THE UNIVERSITY of ADELAIDE

Research Paper No. 2018-64

Professor Alex Reilly

Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation

UNVEILING THE PUBLIC INTEREST: THE PARAMETERS OF EXECUTIVE DISCRETION IN AUSTRALIAN MIGRATION LEGISLATION

GABRIELLE APPLEBY AND ALEXANDER REILLY

(2017) 28 *Public Law Review* 293
[2018] *UNSWLRS* 43

UNSW Law
UNSW Sydney NSW 2052 Australia

Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation

Gabrielle Appleby and Alexander Reilly*

The "public interest" provides the criterion of operation for the discretionary scope of many executive powers. This article explores to what extent this criterion acts as a constraint on power and its consistency with the rule of law. It identifies two key approaches in the High Court's interpretation of such powers: an "idealist" approach, in which the decision-maker's subjective, political assessment of the competing factors relevant to determining the public interest is not subject to judicial review; and a "realist" approach, in which the decision-maker's assessment is judicially reviewable to ensure that relevant processes were followed and factors taken into account. In the migration sphere, the article traces the adoption of these approaches through three examples: the exercise of a national interest discretion to refuse or cancel visas; the introduction of a national interest test for the designation of regional processing countries; and the interpretation of the Minister's public interest powers to grant visas to people otherwise ineligible. It is argued that the Court should adopt a stronger realist approach to reviewing public and national interest discretions through the adoption of a new meta-principle of interpretation. This principle would require that the exercise of public interest discretions is informed by a minimum content, to be determined by reference to the statutory context, ordinary rules of statutory interpretation, the wider non-statutory context in which the discretion is invoked and underlying values within Australia's constitutional system.

<DIV>INTRODUCTION

The "public interest" is an ancient philosophical principle grounding state power.[1] Today, it has become an instrument of positive law: government decision-makers are bestowed with

* Gabrielle Appleby, Associate Professor, Faculty of Law, University of New South Wales, Co-Director of the Judiciary Project at the Gilbert + Tobin Centre of Public Law, Member of the Steering Committee at the Andrew and Renata Kaldor Centre for International Refugee Law; Alexander Reilly, Professor, Director of the Public Law and Policy Research Unit, Adelaide Law School, University of Adelaide.

[1] See, eg MT Cicero, *De Legibus (On the Laws)* (N Rudd and JGF Powell (trans), Oxford University Press, 1998); J Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government)* (1690); T Hobbes,

statutory obligations to take action and make decisions that accord with the "public interest".[2] But the meaning, content and function of the public interest in the exercise of discretionary executive power remains largely undetermined. Thus, fundamental questions arise. Does the public interest act as a constraint on discretionary power or is it simply an expression of absolute discretion? If it is a constraint, how does a decision-maker determine the parameters of the public interest? Is there a singular fixed meaning for the public interest across the statute book? What is the role of the executive, the Parliament, and the courts in determining what might constitute the public interest?

This article seeks to answer these questions through an interrogation of conferral of public interest discretions (and an associated discretion exercised in the "national interest") in Australian migration law. Migration law offers a useful subject for the interrogation of the public interest discretions for three reasons. First, the Minister for Immigration is conferred more discretionary power to be exercised in the public interest than any other government minister.[3] Secondly, public interest discretions under the *Migration Act 1958* (Cth) are exercised in a wide range of contexts within an Act with multiple purposes. Finally, the public interest discretions are associated with substantial ministerial power to affect the liberty and safety of individuals.

In the migration sphere, the discretions have been used to condition the exercise of executive power in relation to decisions about receiving and excluding aliens, granting and cancelling visas, naturalising aliens, processing asylum seeker claims for protection, and most recently in relation to a range of powers facilitating the policy of turning back asylum seekers from Australia's border and arranging for the processing of asylum seeker claims in regional countries.

The first part of the article explores the possible rule of law concerns around the conferral of wide, public interest discretions, before considering three different approaches to interpreting public interest discretions – the rationalist, idealist and realist approaches. It identifies two of these approaches in the High Court's interpretation of such powers: the "idealist" approach, in which the decision-maker's subjective, political assessment of the competing factors relevant to determining the public interest is not subject to judicial review; and the "realist" approach, in which the decision-maker's assessment is judicially

Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil (1651) Ch 30; J-J Rousseau, *The Social Contract and Discourses on the Origin of Equality* (1761); B Spinoza, *Theological-Political Treatise* (1670) Ch 19.

[2] GA Schubert, *The Public Interest: A Critique of the Theory of a Political Concept* (The Free Press of Glencoe, 1960) 9.

[3] Liberty Victoria, *Playing God: The Migration Minister's Unrestrained Powers* (2017) 3–4.

reviewable only to ensure that relevant processes were followed and factors taken into account.

The article then turns to consider the specific public and national interest discretions in the migration legislation, by tracing the High Court's approach to interpreting these discretions through three examples: the exercise of a national interest discretion to refuse or cancel visas; the introduction of a national interest test for the designation of regional processing countries; and the interpretation of the Minister's public interest powers to grant visas to people otherwise ineligible. In each example, the Court adopts a realist approach but in such a deferential fashion that in practice it often resembles idealism.

Finally, drawing on the experience in Australian migration law, a method for determining the outer limits of public interest discretions in a more robust, realist manner is suggested. It is argued that this could be achieved through the adoption of a meta-principle of interpretation that sets minimum factors that must be considered in exercising any such discretion. First, the public interest must be ascertained within the context and parameters of any legislative scheme; and secondly, it must be informed by the historical policy context, relevant international obligations and underlying constitutional values.

This approach accepts that, although considerable deference might be afforded the executive in its determination of the public interest, under a system of the rule of law the concept must ultimately be a legal one, and it must have a meaning that acts to constrain the exercise of executive discretionary power in a manner that is accountable.

<DIV>PUBLIC INTEREST DISCRETIONS AND THE RULE OF LAW

<subdiv>Rule of Law and Discretionary Power

The rule of law requires that any exercise of discretionary power is consistent with the statute enunciating the power; the rule of law is offended by conferrals of power that are so vague they fail to provide guidance to the individual and vest arbitrary power.[4] Rand J of the Canadian Supreme Court warned in *Rancelli v Duplessis* that absolute and untrammelled discretion would signal the beginning of the disintegration of the rule of law.[5] Hume observed:

<blockquote>

> Before its exercise, a broadly-framed power makes it more difficult for individuals to ascertain how the law will be applied. When the power is being exercised, it is more difficult for those applying the law to determine the scope of their power. And, after its exercise, a broadly-framed power can make it more difficult for those affected by its exercise to

[4] This draws on an account of the rule of law that focuses upon clarity of law: P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467, 467.

[5] *Rancelli v Duplessis* [1961] SCR 121, 140–142.

ascertain whether the conduct was unlawful and ought to be challenged in court.[6]</blockquote>

In accordance with these rule of law principles, statutes will, ordinarily, enunciate with some precision the extent of discretionary executive power. However, in some cases, the legislature eschews this responsibility, giving government decision-makers power bounded simply by the "public" or "national" interest.

From its inception, the Commonwealth Parliament has granted public officials powers exercisable in the "public interest".[7] Within the statutes that employ the term as a criterion for government decision-making, only rarely has Parliament indicated what process must be followed or the factors that must be taken into account in determining the public interest.[8]

The public interest is used to import into the law a fundamentally affirming, positive and empowering force.[9] It invokes a concept that resonates positively with the public, the media and the Parliament, but it may be used by government to cloak the exercise of an entirely subjective, unreviewable discretion.[10]

Depending upon how the "public interest" is determined and restricted, there is thus a tension between the rule of law and public interest discretions, which may be heightened or lessened – although it is unlikely ever to be fully resolved.

<subdiv>Determining and Restricting the "Public Interest"

When debating the "public interest", Sorauf observed, scholars disagree "about what they are trying to define: a goal, a process, a myth".[11] Public interest discretions certainly operate at different levels – decision-makers must determine what factors are to be taken into account (the *inputs*), the *process* they employ, and the *outcome*.[12] The objective or subjective nature of each of these decisions is contested.

[6] D Hume, "Broadly-Framed Powers and the Constitution" (Paper presented at *New South Wales Bar Association Seminar*, 3 March 2015).

[7] *Commonwealth Public Service Act 1902* (Cth) ss 40, 72(5).

[8] Exceptions can be found, eg in *Trade Practices Act 1965* (Cth) s 50; *Freedom of Information Act 1982* (Cth) s 11B.

[9] See AS Miller, "The Public Interest Undefined" (1961) 10 *Journal of Public Law* 184.

[10] V Held, *The Public Interest and Individual Interests* (Basic Books Inc, 1970) 1; D Oliver, "Psychological Constitutionalism" (2010) 69 *Cambridge Law Journal* 639, 642.

[11] F Sorauf, "The Conceptual Muddle" in CJ Friedrich (ed), *The Public Interest: Nomos V* (Atherton Press, 1962) 186.

[12] The idea of reviewability for inputs, process and outcomes is adapted from C Wheeler, "The Public Interest Revisited" (2013) 72 *AIAL Forum* 34.

Schubert identified three theoretical approaches to determining public interest criteria in administrative and judicial decision-making.[13] The first is the "legal rationalist" approach. It requires ascertainable criteria for determining the content of the public interest to minimise subjectivity in the decision-making process.[14] Bell has argued that, according to this view, the "public interest" has "an objective element defined by established interests of the community, which establish a set of specific objectives".[15] This approach maximises accountability, the scope for judicial review of the outcome of the decision and is most consistent with the rule of law.

Schubert's second approach is that of the "idealist". According to this approach, the legislature entrusts decision-makers to exercise powers in pursuit of their own enlightened view of the public interest. The decision-maker's view of the public interest is beyond question and review. For instance, in *Re Application of Amalgamated Anthracite Collieries*, a decision of the UK Railway and Canal Commission held that such a discretion is not a legal concept at all, but one for the Parliament and executive to determine.[16] For an idealist, then, the concept of the public interest is wholly empowering, and in no way a restraint on government power.

Schubert's final theory of public interest decision-making is that of the "legal realist". The legal realist eschews the idea that there can be any objective view of the public interest because its meaning is inherently in dispute.[17] A realist approach to decision-making accepts the subjectivity of the weighing and balancing undertaken by the decision-maker. However, it leaves open the possibility of review to ensure the decision-maker has taken into account relevant competing views and interests in the determination of the public interest, and that the process of weighing the views and interests is balanced. While review of outcomes is not possible, the decision-maker will be accountable in relation to the inputs and processes they adopt.

The Australian High Court has tended towards either Schubert's second approach (the idealist perspective) or the third (the realist) in its interpretation of the limits of public

[13] Schubert, n 2, 26; GA Schubert, "'The Public Interest' in Administrative Decision-Making: Theorem, Theosophy or Theory" (1957) 51 *The American Political Science Review* 346; GA Schubert, "The Theory of 'The Public Interest' in Judicial Decision-Making" (1958) 2 *Midwest Journal of Political Science* 1.

[14] WAR Leys, referred to in Schubert, n 2, 25.

[15] J Bell, "Public Interest: Policy or Principle?" in R Brownsword (ed), *Law and the Public Interest* (Franz Steiner, 1993) 27.

[16] *Re Application of Amalgamated Anthracite Collieries* (1927) 43 TLR 672, as reported in *Re Patterson; Ex p Taylor* (2001) 207 CLR 391, [79] (Gaudron J).

[17] WAR Leys, referred to in Schubert, n 2, 26.

interest discretions. This is evident in all areas of the Court's jurisprudence; below it is explained how it has manifested in the migration sphere.

The idealist perspective was evident in the 1987 case of *South Australia v O'Shea*, where Mason CJ explained that legislative adoption of a public interest test reflects the legislature's decision that "political assessment of the public interest is to be preferred to judicial assessment".[18] In 2012, in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ explained that in conferring a public interest discretion the legislature recognises "that the inquiries are best suited to resolution by the holder of a political office".[19]

In *Osland v Secretary to the Department of Justice*, French CJ, Gummow and Bell JJ explained that the criterion of "public interest" is one of Stone's categories of indeterminate (or illusory) reference, which requires the decision-maker to undertake an evaluation of the situation and not simply mechanistically apply a rule to ascertained facts.[20] It is, the Court explained, "like many common law standards, 'predicated on fact-value complexes, not on mere facts', to be applied by the decision-maker".[21]

Alongside this idealist approach is also an approach that reflects the realist perspective. In 1987, in *Re Queensland Electricity Commission; Ex p Electrical Trades Union of Australia*[22] Mason CJ, Wilson and Dawson JJ acknowledged that decision-makers must grapple with competing claims on the public interest,[23] but that the court review the discretion to ensure fundamental factors were taken into account, but not the weight accorded them by the executive decision-maker.[24]

The 1989 decision of *O'Sullivan v Farrer* recognised that the statutory context will often provide a foundation from which to identify factors that must be considered in the determination of the public interest:

<blockquote>

[18] *South Australia v O'Shea* (1987) 163 CLR 378, 390.

[19] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [42]. See also *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, [89] (French, O'Loughlin and Whitlam JJ).

[20] Taking this analysis from Julius Stone's famous work, *Legal System and Lawyers' Reasonings* (1964) 264.

[21] *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320, [15].

[22] *Re Queensland Electricity Commission; Ex p Electrical Trades Union of Australia* (1987) 61 ALJR 393.

[23] See, eg *Re Queensland Electricity Commission; Ex p Electrical Trades Union of Australia* (1987) 61 ALJR 393, 395–396.

[24] *Re Queensland Electricity Commission; Ex p Electrical Trades Union of Australia* (1987) 61 ALJR 393, 395-6.

> [T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view'.[25]</blockquote>

The constitutional and wider legal context will supplement the statutory context to inform what these factors might be.[26] For instance, in considering a public interest-based discretion to issue a suppression order, French CJ stated that a relevant consideration was "the effect of the order upon the open justice principle, on common law freedom of speech, and on the human rights guaranteed by the [Victorian] Charter".[27]

<DIV>THE "PUBLIC INTEREST" AND "NATIONAL INTEREST" IN AUSTRALIAN MIGRATION LAW

The *Migration Act* and *Migration Regulations 1994* (Cth) are the primary statutory mechanisms for the control of entry and exit from Australia, and the rights and duties of temporary and permanent alien residents. As a matter of practical necessity, decision-making power is vested in the executive to regulate migration in conformity with the Act and Regulations.

<subdiv>The Purposes of the Migration Act and Migration Regulations

The purpose of the *Migration Act*, as expressed in the object of the Act in s 4(1), is to "regulate, in the national interest**,** the coming into, and presence in, Australia of non-citizens". Although decisions over entry and membership are fundamental powers of national governments, they are not made in a vacuum. First, and foremost, the decisions affect the fundamental rights of human beings such as their freedom from arbitrary detention, their physical and psychological safety, their interests in connection to family and their economic rights. Although the Commonwealth *Constitution* confers a wide power in relation to "aliens and naturalisation", this power is subject to the rule of law concerns that underpin the *Constitution*.

Secondly, as the High Court recognised in *Plaintiff M61/2010E v The Commonwealth*,[28] Australia has assumed obligations under a range of international conventions that necessarily influence its migration decisions and informs the exercise of discretion under the Act.[29] Migration decisions are made in a global context in which there

---

[25] *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ), referring to *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492, 504, 505 (Dixon J). See also *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 757 (Dixon J). See also *O'Sullivan v Farrer* (1989) 168 CLR 210, [13] [AQ: replace para ref with page ref]. More recently, see *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320; *Hogan v Hinch* (2011) 243 CLR 506, [32] (French CJ), [69] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[26] *Hogan v Hinch* (2011) 243 CLR 506, [31] (French CJ).

[27] *Hogan v Hinch* (2011) 243 CLR 506, [32], referring to *Re Queensland Electricity Commission; Ex p Electrical Trades Union of Australia* (1987) 61 ALJR 393, 395 (Mason CJ, Wilson and Dawson JJ). See also [50] (French CJ).

[28] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, [27].

[29] *UN Convention relating to the Status of Refugees 1951*; *International Covenant on Civil and Political Rights 1966*; *International Convention on the Elimination of all forms of Racial Discrimination 1966*; *International Convention Against Torture and All forms of Cruel, Inhumane and Degrading Treatment or Punishment 1984*; *UN Convention of the Rights of the Child 1989*.

is an increasing movement of people, in which international organisations have taken responsibility for the regulation of many aspects of people movement with the cooperation of states,[30] and in which information about countries in terms of their political organisation and protection of basic human rights is widely available.[31]

Within this global context, Australian migration law has a range of objectives. In general, it is designed to boost the economy through economic migration, strengthen the community through family migration and to assist foreigners in need through humanitarian migration. Often the objects are mixed, and this is particularly evident in refugee and asylum seeker policy under the Act and Regulations. On the one hand, the Act establishes a regime to enable asylum seekers to make a claim for protection from persecution in conformity with Australia's obligations under the *UN Convention relating to the Status of Refugees 1951* (Refugee Convention). On the other hand, the Act has measures to make it difficult for asylum seekers to be able to access protection under Australian law.

With the contextual influences and policy objectives in the Act so various and divergent, how is it possible to delimit the extent of a Minister's discretion exercised in the public or national interest?

<subdiv>Judicial Interpretation of Public and National Interest Discretions

Three examples are now provided of how the courts have interpreted wide executive discretionary power in the *Migration Act*.

<group>The National Interest and the Removal of Non-Citizens of Bad Character

Sections 501 and 501A of the *Migration Act* empower the Minister to act personally to refuse or cancel visas without affording non-citizens natural justice or merits review and to overturn lawful decisions made by the Administrative Appeals Tribunal (AAT). The only restriction, once a person is found to be of bad character, is that "refusal or cancellation is in the national interest".[32] A question arises of whether the "national interest" adds an extra mandatory criteria to the Minister's decision to refuse to grant or to cancel a visa beyond a determination that a person does not satisfy the character test.

The interpretation of the national interest in the context of ss 501 and 501A has only come before the High Court once in *Re Patterson; Ex p Taylor*.[33] The case was decided on other grounds, but Gaudron and Kirby JJ considered the national interest test. Their

[30] Most obviously the role of the United Nations High Commissioner for Refugees (UNHCR).

[31] For example, through the UN Human Rights Watch, see <https://www.hrw.org/>.

[32] For a discussion of the policy and practice of removal, see M Foster, "An 'Alien' by the Barest of Threads: The Legality of the Deportation of Long Term Residents from Australia" (2009) 33 *Melbourne University Law Review* 483.

[33] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391.

approach was most aligned with Schubert's "legal realist" approach. Discretion was not left entirely to the decision-maker, but rather the judges demonstrated a willingness to review the factors taken into consideration by the decision-maker. Kirby J stated that the national interest criteria required more than the Minister's subjective satisfaction[34] – it required national interest reasons that were "personal to the visa holder", [35] and these reasons must relate to the level of threat the person posed "to the nation as a whole or the community of the nation".[36] Kirby J explained:

> <blockquote>
>
> The justification of the … invocation of 'national interest' was perfunctory and misleading. It appeared to equate the existence of a relevant 'national interest' to the presence of a 'substantial criminal record'. However, as the latter is one of the considerations applicable to the other precondition (namely the Minister"s reasonable suspicion that the person does not pass the 'character test'), something more was obviously intended by requiring, additionally, that the danger to the national interest justified the Ministerial decision.[37]</blockquote>

Gaudron J also held that the national interest criteria was "separate and distinct" from the question whether or not a person passed the character test".[38] Gaudron J noted that it was possible for the matters that led to a person failing the character test to also be "the foundation for the Minister's satisfaction that it is in the national interest that that person's visa be cancelled". However, if the same conduct was relied on to satisfy the statutory criteria, "there must be something in the nature, or the seriousness of that conduct, or in the circumstances surrounding it to found a satisfaction that it is in the national interest to cancel the visa of the person concerned".[39]

The Federal Court has interpreted the national interest criteria under ss 501 and 501A on several occasions since *Re Patterson*. The Court has been clear that the Minister must be satisfied that a decision is in the national interest as a precondition of the exercise of the discretionary power under ss 501 and 501A, but the Court has differed markedly as to what is required to satisfy this precondition. The general trend in decisions has been towards allowing the Minister a very broad discretion, ie a trend away from the realist

[34] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391, [330]

[35] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391, [338].

[36] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391, [331].

[37] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391, [336].

[38] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391, [78].

[39] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391, [80].

approach of Gaudron and Kirby JJ and towards the idealist approach. The court has often taken the view that as long as the Minister explicitly states that they are satisfied that refusal or cancellation of a visa is in the national interest, that criterion is satisfied.[40]

In *Madafarri v MIMA*, the Court upheld the Minister's decision to cancel the applicant's visa, noting the Minister had made mention of a range of other matters personal to the applicant, including "the effect of removal from Australia of Mr Madafarri's family, his ties to the Australian community, the welfare of his children and other matters".[41]

In *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh*, the Full Court denied the need for the Minister to consider the personal circumstances of the visa holder, and held that "the Minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa".[42] Contrary to Kirby J's approach in *Re Patterson*, in *Euta Leiataua v Minister for Immigration and Citizenship*[43] Jessup J held that in relation to sexual offences against minors there will "almost inevitably" be grounds for the Minister to exercise their discretion in the national interest.

In *Gbojeuh v Minister for Immigration and Citizenship*, Bromberg J accepted Kirby J's interpretation of the national interest criteria focused on "the potential harm to the Australian community".[44] However, he concluded that the failure of the Minister to consider correctly the individual circumstances of the visa holder, including his risk of reoffending and his rehabilitation, was a result of the Minister having determined that any risk of the non-citizen reoffending was a potential harm to the community, and the individual circumstances of the applicant would not change this.[45] In other words, although Bromberg J gave a particular content to the public interest discretion, his Honour held that it was a matter for the Minister to evaluate whether the test was satisfied.[46]

[40] See also J Kinslor and J English, "Decision-Making in the National Interest" (2015) 29 *AIAL Forum* 35.

[41] *Madafarri v MIMA* (2002) 118 FCR 326, [90] (French, O'Loghlin and Whitlam JJ). Leave to appeal to the High Court was dismissed: *Madafarri v MIMA M144/2002* [2003] HCA Trans 803.

[42] *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505, [74].

[43] *Euta Leiataua v Minister for Immigration and Citizenship* (2012) 208 FCR 448.

[44] *Gbojeuh v Minister for Immigration and Citizenship* (2012) 202 FCR 417, [49].

[45] *Gbojeuh v Minister for Immigration and Citizenship* (2012) 202 FCR 417, [68].

[46] *Gbojeuh v Minister for Immigration and Citizenship* (2012) 202 FCR 417, [44].

In the same year, in *Maurangi v Bowen*, Lander J reinforced the view that the seriousness of a person's criminal record can be sufficient for the Minister to be satisfied that it is in the national interest to cancel a person's visa under s 501A.[47] In that case, the Minister acknowledged factors in the plaintiff's favour, such as that there was a "low risk of further criminal offending", but decided that the seriousness of the offence – manslaughter – meant it was in the national interest to cancel the plaintiff's visa. The Minister also made reference to a number of factors in a practice direction that were influential, though not binding, on his decision, including "the protection of the Australian community, the age at which the person commenced living in Australia, the length of time that the person has lived in Australia, and any relevant international obligations". For Lander J it was enough that the Minister had made reference to these matters and, following the wording in *Madaferri*, that his satisfaction was "obtained reasonably".[48]

In these cases, the Court has been reluctant to dictate what factors the Minister must consider in the national interest, or question the weight that a Minister gives to different factors as long as the Minister has acknowledged that there are factors to be weighed in the balance. The Court has largely eschewed responsibility for interpreting and scrutinising the inputs and processes that must inform a public interest discretion in favour of an idealist approach in which the decision-maker's view of the public interest is not seriously reviewed.

<group>The National Interest and the Designation of Regional Processing Countries

In 2001, the Howard Government introduced a policy of regional processing, entering agreements with third countries to process the applications of asylum seekers who had attempted to enter Australia. Amendments to the *Migration Act* in 2001 conferred a power on the Minister to designate countries to be regional processing countries.[49] The relevant section – s 198A – did not impose a public or national interest criterion as a condition of the exercise of the power. However, the interpretation of the section is of interest because, after the High Court held invalid a Minister's exercise of the power to designate Malaysia as a regional processing country, subsequent amendments introduced a national interest test as the sole criterion for the exercise of the power.

In 2010, the Minister declared Malaysia to be a regional processing country under s 198A, relying on a Department of Foreign Affairs and Trade assessment of Malaysia, the

[47] *Murangi v Bowen* (2012) 200 FCR 191, [67].

[48] *Murangi v Bowen* (2012) 200 FCR 191, [70]–[71].

[49] *Excision Consequential Provisions Act 2001* (Cth),

terms of an Arrangement with Malaysia in which Malaysia agreed to treat asylum seekers transferred under the Arrangement "with dignity and respect and in accordance with human rights standards" and assurances from the Malaysian Government in bilateral discussions.[50] To prevent non-refoulement, Malaysia was not to forcibly remove transferees without providing "the government of Australia with an opportunity to consider the broader claims of any transferee to protection under other relevant human rights conventions". If such claims could be established, Australia would make alternative arrangements for them.[51]

The declaration of Malaysia as a regional processing country was challenged successfully in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*. The Court held that the Minister must form an "evaluative judgment" of the matters set out in s 198A(3)(a).[52] The Court reached this conclusion following a close reading of s 198A(3)(a), placed in the context of Australia's international obligations. The Refugee Convention was central to the majority's interpretation of s 198A(3).[53]

The decision in *Plaintiff M70* undermined the Government's central regional processing policy for responding to the increase of asylum seeker boat arrivals. In 2012, with the support of both major parties, the Parliament amended the legislation to provide the Minister with a broader discretion under the new s 198AB of the *Migration Act* to designate a country to be a regional processing country.[54] The clear intention in amending s 198A was to broaden the Minister's power to designate third countries as regional processing countries. The power of designation was subject to one condition only – that "the Minister thinks that it is in the national interest to designate the country to be a regional processing country".

In broadening the Minister's discretionary power, the Parliament introduced a "national interest" criterion that did not exist in the expression of ministerial power in s 198A. The clear implication is that the Parliament believed the words of "national interest" served to *expand* the Minister's discretion (in combination with other textual changes to the Act).

[50] Arrangement, cl 8.1 extracted in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [7].

[51] Arrangement cl 11.2 extracted in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [13].

[52] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

[53] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [61]-[66] (French CJ), [106]-[107] (Gummow, Hayne, Crennan and Bell JJ). See A Pastore, "Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention" (2013) 13 *Chicago Journal of International Law* 615, 618.

[54] *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

The legislature placed express requirements in s 198AB(3) for how the Minister must conduct the "national interest" inquiry: they "must have regard to" whether or not the country has given Australia any assurances to the effect that the country will not return a person to a country in breach of non-refoulement obligations and that the country will make an assessment about the refugee status. Otherwise, the Minister "may have regard to any other matter which, in the opinion of the Minister, relates to the national interest". Furthermore, a new preamble to the subdivision was included to indicate the Parliament's intention to end people smuggling through a policy of regional processing, and to state expressly that it was for the "Minister and Parliament to decide which countries should be designated as regional processing countries" and that any designation "need not be determined by reference to the international obligations or domestic law of that country".[55]

By including some factors for the Minister's mandatory consideration, the Parliament was indicating that it expected the Court to take a realist approach to construing the national interest discretion; although, the nature of these factors and the statutory statement of purpose indicate that these factors were intended to apply in a highly deferential way, more akin to an idealist approach.

The breadth of the discretion came before the High Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*. The plaintiff argued that there was a minimum core content to the "national interest", including:

<blockquote>

Australia's international law obligations; the need to consult with the Office of the United Nations High Commissioner for Refugees ('the UNHCR') prior to designation; PNG's international obligations; the framework, if any, for processing refugee claims in PNG; the possibility of indefinite detention; and the conditions in which UMAs would be detained.[56]</blockquote>

In a unanimous judgment, the High Court rejected this argument, focusing on the fact that the only statutory conditions to be taken into account in ascertaining the national interest was the specified assurances from Papua New Guinea (PNG). This conclusion appears consistent with the breadth of the discretion conferred. The subjective stipulation in the provision would tend to override any requirement for the Minister to take into account factors such as those argued for by the plaintiff.

[55] *Migration Act 1958* (Cth) s 198AA.

[56] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, [39].

The plaintiff also argued that there was "no evidence that PNG would fulfil its assurances".[57] The Court dismissed this argument on the basis that "there was no statutory requirement that the Minister be satisfied of these matters in order to exercise the relevant power. They do not qualify as jurisdictional facts".[58] The Court commented that, in the context of s 198AB, "what is in the national interest is largely a political question".[59]

<group>The Public Interest in the Migration Act

The "public interest" is used in an even broader range of circumstances in the *Migration Act* than the "national interest". First, it is a condition for the exercise of discretionary power to grant or withdraw rights, privileges and opportunities from migrants, including cancelling visas and refusing to grant visas. In these instances, it appears that the "public interest" is invoked in circumstances where the Minister is asked to balance the rights of migrants against those of the wider Australian community – rather than being focused on international relations or national security. The exclusion of the individual's rights under the test was confirmed by Heydon J in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*:

<blockquote>

> [T]he fact that under the empowering provisions the Minister is to attend to the public interest only means that it is open to the Minister to exclude any consideration of an individual's interests where that interest is not reflected in the public interest.[60]</blockquote>

Secondly, and closely related to the first, the public interest is used as a justification for ministerial intervention to benefit applicants in individual cases. These powers are known as the "public interest powers". They act as a safety net for applicants whose applications for a visa have been rejected but for whom there are compelling reasons to grant a visa on compassionate grounds. The Act emphasises the political rather than the legal accountability of these powers. In exercising the "public interest powers", the Minister is required to explain to the Parliament why they thought a decision was in the public interest. Although, of course, the reasons proffered by the Minister can be grounds for challenging the validity of the decision.[61]

---

[57] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, [57].

[58] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, [57].

[59] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, [40].

[60] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [114].

[61] See, eg *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 (discussed below).

Finally, the Regulations set out a list of "public interest criteria", which are characteristics an applicant must satisfy to be eligible for a visa. Common to these public interest criteria are concerns over national security and the social and economic interests of the Australian community. The criteria also facilitate the granting of a visa for compassionate reasons when a person would otherwise not be eligible for a visa. That is, public interest also covers positive reasons to allow a person into the country because of the benefit to individual members of the Australian community.

In such a complex and contradictory environment, the article now considers two instances of the High Court's interpretation of the "public interest" criteria.

<subgroup>*Exercise of "Public Interest Powers"*

In *Plaintiff M79/2012 v Minister for Immigration and Citizenship*,[62] the Court was faced with two apparently inconsistent statutory criteria for the grant of the same visa under separate sections of the *Migration Act*. In s 195A, the power to grant a wide range of visas, including a temporary safe haven visa, was conditioned only on the public interest criterion. Section 37A provides for the grants of "a class of visa to be known as a temporary safe haven visa". A note to the section states that the visa is to "give the person temporary safe haven in Australia".

The Minister exercised the power under s 195A to grant the plaintiff two visas – a bridging visa and a temporary safe haven visa. One consequence of the grant of the bridging visa, if granted on its own, would have been to enable the non-citizen to make a valid application for a protection visa. It was common ground that the reason the Minister had granted the temporary safe haven visa in addition to the bridging visa was to prevent the plaintiff from making an application for a protection visa,[63] and not because the plaintiff needed temporary safe haven. The Commonwealth pointed to three public interest concerns in granting the temporary safe haven visa:

<blockquote>

> [F]irst, to release a substantial number of persons from detention to ease pressure on the system and confer a benefit on those who were released; second, to seek to preserve the refugee processing which had already taken place and to not waste the resources of the Department and the courts that had already been expended; and third, to enable such

[62] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336.

[63] Because of the operation of s 91K.

> persons, while at liberty in the community, to work and enjoy certain other benefits.[64]</blockquote>

The Commonwealth argued that what was being achieved (and thus was in the public interest) was maintenance of the status quo in relation to their (in)eligibility to apply for a protection visa while getting asylum seekers out of detention, an outcome that was consistent with the purpose for the granting of a visa under s 195A, and thus was an outcome in the public interest.

The three judgments adopted different approaches and articulated different understandings of the significance of the public interest criterion to the determination of validity.

The majority (French CJ, Crennan and Bell JJ) took an expansive view of the public interest criterion, largely denying any judicial oversight and thus adopting a fundamentally idealistic approach – leaving it "for the Minister to judge". The majority began their judgment with a statement that "the mandatory detention in Australia of asylum seekers without visas who have tried to enter Australia from the sea is a matter *of intense public interest and debate*",[65] introducing yet another concept of public interest into the legal space.

They approached the question of validity by asking whether matters of public interest could empower the Minister to grant a temporary safe haven visa under s 195A when the factual basis for the grant of this particular visa under s 37A was manifestly absent. The majority resolved the tension between the statutory requirements in ss 195A and 37A by focusing on the breadth of the discretionary power in s 195A:

> <blockquote>
>
> [T]he purposes for which a visa may be granted under s 195A are to be found in the statutory criterion of the public interest. That is a matter which, within the general scope and purposes of the Act, it is left for the Minister to judge. Neither that criterion nor the mechanism which the section creates for the grant of visas by personal ministerial decision without application are in terms confined by the general scheme of the Act for the grant of visas.[66] </blockquote>

[64] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 339.

[65] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, [1].

[66] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, [32].

This interpretation of the public interest criterion in s 195A seems to *expand* the discretionary power of the Minister beyond the confines of the purposes of the Act, subject to little, if any, review of the courts.

In dissent, Hayne J imported limits on the discretion. He explained:

<blockquote>

> [P]owers that are conditioned on notions of the public interest are not completely unlimited. These powers, like any other form of statutory power, can only be understood in the context of the Act in which they appear.[67]</blockquote>

Hayne J held that s 195A was limited by reference to s 37A: s 195A(3) expressly excluded some classes of visa from consideration in the exercise of the Minister's power in s 195A, but not temporary safe haven visas under s 37A. Hayne J thus established criteria against which the Court must review the discretion, introducing a realist approach.

Gageler J joined the majority in the result but for different reasons, eschewing the fundamentally idealist approach of the majority for an approach that gave the Court some oversight of the factors considered by the Minister, but not as interventionist as that adopted by Hayne J. The central issue for Gageler J was the scope of s 195A on its own terms. With only one exception that was explicit in the provision, Gageler J focused on the public interest as the "sole criterion for the grant of a visa" under s 195A.[68] Gageler J interpreted public interest consistently with the broad purposes of the Act, which he took in part from the Explanatory Memorandum.[69] He noted that the Minister is entitled to focus on the consequence of the grant of a visa when determining when it is in the public interest to grant it, even if to achieve that consequence he is granting a visa that a person does not need in the circumstance.[70]

<subgroup>"Public Interest Powers" and the National Interest

Plaintiff S297/2013 v Minister for Immigration and Border Protection involved a challenge to the Minister's decision to refuse to grant a visa to the plaintiff on the grounds that it was not in the "national interest" to grant a protection visa to unlawful maritime arrivals (UMAs) under cl 866.226 of the *Migration Regulations*, even though the Minister had previously determined that it was in the "public interest" to allow the plaintiff to make an application in the first place under s 46A(2). Under s 46A(2), the Minister can decide

---

[67] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, [62].

[68] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, [127].

[69] Explanatory Memorandum, *Migration Amendment (Detention Arrangements) Bill 2005* (Cth) 2.

[70] *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, [131]-[135].

whether or not to allow an "unauthorised maritime arrival" to make an application for a protection visa in Australia when they are otherwise prevented from doing so. In a statement laid before Parliament, the Minister must set out their reasons for taking action under s 46A(2), including explaining "the Minister's reasons for thinking that the Minister's actions are in the public interest".

The Court held that it would be contrary to the statutory scheme for the Minister to be able to reject an application "in the national interest" on the ground that the applicant was a UMA. What was in the public interest in the Act to allow an application to be made could not be denied in the national interest on the basis of the identity of the applicant as a UMA. It made no difference that it was well known and uncontroversial that the government's policy was to deny UMAs' access to protection visas in Australia. This could not be a national interest consideration if it was contrary to the creation of procedural rights for UMAs in the Act. The limiting of the national interest discretion in this way gave the Court some oversight of the national interest discretion, ie some ability to review the inputs that are considered by a decision, thus representing a strain of the legal realist approach.

<DIV>A META-PRINCIPLE OF STATUTORY INTERPRETATION

It is important that the High Court develop a clear and consistent approach to the interpretation of national and public interest tests in migration legislation. Such an approach must be consistent with the rule of law, in that the approach must act as a restraint on discretionary executive power. Ultimately, it is the authors' view that a stronger realist approach, rather than an idealist view of the public and national interest discretions, must be adopted. That is, the authors do not support judicial review of the substantive public interest decision, but, accepting the inherent subjectivity of a public interest test, advocate for judicial review of the relevant factors taken into account in applying the test. This part explains how a stronger realist approach might operate, considering the aspects of the public interest the court might review, and the processes of decision-making it might require in the exercise of ministerial discretion.

The proposal is for the adoption of a meta-principle of interpretation. This is, in short, that when Parliament adopts the term "public interest" in statutes it is *presumed* to import a number of acceptable and unacceptable factors (or inputs) that might be taken into account in determining the public interest, and the balancing of those inputs to determine an outcome. To be clear, the authors are not advocating an approach that gives public interest discretions a singular "fixed and precise content" across all statutory

contexts,[71] but one that allows the court to identify the factors that must inform the discretion in any given context.

It is proposed that this minimum content of the "public interest" is determined by the statutory context and ordinary rules of statutory interpretation. While the High Court has suggested that there will be no further limitations on the scope of a discretion unless suggested by the legislative context,[72] it is argued that the very invocation of the concept of the public interest suggests the relevance of other, non-statutory factors, including international and political context, as well as underlying values within Australia's constitutional system.

The meta-principle of interpretation proposed is consistent with the High Court's concern evident in other areas to encourage the legislature to unveil its true intentions to the electors, thus enhancing accountability in the democratic process. In particular, this trend can be identified in the High Court's jurisprudence on the principle of legality.[73] The fundamental proposition is that to ensure electoral accountability, Parliament must squarely confront the public with what it is doing. When Parliament confers a power to be exercised in the "public interest", this will resonate with the public, commending it to them as desirable, as balancing the relevant competing interests in the particular context. As Ackland observed:

<blockquote>

> [T]he 'public interest' is a phrase sprinkled through legislation with gay abandon. It sounds democratic and noble, but at the end of the rainbow it has to be interpreted by a judge, or a cluster of judges – a recipe for uncertainty, because the judges themselves are uncertain.[74]</blockquote>

Unless the term is applied by the decision-maker – and reviewable by the judges – in a manner broadly consistent with the public's general understanding of the values that inform it, Parliament avoids full political responsibility for its actions. A principle of interpretation that requires the "public interest" be interpreted by reference to such values means that if Parliament wants to confer a discretion that does not accord with this understanding it must do so expressly – ie it must take responsibility for doing so. As the

[71] *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, [57] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

[72] See, eg *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

[73] *R v Secretary of State for the Home Department; Ex p Simms* [2000] 2 AC 115, 131 (Lord Hoffman); B Lim, "The Normativity of the Principle of Legality" (2013) 37 *Melbourne University Law Review* 372, 374.

[74] R Ackland, "The Obscure World of Public Interest", *Sydney Morning Herald* (29 June 2012).

Full Federal Court explained in *Bropho v Human Rights and Equal Opportunities Commission*, when talking about "good faith":

> <blockquote>
>
> [T]he occurrence of the words in a multiplicity of statutes suggests they bear meaning to those who draft the laws and to at least some of the legislators who vote for them. And it is not unreasonable to expect that those bound by them have a sense of their meaning which can be derived from their ordinary usage.[75]</blockquote>

This part explains in more detail the different steps of the proposed meta-principle of statutory construction, and explores how they might operate in relation to those public and national interest discretions in the migration legislation explored above. While this analysis is limited to the migration sphere, the approach advocated would have more general application across the many legislative spheres in which public interest discretions are now found.

<subdiv>Statutory Context

As with any interpretative exercise, one must start with the particular statutory words and context. Beyond criteria that give content to a small number of public interest discretions in the Act, the legislative scheme often provides little express assistance in determining the meaning of public and national interest. Nonetheless, the statutory context will often provide guidance as to the content of the discretion, and the weight of the relevant factors.

Throughout the *Migration Act* and *Migration Regulations*, the public interest and national interest tests are employed in varied contexts, which strongly suggests that their meaning depends on their particular use. For example, in relation to granting a visa on compassionate grounds when it would otherwise have been rejected, the public interest is more about the interests of individual applicants and those associated with them. In relation to refusing to grant a visa, or cancelling a visa, the public interest is more heavily weighted towards the interests of the Australian community at large.

A specific illustration of the importance of statutory context to determine relevant factors can be taken from the ministerial discretion under ss 501 and 501A to cancel a visa once a person has been found to be of bad character, if "refusal or cancellation is in the national interest". The power to cancel the visas of long-term residents or to overturn the decision of the AAT not to cancel the visa of a long-term resident are extraordinary powers, with serious implications for the lives of the visa holders involved.[76] The context of

[75] *Bropho v Human Rights and Equal Opportunities Commission* (2004) 135 FCR 105, [89].

[76] See Foster, n 32.

ss 501(3) and 501A thus provides good reason for the courts to interpret the national interest criteria narrowly, consistent with the approach of Kirby J in *Re Patterson*.[77]

The different statutory contexts in which the public interest tests arise should also inform each other. The authors agree, therefore, with the approach of the High Court in *Plaintiff S297/2013*, in which the Court resolved ambiguity in the "national interest" discretion to grant a protection visa by reference to the "public interest" discretion to lift the bar and allow the application.

<subdiv>Statutory Purpose

Basic principles of statutory interpretation require that the content of the discretion must be further informed by reference to the particular statutory purpose for which it is employed. A requirement for a "public interest" discretion to be exercised consistently with a statutory purpose recognises that when the legislature passes laws it is presumed to have made a determination about where the public interest lies in that context.[78]

Unfortunately, the explicit statutory purpose of the *Migration Act* – as set out in s 4(1) – provides little help in determining public and national interest discretions. It refers simply to regulating "in the national interest" the coming into and presence in Australia of non-citizens. Further, the multiple and conflicting historical purposes that have underpinned the enactment of different parts of legislation also offer little assistance.

The activities towards which the Act is directed help delimit the terms. Section 4 states that the Act puts in place and carries out a range of activities "to advance the object of the Act", including regulating the entry and exit of people from Australia, and "taking … unauthorised maritime arrivals from Australia to a regional processing country".[79] So the "public interest", as used in the *Migration Act*, will include pursuing these activities, unless the contrary intention appears.

The purpose of individual provisions will also be determined by their context. For example, in *Plaintiff M79/2012* the Court had to consider the purpose of the temporary safe haven visa in s 195A of the *Migration Act*. In the authors' view, the close attention to the purpose of the statutory scheme and its influence on the interpretation of the public interest criteria adopted in the reasoning of Hayne and Gageler JJ in that case is to be

[77] *Re Patterson; Ex p Taylor* (2001) 207 CLR 391.

[78] *Lieberman v Morris* (1944) 69 CLR 69, 84 (Rich J). See also R Brownsword, "Law and the Public Interest" in Brownsword, n 15, 7.

[79] *Migration Act 1958* (Cth) s 4(5).

preferred to the approach of the majority of separating the public interest criterion in s 195A from the purposes of the broad statutory scheme.

<subdiv>Other Principles of Statutory Construction

There are a number of principles of statutory interpretation that can be employed to further elucidate the meaning of wide public interest discretions. The principle of legality presumes that when Parliament legislates it did not intend to interfere with fundamental common law rights and liberties unless it does so clearly.[80] Indeed, when writing of the principle of legality in 2001, Dyzenhaus, Hunt and Taggart explained it by reference to its limiting effect on discretionary powers: "[B]roadly expressed discretions are subject to the fundamental values, including values expressive of human rights, of the common law."[81]

Such presumptions will manifest in public interest discretions where the discretion threatens a relevant right. In the migration sphere, they are likely to manifest particularly in relation to the exercise of discretions that will affect a person's liberty and right to be free from arbitrary detention, but also, as noted above, the right to physical and psychological safety, family life and their economic rights.

An interpretation of the discretion that is most consistent with liberty and protection of human rights should be preferred unless this interpretation is excluded explicitly or by necessary implication. A more specific example relates to the interpretation of s 198AB(3), where in *Plaintiff S156/2013* the High Court adopted an interpretation of the discretion that did not require the Minister to be satisfied that a regional processing country was capable of meeting its assurances regarding the treatment of transferred asylum seekers. An approach more consistent with fundamental rights would require the Minister to have a reasonable basis for accepting the assurances, such as seeking evidence that these assurances are capable of being, and are likely to be, fulfilled.

<subdiv>Wider Context: International Law

There is a presumption that Parliament intended to legislate in accordance with Australia's international obligations. This brings a wider non-statutory context into play. In the migration sphere, this wider context is informed by Australia's obligations under the Refugee Convention and various international human rights treaties.

---

[80] *Coco v The Queen* (1994) 179 CLR 427; Lim, n 74; D Meagher, "The Common Law Principle of Legality in the Age of Rights" (2011) 35 *Melbourne University Law Review* 449; D Meagher, "The Principle of Legality as Clear Statement Rule: Significance and Problems" (2014) 36 *Sydney Law Review* 413.

[81] D Dyzenhaus, M Hunt and M Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 *Oxford University Commonwealth Law Journal* 5, 6. And in Victoria and the ACT, statutory bills of rights require public authorities to give proper consideration to relevant human rights when exercising their powers: *Charter of Rights and Responsibilities Act 2006* (Vic) s 38(1); *Human Rights Act 2004* (ACT) s 40B(1).

For example, Australia's international human rights obligations ought to inform the court's review of the power of the Minister to designate a regional processing country "in the national interest" in s 198AB. Even though the Minister's discretion is expressed in very broad language and the amendment to the provision was evidently intended to bestow a broad discretion, it still operates within the broader framework of the *Migration Act*, which is "directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and Refugees Protocol".[82] It is argued, therefore, that contrary to the decision in *Plaintiff S156/2013*, there must be some role for courts to interrogate the basis for the assurances given to the Minister that the country will not subject a person to refoulement, and will properly assess whether the person is a refugee as defined in the Refugee Convention. Given the concern in s 198AB(3) with specific issues of refoulement and the availability of processing of refugee claims in the country to be designated a regional processing country, it is difficult to understand how the national interest could possibly be served if the other country was manifestly unable to process claims or prevent refoulement from occurring.

The High Court ought not allow the national interest requirement to be a "cloak" to allow a country to be designated a regional processing country where assurances have been given that are manifestly unfounded. To ensure their power is exercised in the national interest, the Minister needs to make some effort to ascertain the capacity of the country to give those assurances. It is here that the jurisdictional facts underpinning the national interest test are to be found. The Minister ought to inquire into PNG's human rights record, the existence of a claims process, its legal and administrative structures, and the conditions of temporary residence of asylum seekers. This approach would be one informed by and consistent with Australia's international obligations.

<subdiv>Underlying Constitutional Values

There is a presumption that Parliament did not intend to legislate inconsistently with constitutional limits, so that where the Parliament has conferred wide discretions they must be exercised in accordance with those limits.[83] At the federal level, there is also a need for all statutory provisions to fall within the Commonwealth's legislative competence,

[82] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[83] In *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 612–615 (Brennan J).

so that a discretion that is framed too broadly may not be able to be characterised as being with respect to a head of Commonwealth power.[84]

It is also proposed that the public interest must be informed by values that underpin the wider constitutional system in which the discretion operates. Quinn argues that the public interest lies in those values, norms and institutions that embody the public in any given society.[85] Drawing on this position, it is argued that there are values, norms and institutions that are established within Australia's constitutional structure that ought to inform the executive's consideration of the public interest. This approach is consistent with one advocated by Sunstein, that legislative interpretation ought to draw "on background principles from the legal culture more generally".[86]

While there is a generalisable aspect to this, the relevant considerations may differ between contexts in which the public interest is invoked. So, how to identify the relevant values, norms and institutions that embody the public interest in Australian society today? Such challenges confront other approaches to statutory and constitutional interpretation. For instance, they confront the functionalist approach to constitutional interpretation advocated by Dixon, which is informed by substantive constitutional values.[87] Similar hurdles confront the determination of what rights or values animate the principle of legality.[88]

Attempts have been made to articulate the values that inform the "public interest" within the Australian *Constitution*. Wheeler has posited a hierarchy of public interest values: shared public values; things of shared public concern; and individual concerns. According to Wheeler's classification system, values lower in the hierarchy cannot trump values located higher.[89] Appleby has argued that three broad principles underpin Australia's constitutional system, and ought to inform the public interest obligations of the Law Officers (the Attorney- and Solicitor-General). These are: the rule of law (which includes the prohibition on arbitrary exercise of government power protections of judicial independence and fair process, and extends at least some way to protecting individual

[84] See L Burton-Crawford, "Can Parliament Confer Plenary Executive Power? The Limitations Imposed by ss 51 and 52 of the Australian Constitution" (2016) 44(2) *Federal Law Review* 285.

[85] CJ Quinn, "Theories of Public Interest: A Conceptual Analysis" (PhD Thesis, Syracuse University, 1980) 288.

[86] C Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1993) 4.

[87] R Dixon, "The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term" (2015) 43(3) *Federal Law Review* 455.

[88] See, eg attempts to grapple with this question in Lim, n 74; Meagher (2011), n 81; Meagher (2014), n 81.

[89] Wheeler, n 12, 39.

rights); the democratic principle (which encompasses the right to vote and participate in government affairs, accountability, freedom of communication and association, and openness and transparency); and the federal principle.[90]

Consistent with Heydon J's position in *Plaintiff S10/2011*, such an approach must not prioritise the individual over the community, as it is the *public* interest that is considered. Rather, the individual's interests are prioritised to the extent they are consistent with community commitments that value and protect individuals, for instance, against arbitrary exercise of government power.

How might such values inform the exercise of a public interest discretion? Consider their application in the context of the "public interest powers" in the *Migration Act*. In *Plaintiff M79/2012*, the majority accepted that a safe haven visa could be issued "in the public interest" without recourse to the purpose for which a safe haven visa was granted but rather by reference to other purposes for which the visa had not been created. This is fundamentally inconsistent with the value of protecting against arbitrary exercise of government power, as well as the values of accountability and transparency. The approach of Hayne J is far more consistent with ensuring power is limited and accountable to the purpose for which it is conferred.

Attempts to source informative values have largely focused on the *public* interest rather than the *national* interest, which is a discretion particularly encountered in the migration setting. It is likely that the national interest is informed at least in part by different values; specifically, the national interest is likely to weigh more heavily values including national security and economic and social cohesion than protecting and promoting the individual within the community. However, where possible, these values should still be pursued.

The national interest discretion in ss 501 and 501A, where the Minister can refuse or cancel visas without affording non-citizens natural justice or merits review, provides a useful example of how these values might inform a national interest discretion. Fundamental national interest values would emphasise the importance of the Minister being satisfied of the specific threat of the individual to national security and economic and social cohesion. While this might initially be thought to point towards a broad reading of the discretion, consistent with the approach of Kirby and Gaudron JJ in *Re Patterson*, the

[90] G Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 141–143. See also P Finn, "A Sovereign People, A Public Trust" in PD Finn (ed), *Essays on Law and Government: Volume 1 Principles and Values* (The Law Book Co Ltd, 1995) 1, 232; B Selway, "The Duties of Lawyers Acting for Government" (1999) 10 PLR 114; D Collins, "Address by Dr David Collins QC, Solicitor-General of New Zealand to the Australian Law Teachers Assocation 65th Annual Conference" (Paper presented at the *ALTA Conference*, Auckland, 6 July 2010) 4 fn 10; J Tait, "The Public Lawyer, Service to the Client and the Rule of Law" (1997) *The Commonwealth Lawyer* 58, 65.

decision-maker must not simply be satisfied that the individual had a substantial criminal record but that they represented a genuine threat to the community.

<DIV>CONCLUSION

Orwell observed that some political words are now "almost completely lacking in meaning". Often they simply signify something desirable or undesirable. They may have several, irreconcilable meanings. The settling upon an agreed definition of such words is resisted as the existence of a single meaning would decrease the capacity of a broad range of regimes to invoke the word for their own political objectives. As Orwell explained: "Words of this kind are often used in a consciously dishonest way, that is, the person who uses them has his own private definition but allows his hearer to think he means something quite different."[91]

This article has studied the national and public interest discretions that pervade Australia's migration law in an attempt to articulate what might inform those discretions in a meaningful way. It has argued that the courts must not leave these discretions entirely in the hands of executive decision-makers. The rule of law requires that these powers have content and that they be subject to review.

To address these concerns, the adoption of a meta-principle of interpretation was suggested to encourage the courts to take a strengthened "realist" approach in which they have power to review the factors that inform a public interest discretion. While the interpretation exercise must be informed, as with all provisions, by the statutory words, context and purpose, and ordinary rules of statutory interpretation, it was argued that it must also be informed by the historical policy context, relevant international obligations and underlying constitutional values. Informed in this way, the national and public interest can be legitimate and positive features of Australia's statute books with important work to do.

It is unlikely that future Parliaments will shy away from the public interest test in the migration context (as well as many others). It is imperative, then, that the courts have clear principles for the interpretation of the public interest discretion so that it acts as an effective constraint on executive power and is not deployed dishonestly for political ends.

[91] G Orwell, *Politics and the English Language* (Horizon, 1946).