* (Cth) sch 1; *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) sch 1AA pt 3 cl 412.001; *Insurance Acquisitions and Takeovers Act 1991* (Cth) s 5(1)(d); *International Monetary Agreements Act 1947* (Cth) s 8E; *International War Crimes Tribunals Act 1995* (Cth) s 26(3); *Mutual Assistance in Criminal Matters (Sweden) Regulations 2001* (Cth) sch 1 art 4(1)(g).

On the other hand, where the national interest criterion has not been defined in legislation, Australian courts have generally ruled that the meaning of the criterion is a matter of ‘political opinion’ in the application of government policy.¹¹ Evidently, this has limited the scope for judicial review of Commonwealth executive decisions that apply such a legislative criterion.¹²

For example, in *Hot Holdings Pty Ltd*,¹³ Gaudron, Gummow and Hayne JJ noted that ‘the whole object’ of a statutory provision placing a power into the hands of the Minister is that he may exercise it according to government policy.¹⁴

Accordingly, where a national interest criterion appears in Commonwealth legislation, Australian courts have not generally treated this concept as a jurisdictional fact open to review.¹⁵ The present position is very much *one of deference* to the executive, with the judiciary adopting significant ‘self-imposed limits’ on the judicial review of national interest decisions.¹⁶

An alternative view is that the judiciary do not adopt a position of ‘deference’ when judicially reviewing a national interest criterion in Commonwealth legislation. On this view, the court engages more closely with the national interest criterion in legislation by actively employing principles of statutory interpretation.

This alternative judicial method is not impermissible ‘merits review’ (that is, substituting the court’s opinion for that of the Minister). Instead, it is about ensuring that Ministerial discretion is exercised within the limits of the empowering statute. Thus, the limitations of statutory executive power reflect the court’s interpretation of the scope of the power that the statute confers.¹⁷ They are not derived from free-standing principles such as the rule of law, though they may serve them.¹⁸

Under various provisions in the *MA 58*, the Minister is vested with a specific statutory power to make decisions in relation to non-citizens applying a national interest criterion.¹⁹ Let us consider an example here. Notably, other examples will be outlined later in this paper.

Under s 198AB(1) of the *MA 58*, the Minister may, by legislative instrument, designate that a country is a regional processing country.²⁰ Notably, under s 198AB(2), the only condition for the exercise of this power is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.

When considering the national interest concept under s 198AB(1), the Minister must have regard to whether or not the country has given Australia any ‘assurances’ to the effect that the country will not expel or return a person taken to the country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.²¹

¹¹ *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 (Gaudron, Gummow and Hayne JJ); *Plaintiff S297-2013 v Minister for Immigration and Border Protection* (2015) 89 ALJR 292, 296 (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

¹² *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

¹³ *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.

¹⁴ *Ibid* 455 [50]. Similarly, in *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 [89], French, O’Loughlin and Whitlam JJ outlined that the question of what is or is not in the national interest is an evaluative one and is entrusted by the legislature to the Minister to determine according to his satisfaction, which must nevertheless be obtained reasonably.

¹⁵ *Wight v Pearce* [2007] FCA 26 (29 January 2007); *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

¹⁶ *Leisure Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 220 (Spender J); *Conwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 525; *Habib v Commonwealth of Australia [No 2]* [2009] FCA 228 (13 March 2009) [56], [58] (Perram J); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 75 (Mason J); *A v Hayden* (1984) 156 CLR 532, 543 (Gibbs CJ); *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146, 157-9 (Ipp J, Malcolm CJ and Wallwork J agreeing); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (27 May 2005) [19], [28], [38] (Allsop J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 367-73.

¹⁷ Lisa Burton Crawford, ‘Who Decides the Validity of Executive Action?: No-Invalidity Clauses and the Separation of Powers’ (2017) 24 *Australian Journal of Administrative Law* 81, 85.

¹⁸ *Ibid*.

¹⁹ *Migration Act 1958* (Cth) ss 4(1), 145(1)(b), 146(2)(b), 198AB(2), 198AC(2)(b), 339, 411(3), 473BD(a)-(b), 501A(2)-(3), 501B(2)(e), 501BA(2), 502(1)(b).

²⁰ A regional processing country is a country that ‘will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol’: *Migration Act 1958* (Cth) s 198AB(3)(a)(ii).

²¹ *Migration Act 1958* (Cth) s 198AB(3)(a)(i).

Somewhat extraordinarily, the assurances given by the proposed regional processing country to the Minister ‘need not be legally binding’.²² Accordingly, such assurances may very well be no more than hollow promises by the proposed regional processing countries.

Further, in a likely effort to reduce the scope of judicial review, an exercise of power under s 198AB(1) is not subject to the rules of natural justice.²³ It follows that procedural fairness and bias applications to quash a decision made by the Minister under s 198AB(1) would fail at the outset.

III THE RULE OF LAW DOCTRINE

The rule of law occupies a central place in Australian political and legal rhetoric.²⁴ Writing in 1885, Albert Venn Dicey identified three essential principles in the rule of law.²⁵

First, the absolute supremacy of regular law as opposed to the influence of arbitrary power.²⁶ Punishment can be justly administered only for breach of the law.²⁷

Second, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts;²⁸ the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.²⁹

Third, the law of the constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the judiciary.³⁰ Consequently, the constitution is the result of the ordinary law of the land.³¹ This latter point is not squarely applicable in Australia, where, unlike in England, Australia has a codified written constitution.

Since Dicey, much has been written on the rule of law topic in Australia and internationally.³² Kirby has pointed out that it has been the very vagueness of what is involved in the ‘rule of law’ that has probably made the concept popular, particularly with lawyers.³³

In the international context, a modern description of the rule of law doctrine was conveniently outlined by Kofi Annan (the Secretary-General of the United Nations in 2004), who emphasised that the rule of law reflected principles of governance in which the State itself is accountable to laws that are publicly promulgated, legal certainty, avoidance of arbitrariness and procedural and legal transparency.³⁴

Lord Bingham, who wrote a great deal on the rule of law subject, was somewhat dissatisfied with what he feared might lead lawyers to dismiss the central ideas of the rule of law as ‘meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie’.³⁵

Lord Bingham identified what he declared to be eight sub-rules, which together amounted to a unified notion of the ‘rule of law’ that every modern civilised country is bound to uphold.³⁶ For example, Lord Bingham saw the rule of law as meaning that the law is accessible, intelligible, clear, predictable and

²² Ibid s 198AB(4).

²³ Ibid s 198AB(7).

²⁴ Recent invocations include the work of Murray Gleeson, *Boyer Lectures 2000: The Rule of Law and the Constitution* (ABC Books, 2000) and Murray Gleeson, ‘Courts and the Rule of Law’, (Speech delivered at the Rule of Law Lecture Series, Melbourne, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm>.

²⁵ A V Dicey, *Introduction to the Study of the Law of the Constitution* (McMillan, 10th ed, 1960).

²⁶ Ibid 202. This excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.

²⁷ Ibid.

²⁸ Ibid 202–3.

²⁹ Ibid. This principle was referred to in *Leath v Commonwealth* (1992) 174 CLR 455, 485, 486 (Deane and Toohey JJ).

³⁰ Dicey, above n 25, 203.

³¹ Ibid.

³² See, eg, Robert Summers, ‘A Federal Theory of Rule of Law’ (1993) 6(2) *Ratio Juris* 127; Helen Pringle and Elaine Thompson, ‘Tampa as Metaphor: Majoritarianism and the Separation of Powers’ (2003) 10 *Australian Journal of Administrative Law* 107; Andrew Greenwood, ‘ADR Processes and their Role in Consensus Building’ (2010) 21 *Australasian Dispute Resolution Journal* 11, 15; Giridhar Kowtal, ‘Jurisdictional Error and No-Invalidity Clauses at State Level: Does the High Court Still Hold all the Cards?’ (2015) 22 *Australian Journal of Administrative Law* 253; Peter Billings, ‘Operation Sovereign Borders and interdiction at Sea: *CPCF v Minister for Immigration and Border Protection*’ (2016) 23 *Australian Journal of Administrative Law* 76.

³³ Michael Kirby, ‘The Rule of Law Beyond the Law of Rules’ (2010) 33 *Australian Bar Review* 195, 198.

³⁴ Kofi Annan, cited in Nicholas Cowdery, ‘Magna Carta: 800 Years Young’ (2015) 40 *Australian Bar Review* 101.

³⁵ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 81.

³⁶ Ibid 69–84.

questions of legal rights and liability should ordinarily be resolved by application of the law and not by the exercise of discretion.³⁷

This detailed sub-set of rules has been described by respected international commentators as a ‘powerful and persuasive’ description of the ‘rule of law’ in contemporary circumstances.³⁸

In a resolution of the International Bar Association (‘IBA’) in 2009, the sub-rules said to be implicit in the concept of the ‘rule of law’ were reduced to 12 essential ideas³⁹ (several of which are closely aligned to those sub-rules identified earlier by Lord Bingham).

Fuller concluded that although judges may play an essential role in preserving rule-of-law values, any significant achievement is primarily a matter of legislative craft.⁴⁰

Raz contended a critical rule of law principle is that the ‘law must be capable of guiding the behaviour of its subjects’.⁴¹ This principle identifies predictability and continuity in law as two fundamental values that any constitutional system giving effect to the rule of law should manifest.⁴²

Krygier argued that:

... any achievement (by either courts or legislatures) of the legal conditions which are thought necessary for the rule of law ‘themselves depend on conditions that are not legal’, namely, social conditions which relate to the extent to which law counts ‘as a source of restraint and a normative resource, usable and with some routine confidence used in social life’.⁴³

In Australian scholarship, the rule of law doctrine has also been the subject of much consideration.

Writing very recently, Carney argued that the denial of procedural fairness and the lack of any judicial review create a situation which is repugnant to the rule of law.⁴⁴ Kirby has contended that concepts of independence and impartiality are essential characteristics of the decision-maker established by law to resolve conflicts (courts, tribunals and like decision-makers) in a ‘rule of law’ society.⁴⁵

Cowdery has outlined that the rule of law doctrine means that justice will be done according to laws that are *certain* and *knowable* in advance.⁴⁶ Rares has reasoned that the availability of judicial power to quell disputes independently and authoritatively is a hallmark of a democratic society governed by the rule of law.⁴⁷

Hume outlined that rule of law values can play a role in the statutory construction process⁴⁸ – both in general and particularly in the context of reading statutes in conformity with the *Constitution*.⁴⁹ For Hume, there is a role for the courts to consider rule of law values of *predictability* and *continuity* when applying the presumption of valid meaning.⁵⁰

Kirk has offered a sophisticated discussion of the role the rule of law may play in defining the boundaries of the entrenched minimum provision of judicial review. Although Kirk argues that the rule of law is the best foundation for determining which grounds of review (or categories of jurisdictional error) are constitutionally

³⁷ For other taxonomies, see F A Hayek, *The Road to Serfdom* (University of Chicago Press, 1984); A Clarke and J Sorabji, ‘The Rule of Law and our Changing Constitution’ in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amoricum* (Oxford University Press, 2009) 41.

³⁸ R McCorquodale, ‘The Rule of Law Internationally: Lord Bingham and the British Institute of International and Comparative Law in Andenas and Fairgrieve, above n 37, 137, 140.

³⁹ International Bar Association, *Rule of Law: A Commentary on the IBA Council’s Resolution of September 2005* (2009) 6, cited in Kirby, above n 33, 199).

⁴⁰ See Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 33–94. See further J Goldsworthy, ‘Legislative Sovereignty and the Rule of Law’ in T Campbell, E D Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 61.

⁴¹ Joseph Raz, ‘The Rule of Law and its Virtue’ in Keith Culver (ed), *Readings in the Philosophy of Law* (Broadview Press, 1999) 13, 16.

⁴² David Hume, ‘The Rule of Law in Reading Down: Good Law for the “Bad Man”’ (2014) 37 *Melbourne University Law Review* 620, 621.

⁴³ Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14, 26 citing M Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’ in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart Publishing, 2008) 60–1.

⁴⁴ Gerard Carney, ‘The Exercise of Judicial Power by State Parliaments’ (2017) 44 *Australian Bar Review* 204, 214.

⁴⁵ Michael Kirby, ‘Grounds for Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence’ (2015) 40 *Australian Bar Review* 195, 211.

⁴⁶ Cowdery, above n 34, 104.

⁴⁷ Steven Rares, ‘Competition, Fairness and the Courts’ (2014) 39 *Australian Bar Review* 79, 97.

⁴⁸ Hume, above n 42, 624, 629, 637.

⁴⁹ *Ibid* 620.

⁵⁰ *Ibid* 622.

entrenched, he is quick to acknowledge a serious objection to the court specifying its preferred conception of the ideal and then attempting to work out what principles flow from it.⁵¹

McDonald has pointed out that given ongoing disagreements about the content of the rule of law, judicial stipulations that aspects of the ideal are constitutional requirements would be likely to lead to accusations of rule by the judges, as opposed to the rule of law.⁵² It is accepted that many aspects of the rule of law – even on relatively ‘thin’ or ‘formal’ accounts – raise difficult questions of degree and judgement.⁵³

Shklar has observed that it would not be difficult to show that the phrase ‘the rule of law’ has become meaningless thanks to ideological abuse and general over-use.⁵⁴ In a similar light, Evans has noted that it is possible to argue that the rule of law is an empty slogan.⁵⁵ There are two responses to these points.

First, ideological abuse and general over-use of the rule of law doctrine does not make the doctrine meaningless. Instead, the sustained engagement with the rule of law doctrine since Dicey demonstrates the continued importance and relevance of the doctrine in modern day Australia.

Second, contrary to the position argued by Evans, the rule of law doctrine in Australia is not an ‘empty slogan’. One only need examine a litany of cases⁵⁶ and modern literature⁵⁷ in Australia where the doctrine has been clearly unpacked and actively applied and considered in various contexts. As demonstrated earlier, both Lord Bingham and the IBA have provided cogent ‘sub-set rules’ for giving practical substance to the rule of law doctrine – so that it is more than merely an ‘empty slogan’.

Citing the High Court of Australia (‘HCA’) decision in *Plaintiff S157/2002*,⁵⁸ Muir pointed out that constitutional considerations,⁵⁹ including the rule of law, may inform the process of statutory construction.⁶⁰ Muir contended that ‘uncodified constitutional values’ (like the rule of law) may influence the choice whether or not to interfere with a decision by characterising the error invoked by the applicant seeking relief as jurisdictional.⁶¹ In that context, the rule of law doctrine is not an ‘empty slogan’.

⁵¹ Jeremy Kirk, ‘The Entrenched Minimum Provision of Judicial Review’ (2004) 12 *Australian Journal of Administrative Law* 64.

⁵² McDonald, above n 43, 25.

⁵³ McDonald argues for potential adoption of what is titled the ‘institutional approach’, where the rule of law is not looked to as a source of putting doctrinal flesh on the bones of the minimal provision of judicial review. Instead, s 75(v)’s role in the preservation of the rule of law is considered in the broader institutional context of legal accountability: McDonald, above n 52, 29.

⁵⁴ Judith Shklar, ‘Political Theory and the Rule of Law’ in Stanley Hoffman (ed), *Political Thought and Political Thinkers* (University of Chicago Press, 1998) 21.

⁵⁵ Simon Evans, ‘The Rule of Law, Constitutionalism and the MV Tampa’ (2002) 13 *Public Law Review* 94.

⁵⁶ *Palmer v Ayres* [2017] HCA 5 (8 February 2017) [42] (Gageler J); *Miller v The Queen* [2016] HCA 30 (24 August 2016) [12] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Alqudsi v The Queen* [2016] HCA 24 (10 February 2016) [58] (French CJ); *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16 (4 May 2016) [52] (French CJ, Kiefel, Bell, Gageler and Keane JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41 (11 November 2015) [81] (Gageler J); *Police v Dunstall* [2015] HCA 26 (5 August 2015) [57], [66] (Nettle J); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 (4 March 2015) [67] (Gageler J); *Argos Pty Ltd v Minister for the Environment and Sustainable Development* [2014] HCA 50 (10 December 2014) [48] (French CJ and Keane J).

⁵⁷ Angeline Lewis, ‘Defining the Rule of Law for Military Operations’ (2010) 29 *Australian Year Book of International Law* 155; Martin Krygier, ‘The Rule of Law: An Abuser’s Guide’ (University of New South Wales Faculty of Law Research Paper No 2007–4, 2007); Martin Krygier, ‘The Rule of Law: Past, Present, and Two Possible Futures’ (2016) 12(1) *Annual Review of Law and Social Science* 1999.; Leighton McDonald, ‘Positivism and the Formal Rule of Law: Questioning the Connection’ (2001) 26 *Australian Journal of Legal Philosophy* 93; Cameron Stewart, ‘The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law’ (2004) 4 *Macquarie Law Journal* 135; Clarence Ling, ‘Martin Krygier’s Contribution to the Rule of Law’ (2013) 4 *Western Australian Jurist* 211; Andrew Sykes, ‘The “Rule of Law” as an Australian Constitutionalist Promise’ [2002] *Murdoch University Electronic Journal of Law* 2; Denise Meyerson, ‘The Rule of Law and the Separation of Powers’ (2004) 4 *Macquarie Law Journal* 1.

⁵⁸ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30]-[31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁵⁹ The HCA has endorsed the rule of law and non-arbitrary government as sub-constitutional values: Rosalind Dixon, ‘The Functional Constitution: Re-reading the 2014 High Court Constitutional Term’ (2015) 43 *Federal Law Review* 455, 462–3; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 196 (McHugh J); *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145, 147 [3] (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁶⁰ Lindsay Muir, ‘The Function of s 75(v) of the Constitution’ (2017) 24 *Australian Journal of Administrative Law* 21, 25.

⁶¹ *Ibid* 26. See the invocation of the rule of law in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); see James Spigelman, ‘The Common Law Bill of Rights’ (Speech delivered at the McPherson Lecture Series, University of Queensland, 10 March 2008) for a list of the common law rights and freedoms that invoke the principle of legality.

There have also been at least three HCA decisions that have stated s 75(v) of the *Commonwealth Constitution* is the textual foundation for the rule of law.⁶² Whilst it is true that this case law does not specify which exact conception of the rule of law finds its footing in s 75(v),⁶³ even the ‘core’ and thinnest version of the rule of law embodies the value of non-arbitrary government.⁶⁴

As Gilmour has contended, s 75(v) serves a primary element of the rule of law.⁶⁵ While it is accepted that the rule of law is an assumption on which the *Constitution* is based,⁶⁶ the HCA has yet to determine ‘all that may follow’ from that observation.⁶⁷

Given that the HCA has the ultimate say on whether jurisdictional error has been demonstrated, a potential limit to the preceding argument of Gilmour is that the exercise of judicial power may itself be viewed as ‘arbitrary’ (in the sense that the HCA is the ‘arbitrary arbitrator’ of what is law and what is not).

However, beyond constitutional cases, there is nothing stopping the Commonwealth Government from introducing law to overcome a perceived incorrect decision of the HCA. As McDonald has observed, Parliament might attempt to evade any meaningful review by merely expanding the powers (that is, widening the jurisdiction) given to administrators such that there are no significant statutory limits on power.⁶⁸

IV CONSIDERATION 1 – EQUALITY BEFORE THE LAW

A fundamental aspect of the rule of law is the idea that no particular body of administrative law exists that has the effect of separating the Crown and its representatives from the ordinary law and its administration by the ordinary courts.⁶⁹ Deane J has suggested the prima facie right to insist upon the exercise of jurisdiction is a concomitant of a fundamental element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is ‘amenable to the jurisdiction’ of the courts and other public tribunals.⁷⁰

In recent years, the HCA has recognised the existence of a constitutional right to the judicial review of decisions by Commonwealth officers,⁷¹ which cannot be significantly limited by the operation of privative (or ouster) clauses.⁷²

However, the nature of that constitutional right is somewhat limited, in that the aggrieved party must demonstrate that the decision of the Commonwealth was infected by jurisdictional error. It is said that this ‘secures a basic element of the rule of law’.⁷³ In other words, jurisdictional error embodies the rule of law.⁷⁴ That said, McDonald has rightly observed the concept of jurisdictional error is notoriously slippery.⁷⁵

⁶² *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145, 147 [3] (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482–3 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham v Minister for Immigration and Border Protection* [2017] HCA 33 (6 September 2017) [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

⁶³ McDonald, above n 52, 17.

⁶⁴ James Crawford, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3, 4; Muir, above n 60, 34.

⁶⁵ J Gilmour, ‘Kirk: Newton’s Apple Fell’ (2011) 34 *Australian Bar Review* 155, 160; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482–3 [5] (Gleeson CJ).

⁶⁶ The classic statement for this proposition is found in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

⁶⁷ Hume, above n 42, 629; Kirk, above n 51, 64.

⁶⁸ McDonald, above n 52, 18.

⁶⁹ Dicey, above n 25, 202–3.

⁷⁰ *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1, 12 (Deane J).

⁷¹ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

⁷² *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651. Privative clauses are statutory provisions which attempt to deprive the courts of their judicial review jurisdiction and/or the power to issue remedies which would otherwise be available in a judicial review application: McDonald, above n 52, 15.

⁷³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482–3 [5] (in reference to *Constitution* s 75(v)).

⁷⁴ Muir, above n 60, 24; Mark Aronson, ‘Jurisdictional Error and Beyond’ in Matthew Groves, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 249, 253; Will Bateman, ‘The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review’ (2011) 39 *Federal Law Review* 463, 469.

⁷⁵ McDonald, n 52, 18.

Despite the preceding, a fair number of Australian courts have effectively refused to adequately review the exercise of a national interest legislative criterion by members of the Commonwealth executive.⁷⁶ A good illustration of this is reflected in a series of cases in Australia known as the *Jia* litigation.

The *Jia* litigation⁷⁷ involved a series of cases in both the Federal Court of Australia ('FCA') and HCA between a non-citizen and the Minister for Immigration. There, a non-citizen had his Australian visa cancelled on character grounds as a result of being convicted of sexual related crimes.⁷⁸

Subsequently, the Minister excluded the non-citizen from Australia by applying a national interest criterion under s 502 of the *MA 58*.⁷⁹ The non-citizen appealed the Minister's decision to the FCA. At first instance the appeal was dismissed by French J.⁸⁰

The non-citizen argued that s 502 of the *MA 58* could not be used in a situation where there is merely a dispute between the Minister and the Administrative Appeals Tribunal ('AAT') as to whether a particular non-citizen meets the character test.⁸¹ The non-citizen made that argument because previous to the Minister personally cancelling the non-citizen's visa, the AAT found that he was of 'good character'.⁸²

Justice French rejected the non-citizen's appeal, finding that the seriousness of circumstances giving rise to the making of a decision in applying the national interest power under s 502 of the *MA 58* is a matter peculiarly for assessment by the Minister.⁸³ As a result, his Honour found that there was nothing on the materials to indicate that the Minister strayed beyond the proper limits of an assessment under s 502.⁸⁴

The decision of French J reads almost as an argument that something is in the national interest because the Minister says it is, or that the Minister's interpretation of the national interest is non-justiciable.⁸⁵ Justice French also noted later in the judgment that '[t]he consideration of the national interest is a matter peculiarly within the province of a Minister of the Crown responsible to the Parliament',⁸⁶ which again reads like a non-justiciability argument.⁸⁷

Freckelton has asserted that the decision-making power of the Minister (i.e. application of the national interest legislative criterion) in *Jia* was an affront to the rule of law doctrine in Australia, because the Minister's word 'being law' (as an elected official) neglects careful consideration of individual cases.⁸⁸

First, it is arguable that the *Jia* decision may undermine the rule of law doctrine in Australia. Certainly, in *Fraser*,⁸⁹ Perram J doubted the correctness of *Jia* by outlining in *obiter* that s 501 of the *MA 58* did not abrogate the bias rule (applying the principle of legality).⁹⁰ The principle of legality was not really considered in *Jia*.

Second, drawing upon the rule of law principles outlined earlier, the effect of the *Jia* decision plainly demonstrates that Commonwealth Ministers do not necessarily need to adopt a 'fair and independent' process in the making of broad discretionary decisions. Far from the application of 'equality of all before the law',

⁷⁶ *Chapman v Luminis Pty Ltd [No 5]* (2001) 123 FCR 62 124-34 [233]-[263] (Von Doussa J); *Anderson v Minister for the Environment, Heritage and the Arts* [2010] FCA 57 (10 February 2010) [46]; *Habib v Commonwealth of Australia [No 2]* [2009] FCA 228 (13 March 2009) [51]-[52], [55], [58], [62] (Perram J); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (27 May 2005) [19] (Allsop J); *Leisure Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 220 (Spender J); *Conwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 525; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 75 (Mason J); *A v Hayden* (1984) 156 CLR 532, 543 (Gibbs CJ); *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146, 157-9 (Ipp J, Malcolm CJ and Wallwork J agreeing).

⁷⁷ *Jia v Minister for Immigration and Multicultural Affairs* (1998) 52 ALD 20; *Jia v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 45; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

⁷⁸ *Jia v Minister for Immigration and Multicultural Affairs* (1998) 52 ALD 20, 23, 33.

⁷⁹ *Ibid* 33.

⁸⁰ *Ibid* 43.

⁸¹ *Ibid* 40.

⁸² *Ibid* 24.

⁸³ *Ibid* 40.

⁸⁴ *Ibid*.

⁸⁵ Alan Freckelton, 'The Benefit of Law, the Devil and the *Jia* Litigation' (2015) 23 *Australian Journal of Administrative Law* 37, 43.

⁸⁶ *Jia v Minister for Immigration and Multicultural Affairs* (1998) 52 ALD 20, 43.

⁸⁷ Freckelton, above n 85, 43.

⁸⁸ *Ibid* 54.

⁸⁹ *Fraser v Minister for Immigration and Border Protection* [2014] FCA 1333 (9 December 2014).

⁹⁰ *Ibid* [35].

Jia sanctioned the *relaxation* of the apprehended bias rule as it applies to Ministerial decision-making compared to other statutory decision-makers in Australia (i.e. delegates, etc).

Although the effect of the *Jia* decision did not expressly abrogate the rules of procedural fairness, the indulgence given to Commonwealth Ministers in relation to the bias rule does demonstrate a substantial reduction in the protections inherent within *procedural fairness* principles. In that manner, on one view, the *Jia* decision does show a level of repugnancy to the rule of law doctrine in Australia.

On appeal to the Full Court of the FCA, the non-citizen argued that French J erred in law in finding that the question of the national interest was a matter ‘peculiarly for assessment’ by the Minister.⁹¹ For various reasons, the Full Court rejected the non-citizen’s argument in relation to French J’s approach to the national interest criterion in s 502 of the *MA 58*.⁹²

Justice Cooper adopted an analogous approach to French J at first instance, refusing to explore the applicable limits of the national interest legislative power in s 502.⁹³ Justice Cooper held it was not possible to lay down with any degree of precision where the boundaries of the national interest power will fall in any particular case.⁹⁴

Justice RD Nicholson agreed with the argument of the Minister, who contended that where he or she makes an assessment as to the ‘public’ or ‘national interest’ the court should be slow to find a reviewable error in that decision.⁹⁵ Justice Spender agreed with the judgment of RD Nicholson J.⁹⁶

Consistent with the approach in the FCA at first instance and before the Full Court, the HCA rejected the non-citizen’s argument regarding the ‘national interest’ criterion in s 502 of the *MA 58*. Chief Justice Gleeson and Gummow J held that the national interest legislative criterion in s 502 of the *MA 58* was for the Minister to give effect to ‘his own opinions and judgment’.⁹⁷

As the *Commonwealth Constitution* entrenches rule of law values, they are found in ch 3 and the implications drawn from it.⁹⁸ Given that the Australian courts have taken a minimalist approach to the judicial review of decisions that concern the application of a national interest criterion by the Commonwealth,⁹⁹ it follows that the judiciary are potentially challenging rule of law values in Australia.

In other words, if ch 3 courts are not actively exercising judicial power involving the judicial review of national interest decisions, it could hardly be said that the Courts are giving effect to rule of law values in Australia. The rule of law depends on access to the courts – never more so than when the rights of an unpopular and powerless minority are at stake.¹⁰⁰

Although Australian courts are scrutinising decisions that concern the application of a national interest legislative criterion, the level of *legal indulgence* given to Ministerial decision-making is significant. Although an individual has access to the courts, the real extent of that access from a legal perspective is relatively hollow.

Dicey explained the potential inconsistency between unfettered parliamentary power and the rule of law as follows.¹⁰¹ Only Parliament could make law.¹⁰² It must do so through a statute, and statutes would have general application.¹⁰³ Laws, in turn, could be interpreted and applied by Courts.¹⁰⁴ Power is exercised by government in accordance with a law that is subject to judicial review.¹⁰⁵

⁹¹ *Jia v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 45, 60.

⁹² *Ibid* 74 (Cooper J), 90 (R D Nicholson J).

⁹³ *Ibid* 74.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* 90.

⁹⁶ *Ibid* 46.

⁹⁷ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 536.

⁹⁸ Evans, above n 55, 100.

⁹⁹ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

¹⁰⁰ Commonwealth, *Parliamentary Debates*, Senate, 29 August 2001, 27827 (Andrew Bartlett).

¹⁰¹ Cheryl Saunders and Kevin K F Yam, ‘Government Regulation by Contract: Implications for the Rule of Law’ (2004) 15 *Public Law Review* 51, 57.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

In other words, it is the role of the judiciary ‘to make a binding and authoritative declaration of the legal consequences of an action, including whether or not legal effect is given to that action by statute’.¹⁰⁶ This is an extension of the ‘stream/source’ doctrine, from the constitutional to the administrative context.¹⁰⁷ It is a well-known maxim of Australian constitutional law, that the ‘stream cannot rise higher than its source’.¹⁰⁸ Without risk of overstatement, this captures the fundamental nature of the Australian legal order.¹⁰⁹

The difficulty here is that the Courts have failed to adequately ‘interpret’ what is meant by the national interest criteria in Commonwealth legislation, merely indicating such a criterion is a ‘political’ notion to be made by the legislative and executive arms of government.¹¹⁰

To consider a contrary position, it might be argued that a finding by the Courts that the national interest criterion is ‘political’ is itself a legitimate interpretation. On this view, national interest decisions made by Commonwealth Ministers are legitimate in accordance with the notion of responsible government.¹¹¹ Although there is some attractiveness to this view, two points can be made.

First, in circumstances where a delegate of a Minister exercises a national interest legislative criterion, there is less legitimacy in reliance upon the responsible government ideology. Ministerial delegates are not ‘politically accountable’ in the same way as Commonwealth Ministers.

Second, reliance upon principles of responsible government can detract from the judiciary closely applying established principles of statutory interpretation. In other words, notions of responsible government serve as an *external consideration* to trump closely having regard to the statutory context and purpose of a national interest legislative criterion.¹¹² A good example of this point is fairly reflected in the minority judgment of Kirby J in *Re Patterson; Ex parte Taylor*.¹¹³

Re Patterson was another case involving the *MA 58*. There, the non-citizen had his Australian visa cancelled by the Parliamentary Secretary for sexual related offences.¹¹⁴ The Parliamentary Secretary decided to cancel the non-citizen’s visa under s 501(3) of the *MA 58*, which included a national interest test.¹¹⁵

In seeking to impugn the decision in the HCA, the non-citizen argued, in part, that the Parliamentary Secretary erred in satisfying herself as to the existence of the jurisdictional fact that it was ‘in the national interest’ that his visa be cancelled.¹¹⁶ The non-citizen argued that the Parliamentary Secretary’s decision was infected by jurisdictional error.

Although the appeal was heard before a Full Bench of the High Court, only Gaudron and Kirby JJ adequately addressed the argument regarding the question of treating the national interest criteria in s 501(3) of the *MA 58* as a ‘jurisdictional fact’ open to review.

For Gaudron J, the exercise of the legislative national interest criterion in s 501(3) cannot occur for any reason the decision-maker thinks fit.¹¹⁷ For Gaudron J, there must be something in either the nature or seriousness of the non-citizen’s criminality which justifies the invocation of this limb of the national interest power in s 501(3).¹¹⁸ Because the Parliamentary Secretary’s decision did not demonstrate this, Gaudron J found the decision was infected by jurisdictional error.¹¹⁹

¹⁰⁶ Stephen Gageler, ‘The Legitimate Scope of Judicial Review: The Prequel’ (2005) 26 *Australian Bar Review* 303, 304 citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 375–6.

¹⁰⁷ Crawford, above n 17, 93.

¹⁰⁸ *Ibid.*

¹⁰⁹ See further Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) ch 11.

¹¹⁰ *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 (Gaudron, Gummow and Hayne JJ); *Plaintiff S297-2013 v Minister for Immigration and Border Protection* (2015) 89 ALJR 292, 296 (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ); *Miller v Minister for Immigration and Citizenship* [2013] FCA 590 (7 June 2013) [9] (Logan J).

¹¹¹ A system of responsible government traditionally has been considered to encompass ‘the means by which Parliament brings the Executive to account’ so that ‘the Executive’s primary responsibility in its prosecution of government is owed to Parliament: David Kinley, ‘Government Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices’ (1995) 18 *University of New South Wales Law Journal* 409, 411.

¹¹² Joanne Kinslor and James English, ‘Decision-Making in the National Interest?’ (2015) 79 *Australian Institute of Administrative Law Forum* 35, 35, 46.

¹¹³ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

¹¹⁴ *Ibid* 404.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* 476.

¹¹⁷ *Ibid* 419.

¹¹⁸ *Ibid* 419–20.

¹¹⁹ *Ibid* 419.

Justice Kirby turned to the parliamentary debates that introduced the s 501(3) statutory power in the *MA 58* in 1998.¹²⁰ Justice Kirby recalled that the relevant Minister who discussed the legislative ambit of s 501(3) told parliament that ‘...in exceptional or emergency circumstances, the minister, acting personally, will be given powers to act decisively on matters of visa refusal, cancellation and the removal of non-citizens’.¹²¹

Accordingly, Kirby J reasoned that given the statutory purpose of s 501(3), the national interest limb could only be exercised in ‘exceptional’ or ‘emergency’ circumstances.¹²² Justice Kirby observed that the reasons of the impugned decision failed to indicate any features that elevated the circumstances of the non-citizen’s case to the ‘emergency category’.¹²³

For Kirby J, the ‘absence of emergency for the nation was shown by the very history of the case’.¹²⁴ The learned judge recalled that the original decision to cancel the visa of the non-citizen was made under s 501(2) of the *MA 58*, which is not considered an ‘emergency power’.¹²⁵ Further, after being released into the Australian community, the non-citizen complied with his parole conditions and made efforts at rehabilitation.¹²⁶

Unfortunately, the approach adopted by Kirby J in *Re Patterson* to construing national interest criteria in Commonwealth legislation is rare. The great deal of judicial authority on this topic has not engaged in the statutory interpretation process undertaken by Kirby J, merely finding that the application of such a criterion is for the relevant Commonwealth Minister to decide.¹²⁷

The Australian concept of government has embedded in it the separation of powers doctrine.¹²⁸ The separation of powers, by dividing powers, provides a system with checks and balances, the aim of which is to ensure individual liberty under and by virtue of the rule of law.¹²⁹

Although, strictly speaking, decisions made by reference to a national interest criterion in legislation can be the subject of judicial review, the stark reality is that the nature of such review is exceptionally limited. The judiciary play little role in undertaking relevant ‘checks and balances’ on the arbitrary exercise of national interest legislative criteria by the executive arm of government. However, it must be acknowledged that this approach has been the free decision of a notable number of judges in Australia.

V CONSIDERATION 2 – UNDERSTANDING THE LAW

The rule of law assumes that the law is known or at least knowable.¹³⁰ Thus legislation is debated and approved in public and published in forms that are accessible and relatively easy to find.¹³¹ Therefore, the rule of law requires that Australian laws be prospective, open and clear.¹³²

One of the most significant difficulties of inserting a national interest criterion in Commonwealth legislation is the ambiguous and vague nature of the concept.¹³³ As previously outlined, the legislature has often failed to provide a statutory definition of the concept when it is reflected in Commonwealth legislation.¹³⁴ Consequently, it becomes apparent that members of the Australian community will find it difficult to understand what is meant by the national interest concept when it is not defined in Commonwealth

¹²⁰ Ibid 500.

¹²¹ Commonwealth, *Parliamentary Debates*, House of Representatives., 2 December 1998, 1230.

¹²² *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 504.

¹²³ Ibid 504.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ *Jia v Minister for Immigration & Multicultural Affairs* (1998) 52 ALD 20; *Jia v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 45; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; *Wight v Pearce* [2007] FCA 26 (29 January 2007); *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205.

¹²⁸ John Doyle, ‘Investing in the Judiciary’ (2004) 14 *Journal of Judicial Administration* 5, 6.

¹²⁹ Ibid.

¹³⁰ Saunders and Yam, above n 101, 59.

¹³¹ Ibid.

¹³² Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 214–19.

¹³³ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 176 (Heydon J).

¹³⁴ See, eg, s 501(3) of the *Migration Act 1958* (Cth) (where no statutory definition of the ‘national interest’ concept is offered).

legislation. Although the national interest may very well be an inherently political notion,¹³⁵ the concept takes on a legal meaning when a decision-maker becomes the repository of such a statutory power. The concept must be read in light of the statutory context and purpose of the empowering statute.¹³⁶

The previous problem was evidently borne out in the FCA decision of *Durani*.¹³⁷ There, acting under s 501A(2) of the *MA 58* (i.e. which concerned a national interest criterion), the Minister personally cancelled a non-citizen's visa for several sexual-related offences.¹³⁸

Before the non-citizen's visa was cancelled, the non-citizen was given pre-decisional correspondence from the Minister as follows:¹³⁹

You may wish to submit information about whether you pass the character test or provide comment on, or information relating to, whether the Minister should exercise his discretion to cancel your visa and on the Minister's consideration of whether cancellation of your visa would be in the national interest.¹⁴⁰

In cancelling the non-citizen's visa in the national interest, the Minister found that given the non-citizen committed his offending whilst performing his professional duties as a medical doctor, the Australian 'skilled migration program' had been brought into disrepute.¹⁴¹ For the Minister, the circumstances in which the offending was committed undermined 'public confidence' and integrity in the program and Australia's healthcare system.¹⁴²

In appealing the decision, the non-citizen argued that nothing in the pre-decisional correspondence he received from the Minister identified '...as to what the content of the "national interest" might be in the circumstances of the present case and on what basis the minister might accordingly be "satisfied" that cancellation of the applicant's visa could be in the national interest'.¹⁴³

At first instance, Gilmour J rejected the non-citizen's procedural fairness appeal¹⁴⁴ ground.¹⁴⁵ For Gilmour J, the reasoning of the Minister that the non-citizen's serious sexual offending undermined the integrity of the skilled migration program as well as reducing public confidence in the nation's health care system was no more than an expression of 'thought processes or provisional views'.¹⁴⁶ For Gilmour J, those matters did not need to be revealed by the Minister in advance of the decision.¹⁴⁷

Further, Gilmour J reasoned that the Minister's adverse conclusion with respect to the national interest finding all relate to implications arising from the non-citizen's substantial criminal record.¹⁴⁸ Justice Gilmour further held that findings made by the Minister in relation to the national interest under s 501A(2) was an 'obviously natural response, or were obviously open on the known material'.¹⁴⁹

The legitimacy of Gilmour J's decision was brought to reality on appeal, where the Full Court of the FCA in *Durani*¹⁵⁰ overturned the decision.¹⁵¹ On appeal before the Full Court, the non-citizen argued that Gilmour J committed jurisdictional error in not finding that the Minister had failed to afford him procedural fairness.¹⁵² In response, the Minister argued that procedural fairness did not require additional particularisation of what considerations the Minister may be inclined to regard as important in assessing the 'national interest'.¹⁵³

¹³⁵ *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, 353 [89]; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 (Gaudron, Gummow and Hayne JJ).

¹³⁶ *Shi v Minister for Immigration & Citizenship* [2011] FCA 935 (18 August 2011) [10] (Perram J).

¹³⁷ *Durani v Minister for Immigration and Border Protection* [2014] FCA 129 (24 February 2014).

¹³⁸ *Ibid* [10].

¹³⁹ *Ibid* [15].

¹⁴⁰ *Ibid* [32].

¹⁴¹ *Ibid* [26].

¹⁴² *Ibid*.

¹⁴³ *Ibid* [19].

¹⁴⁴ *Ibid* [27], [29].

¹⁴⁵ *Ibid* [46].

¹⁴⁶ *Ibid* [39].

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid* [41].

¹⁴⁹ *Ibid*.

¹⁵⁰ *Durani v Minister for Immigration and Border Protection* [2014] FCAFC 79 (4 July 2014).

¹⁵¹ *Ibid* [81].

¹⁵² *Ibid* [33].

¹⁵³ *Ibid* [46].

Cutting down both the reasoning of Gilmour J at first instance, and the view taken by the Minister,¹⁵⁴ Besanko, Barker and Robertson JJ found that it was not sufficiently apparent from the facts and circumstances of the case and the national interest statutory criterion that criminal convictions will bring the skilled migration program into disrepute or undermine public confidence in the system.¹⁵⁵

Consequently, the Full Court in *Durani* allowed the non-citizen's appeal on the basis that he had been denied procedural fairness.¹⁵⁶ As a result, the *Durani* litigation demonstrates how utilisation of a national interest criterion in legislation by the Commonwealth was far from 'clear' and not a 'transparent and open' process.¹⁵⁷

The judiciary in Australia have generally made clear that satisfaction as to what is or is not in the national interest is a paradigm by example of the kind of broad touchstone depending on matters of opinion or taste.¹⁵⁸ In other words, the question of what is or is not in the national interest is an evaluative one entrusted by the legislature to the Minister to determine according to his or her satisfaction.¹⁵⁹

Expressed at the preceding level of abstraction or generality (i.e. matters of 'opinion' and 'taste'), it could hardly be said that the national interest concept is easily known or identifiable by members of the Australian community. Such a point appears to have been conceded by Kirby J in *Re Patterson*,¹⁶⁰ where his Honour made plain that what is in the 'national interest' does not readily lend itself to the compartmentalisation of the considerations involved.¹⁶¹

In light of the preceding, utilisation of a national interest criterion in Commonwealth legislation arguably undermines rule of law values in Australia. The legislature has not clearly, in most instances, defined what is meant by the national interest criteria in Commonwealth statutes. Evidently, this has meant understanding how the criterion operates under Australian law particularly difficult for members of the Australian community.

Other principles of statutory interpretation can be understood to advance rule of law values of predictability and continuity, even if judges have not always expressly linked them to the rule of law.¹⁶² Take the principle that the 'process of construction begins with a consideration of the ordinary and grammatical meaning' of the text of the law.¹⁶³

When you consider the national interest criterion in various sections of the *MA 58*, nothing in the 'ordinary and grammatical meaning' of the text indicates that such a criterion is co-extensive with the mere 'political opinion' of the Minister. Arguably, the 'ordinary and grammatical meaning' of the national interest term in the *MA 58* directs attention to the 'interests of Australia as a whole' as distinct from local or regional interests within Australia.¹⁶⁴

¹⁵⁴ Ibid [68].

¹⁵⁵ Ibid [69].

¹⁵⁶ Ibid [73].

¹⁵⁷ In an administrative law context, aggrieved persons may only become aware of what matters were relevant in the exercise of a national interest legislative criterion when a decision-maker publishes his or her decision: *Maurangi v Bowen* [2012] FCA 15 (19 January 2012).

¹⁵⁸ *Miller v Minister for Immigration and Citizenship* [2013] FCA 590 (7 June 2013) [9] (Logan J).

¹⁵⁹ *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, 353 [89].

¹⁶⁰ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

¹⁶¹ Ibid 502.

¹⁶² Hume, above n 42, 626.

¹⁶³ *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ); Hume, above n 42, 626.

¹⁶⁴ *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 959 (6 August 2002) [34] (Tamberlin J).

VI CONSIDERATION 3 – CONSISTENT AND STABLE

Lon Fuller outlined that the rule of law encapsulates principles of the law being consistent, not too frequently changeable and actually congruent with the behaviour of government officials.¹⁶⁵

Judicial interpretation of a national interest criterion in Commonwealth legislation has not been entirely consistent in its approach.¹⁶⁶ As previously outlined, there is a great deal of Australian jurisprudence that makes clear that determination of the national interest concept in a legislative context is a ‘political matter’ squarely for the executive.¹⁶⁷

On that account, in judicial review cases that concern the application of the national interest statutory criterion, the courts have shown great deference to the Commonwealth executive. In other words, these cases have refused to treat the ‘national interest’ criterion in legislation as a ‘jurisdictional fact’ open to review.¹⁶⁸

For example, in *Wight*,¹⁶⁹ Besanko J refused to follow Kirby J’s approach in *Re Patterson* in treating a national interest criterion in Commonwealth legislation as a ‘jurisdictional fact’, simply holding that no other judges in that case ‘took a similar approach’.¹⁷⁰

Despite the preceding, a number of Australian cases have been more willing to find that the national interest criterion in Commonwealth legislation is a ‘jurisdictional fact’ open to review.¹⁷¹ In clear contrast to the approach taken in *Wight*, in the earlier Full Court of the FCA decision of *Chaudhary*, Wilcox, Burchett and Foster JJ treated the national interest criterion as a ‘jurisdictional fact’ in the *MA 58*.¹⁷² The Full Court in *Chaudhary* held that the delegate had committed an error of law in ignoring the ‘compassionate facet’ of the national interest notion.¹⁷³

The preceding demonstrates that judicial treatment of the national interest criterion in Commonwealth legislation has not been entirely consistent. Whilst more recent judicial authority in Australia has rejected treating the national interest criterion as a ‘jurisdictional fact’ (i.e. cases such as *Wight* and the majority in *Re Patterson*), older authority has taken an opposite approach (i.e. *Ates*¹⁷⁴ and *Chaudhary*).

As previously observed, only a small number of Commonwealth statutes and delegated legislation in Australia either expressly¹⁷⁵ or implicitly¹⁷⁶ provide a statutory definition of the national interest criterion. One would have thought to give a greater sense of legislative consistency in utilisation of the national interest concept in Commonwealth legislation, all Commonwealth statutes would provide a statutory definition of the concept.

¹⁶⁵ Fuller, above n 40, 39.

¹⁶⁶ Jason Donnelly, ‘Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door’ (2017) 24 *Australian Journal of Administrative Law* 99.

¹⁶⁷ *Leisure Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 220 (Spender J); *Conwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 525; *Habib v Commonwealth of Australia [No 2]* [2009] FCA 228 (13 March 2009) [56], [58] (Perram J); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 75 (Mason J); *A v Hayden* (1984) 156 CLR 532, 543 (Gibbs CJ); *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146, 157–9 (Ipp J, Malcolm CJ and Wallwork J agreeing); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (27 May 2005) [19], [28], [38] (Allsop J); *Re Diffort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 47, 367–73.

¹⁶⁸ *Wight v Pearce* [2007] FCA 26 (29 January 2007) [121] (Besanko J); *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 220–221 (Spender J); *Jia v Minister for Immigration & Multicultural Affairs* (1998) 52 ALD 20; *Jia v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 45; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

¹⁶⁹ *Wight v Pearce* [2007] FCA 26 (29 January 2007).

¹⁷⁰ *Ibid* [121].

¹⁷¹ *Ates v Minister for Immigration and Ethnic Affairs* (1983) 67 FLR 449; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 291; *Chaudhary v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 315.

¹⁷² *Chaudhary v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 315, 318. The Court found that ‘true national interest’ has a concern for Australia’s name in the world, and may at times involve a measure of generosity.

¹⁷³ *Ibid*.

¹⁷⁴ *Ates v Minister for Immigration and Ethnic Affairs* (1983) 67 FLR 449.

¹⁷⁵ *Automotive Transformation Scheme Regulations 2010* (Cth) regs 2.8(4)(a)-(h), 2.25(4); *Broadcasting Services Act 1992* (Cth) ss 121FL(8)-(9); *Competition and Consumer Act 2010* (Cth) ss 10.67, 10.72B; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 133(4)(b), 146B(6), 158(5); *Migration Act 1958* (Cth) ss 5(1), 198AB(3); *National Environment Protection Measures (Implementation) Act 1998* (Cth) s 5; *Radiocommunications Act 1992* (Cth) s 152.

¹⁷⁶ *Appropriation Act (No 1) 2012-2013* (Cth) sch 1; *Appropriation Act (No. 3) 2012-2013* (Cth); *Appropriation Act (No 1) 2013-2014* (Cth) sch 1; *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) sch 1AA pt 3 cl 412.001; *Insurance Acquisitions and Takeovers Act 1991* (Cth) s 5(1)(d); *International Monetary Agreements Act 1947* (Cth) s 8E; *International War Crimes Tribunals Act 1995* (Cth) s 26(3); *Mutual Assistance in Criminal Matters (Sweden) Regulations 2001* (Cth) sch 1 art 4(1)(g).

Given that the national interest concept has been viewed as really a reflection of government policy,¹⁷⁷ it can hardly be said that utilisation of a national interest criterion in Commonwealth legislation by the executive is not ‘frequently changeable’. As Ministers of government departments change, so do policies. More evidently, perhaps, is government policy often changes with a change of government or leadership.

Given that the national interest concept has been viewed in Australian law as a reflection of various subject matters¹⁷⁸ (i.e. national security, foreign relations, Australia’s national economic well-being, etc),¹⁷⁹ it’s hard to see how the concept could be treated as anything but regularly open to change and transformation. In other words, given the broad scope of considerations that may potentially relate to the national interest criteria,¹⁸⁰ there is a very good chance that aspects of the concept will frequently be open to modification.

VII CONCLUSION

The legitimacy of government power depends on its commitment to the forms of legality inherent in the rule of law.¹⁸¹ Far from a commitment to the rule of law, utilisation of a national interest statutory criterion by the government has the real potential to undermine the rule of law in Australia.

As the preceding has demonstrated, invocation of a national interest legislative criterion by the executive places significant limitations on judicial review of such decisions. Without adequate judicial supervision of executive power, the executive is free to adopt ‘free rein’ over abrogating and significantly limiting individual rights.

Given the vague and ambiguous nature of the national interest concept, aggrieved parties have often been left in the dark as to what is meant by the term. In that context, use of a national interest criterion in legislation is not always clear. The law, in accordance with the rule of law doctrine, should always aim to be both clear and precise in its application.¹⁸²

Judicial review will only be in consonance with the rule of law ‘when courts apply known rules and principles, not when their decisions may turn on their opinion’.¹⁸³ Australian courts should more actively explore the limits of a national interest criterion given the relevant statutory context and purpose in the empowering legislation.¹⁸⁴

A meaning given to a provision in a statute should not be preferred if it would have a statutory criterion which ‘might be productive of uncertainty’¹⁸⁵ and would expose persons to ‘uncertainty’.¹⁸⁶ These principles can all be seen to advance the rule of law values of predictability and continuity in the law.¹⁸⁷

The majority judicial approach in Australia to construing national interest criteria in the *MA 58* undermines values associated with the rule of law. The majority construction favoured by Australian courts in interpreting the national interest criterion has the real potential to expose non-citizens under the *MA 58* (and members of the Australian community) to ‘uncertainty’. After all, what meaning a politician would give to such a criterion in reasonably ambiguous and vague.

Judicial review and the right of the individual to bring a legally enforceable action in court seeking review of the lawfulness of government action goes to the very core of the rule of law as articulated by

¹⁷⁷ *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 (Gaudron, Gummow and Hayne JJ); *Plaintiff S297-2013 v Minister for Immigration and Border Protection* (2015) 89 ALJR 292, 296 (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

¹⁷⁸ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 174 (Heydon J).

¹⁷⁹ *XCIV v Australian Crime Commission* [2015] FCA 586 (26 June 2015) [19] (Wigney J).

¹⁸⁰ *Durani v Minister for Immigration and Border Protection* (2014) 314 ALR 130, 143 [61]; *Jione v Minister for Immigration and Border Protection* [2015] FCA 144 (3 March 2015) [44].

¹⁸¹ Evans, above n 55, 99.

¹⁸² Saunders and Yam, above n 101, 59.

¹⁸³ Geoffrey De Q Walker, *The Tax Wilderness: How to Restore the Rule of Law* (Centre for Independent Studies, 2004) 2.

¹⁸⁴ Many canons of interpretation are justified by rule of law values (predictability, objectivity and coherence) and democracy values (ensuring that statutes are applied in ways reflecting the aims, goals and compromises that in fact drove the legislative process): William N Eskridge, ‘The New Textualism and Normative Canons’ (2013) 113 *Columbia Law Review* 531, 576–80.

¹⁸⁵ *AMS v AIF* (1999) 199 CLR 160, 184 [64] (Gaudron J).

¹⁸⁶ *Legal Services Board v Gillespie-Jones* (2013) 300 ALR 430, 455 [126] (Bell, Gageler and Keane JJ).

¹⁸⁷ Hume, above n 42, 627.

A V Dicey.¹⁸⁸ The exceptionally minimalist nature of judicial review of national interest decisions is tantamount to no 'legally enforceable action' at all for an aggrieved party.

The rule of law stands for the proposition that no one is above the law.¹⁸⁹ In the modern day, utilisation of a national interest legislative criterion raises serious questions as to whether the executive is acting 'above the law'; especially is this so where the judiciary have left national interest decisions of the executive primarily 'unchecked'.

¹⁸⁸ Scott Guy and Barbara Hocking, 'Migration Act and the Constitutionality of Privative Clauses' (2008) 16 *Australian Journal of Administrative Law* 21.

¹⁸⁹ Gavin Loughton, 'Privative Clauses and the Commonwealth Constitution' (Paper Presented at the Australian Government Solicitor's Constitutional Law Forum, Canberra, 23 October 2002) 3.