Tribunals and the public interest

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The jurisdiction conferred on Australian tribunals is diverse and complex. Tribunals review decisions of government agencies and decision-makers, including ministers; in the states and territories they determine civil disputes between citizens in an exercise of judicial power; and they exercise protective functions in matters such as guardianship and in professional disciplinary proceedings.

Administrative review of government decision-making is often characterised as a contest between the rights or interests of the individual initiating the process and a broader public interest. That broader public interest is sometimes framed in terms of a fair allocation of limited resources across the community — for example, in income support or natural resource decision-making. Some administrative review proceedings, such as migration, call on broader policy objectives. Traditional thinking as to how best to achieve a proper balance between fairness to an individual, consistency in decision-making across an agency and review tribunals, and consistency with broader goals, usually by recourse to government policy, reflects that contest.

The public interest dimension of what tribunals do is not limited to administrative review. A tribunal determining a professional or occupational licensing or disciplinary matter will also be mediating a contest between individual and broader interests, in many circumstances deciding whether a person can maintain a valued and valuable livelihood in a context where protection of the public is paramount. A guardianship tribunal will be balancing fundamental human rights, including the right to individual autonomy in decision-making and the right to protection from neglect, abuse and exploitation.

Tribunals are not infrequently required to have regard to 'the public interest': the legislation they apply may identify it, whether expressly or not, as a mandatory relevant consideration; as a factor in the process adopted; or as an outcome or goal to be achieved in the exercise of a discretionary power.

Engaging 'the public interest' in the context of good public administration in a democratic society has been considered from the perspective of public officials;[1] and in the context of the exercise of discretionary powers by the executive.[2] This article seeks to contribute to that debate by considering how tribunals identify, take into account and promote 'the public interest'. It does so from two perspectives: first, by asking when and how a tribunal may be required to take into account or apply 'the public interest'; and, secondly, by considering how a

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1 C Wheeler 'The Public Interest Revisited — We Know it's Important But Do We Know What it Means?' (2013) 72 *AIAL Forum* 34.

2 G Appleby and A Reilly, 'Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation' (2017) 28 *Public Law Review* 293.

tribunal can identify what is the 'public interest' in a particular context. The observations made in this article draw primarily on a brief survey of one area of tribunal work — administrative review of decisions made under the firearms legislation in each of the states and territories, with a brief comparison with professional disciplinary proceedings.

The public interest

The threshold question is: what is 'the public interest'? Is there 'a' public interest or rather a range of interests that might properly be described as 'public interests'? If so, how do we define them? A common starting point is to think of the public interest as 'the common good' or as being whatever is not a purely 'private' interest. Neither is entirely satisfactory as a definition of what is 'the public interest'.

Wheeler has commented that, although the term 'public interest' is a central concept in a democratic system of government, it has never been definitively defined either in legislation or by the courts:

> The public interest has been described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as being for the benefit of society, the public or the community as a whole.[3]

Wheeler notes that, while most attempts to describe what is meant by the 'public interest' refer to the 'community', 'common' good or welfare, 'society', 'public' or the 'nation', the issue of what constitutes the 'public' in 'public interest' has largely been unexplored.[4] He argues that there is wide acceptance that there is a spectrum: at one end, 'public interest' relates to the interests of members of the community as a whole or a substantial segment of them, as distinct from individual or sectional interests, while, at the other, there are certain private rights of individuals regarded as being so important that their protection is in the public interest — for example, privacy. In between, he argues, there can be the interests of groups, classes or sections of a population, and the 'public' whose interests are to be considered can validly consist of a relatively small group or section of a population.

The public interest: statutes

Writing in 2013, Wheeler noted that in New South Wales there are nearly 190 Acts which require that the public interest be considered in implementing the Act or in making particular administrative decisions under the Act.[5] There are now no doubt many more, both in New South Wales and, assuming the pattern is uniform, across Australia. As Appleby and Reilly note, the 'public interest' has become an instrument of positive law, as government decision-makers have statutory obligations to take action and make decisions that accord with the 'public interest'.[6]

Those statutory obligations take many forms. In the context of administrative decision-making, that may be imposing an obligation to consider the public interest, in

3 Wheeler (n 1) 35.
4 Ibid 37.
5 Ibid 46.
6 Appleby and Reilly (n 2) 293.

conferring a power to act or confer a benefit if that is in the public interest, or by requiring refusal of a benefit if contrary to the public interest.[7] The public interest may be identified as a factor to be taken into account — that is, an *input*; as a *process*; or as the *outcome* of the decision-making process.[8]

The approach to understanding 'the public interest' in a legislative context was stated by the High Court in *O'Sullivan v Farrer*[9] (*O'Sullivan*) in the following terms:

> the 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': *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR, at p505, per Dixon J.[10]

The 'public interest' means different things in different contexts. In *Commissioner of Police v Eaton*,[11] concerning dismissal of a probationary constable, at issue was the interrelationship between two statutes — the *Industrial Relations Act 1996* (NSW) and the *Police Act 1990* (NSW). Both required consideration of the public interest. As Crennan, Kiefel and Bell JJ noted:

> The [Industrial Relations] Act has as its objects matters of public interest, such as the promotion of efficiency and productivity in the New South Wales economy. Section 146(2) requires the IR Commission to take into account the public interest in the exercise of its functions and, for that purpose, to have regard to the objects of the IR Act, and the state of the economy of New South Wales and the likely effect of its decisions on that economy. The matters of public interest to which the Police Act directs attention are different. The Police Act requires, for the purposes of Div 1C of Pt 9, that the public interest be taken to include maintaining the integrity of the NSW Police Force and the fact that the Commissioner made an order for removal.[12]

In the context of freedom of information legislation, in *McKinnon v Secretary*, *Department of Treasury*[13] Tamberlin J said:

> 9 The expression 'in the public interest' directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. …
>
> 10 The expression 'the public interest' is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination …
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> 11 The indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination. …

7 Wheeler (n 1) 46.
8 Ibid 40.
9 (1989) 168 CLR 201.
10 Ibid 216 (Mason CJ; Brennan, Dawson and Gaudron JJ).
11 [2013] HCA 2.
12 Ibid [70].
13 [2005] FCAFC 142.

> 12 The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides.[14]

Justice Tamberlin referred to the decision of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith*,[15] where Kaye, Fullagar and Ormiston JJ said:

> The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals: *Sinclair v Mining Warden at Maryborough* [1975] HCA 17; (1975) 132 CLR 473 at 480, per Barwick CJ. There are ... several and different features and facets of interest which form the public interest.[16]

In *Philip Morris Ltd and Prime Minister*,[17] also a freedom of information matter, Deputy President Forgie acknowledged the fluid nature of the concept in her conclusion that:

> the public interest is not a static concept. It is, instead, a concept that takes its shape and substance from the circumstances which are said to give rise to it. Those circumstances will be factual and statutory.[18]

Tribunals and the public interest

Tribunals are creatures of statute, and they derive their powers and functions from their constituent legislation and jurisdiction-specific legislation. Tribunals exercising administrative power, most often in determining an application for administrative review of a decision of a government decision-maker or agency, operate in the same statutory context and for the most part will be exercising the same powers and functions as the original decision-maker.

However, tribunals are not part of the executive, bound by the same accountability framework as those whose decisions they review. How do tribunals identify and take account of the public interest when exercising statutory powers? Are there constraints or challenges for a tribunal in doing so?[19]

An obvious context in which to consider this question might be freedom of information legislation, which explicitly requires the decision-maker to consider the public interest in disclosure, or non-disclosure, of particular information in response to an access request. However, freedom of information legislation is unusual in that it expressly identifies the

14 Ibid [9]–[12].
15 [1991] VicRp 6; [1991] 1 VR 63.
16 Ibid [75].
17 [2011] AATA 556.
18 Ibid [229].
19 An analogous issue is raised for the Administrative Appeals Tribunal in how it is to take into account 'expectations of the Australian community' in consideration of visa decisions on character grounds: see *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690 [79] (Justice Downes, President of the AAT) and *Re Jupp and Minister for Immigration and Indigenous Affairs* [2002] AATA 458, considered in M Harkin, 'Balancing the Discretionary Seesaw: Are Community Values an Appropriate Guide for the AAT's "Preferable' Decisions?"' (2017) 24 *Australian Journal of Administrative Law* 19; Hon Justice D Thomas, 'Contemporary Challenges in Merits Review: The AAT in a Changing Australia' (2020) 96 *AIAL Forum* 1–11.

relevant (and competing) public interests and directs the decision-maker, including a tribunal on review, as to how they are to be evaluated. The *Freedom of Information Act 1982* (Cth), for example, establishes categories of documents that are exempt or conditionally exempt by reference to public interest considerations, access to the latter being required unless at that time it would, on balance, be contrary to the public interest.[20] In New South Wales, Pt 2 Div 2 of the *Government Information (Public Access) Act 2009* states that there is a general public interest in favour of disclosure of government information, gives examples of public interest considerations in favour of disclosure, lists in table form public interest considerations against disclosure, and requires the decision-maker to determine whether on balance the public interest considerations against disclosure outweigh those in favour of disclosure.

For the purposes of this article, a better place to start is the firearms legislation of each state and territory. There are two reasons for that choice: first, its relative consistency across Australia enables some comparison between jurisdictions; and, secondly, it has been shaped by and reflects significant public policy drivers. Australian firearms legislation is the outcome of the law reform process undertaken since the 1990s in response to specific incidents such as the Port Arthur shootings in Tasmania in 1996 and the Monash University shootings in 2002. Three national agreements, primarily through the Council of Australian Governments (COAG) process, have led to the relatively consistent approach to firearms legislation across Australia: the National Firearms Agreement (1996), the National Firearm Trafficking Policy Agreement (2002) and the National Handgun Control Agreement (2002).[21]

Firearms legislation

The legislation of each state and territory is complex, regulating possession of and dealings with a range of different types of weapons; different types of licences and permits; and different factors for consideration of the issue, renewal or cancellation of those licences or permits. For an application for the issue of a licence for a firearm, all jurisdictions require that matters such as the applicant's criminal record, mental and physical health, any criminal intelligence information, and whether there are any other adverse concerns — for example, domestic violence orders — be taken into account.

All jurisdictions other than the Australian Capital Territory (ACT) require the decision-maker to decide whether the person seeking a licence is a 'fit and proper person' to hold the licence. The requirement is expressed in different terms: that the licence may only be issued if the decision-maker is satisfied that the applicant is a fit and proper person,[22] or may only be refused if the decision-maker is not satisfied that the applicant is a fit and proper person,[23] or must not be issued if the decision-maker is satisfied that the applicant is not a fit and

20 *Freedom of Information Act* 1982 (Cth) s 11A(5).

21 Noting that in some instances that has been grafted on to existing legislation: see discussion in *Kocic v Commissioner of Police, NSW Police Force* [2014] NSWCA 368 [30]–[33].

22 *Firearms Act 1996* (NSW) s 11(3)(a); *Weapons Act 1990* (Qld) s 10(2)(e); *Firearms Act 1996* (Tas) s 29(1)(c); *Firearms Act 1996* (Vic) s 17(1)(c)(i); *Firearms Act 1997* (NT) s 10(3)(b).

23 *Firearms Act 2015* (SA) s 15(1)(b).

proper person.[24] The ACT requires the decision-maker to be satisfied that the applicant 'is suitable'.[25]

Criteria for determining whether an applicant is a 'fit and proper person' are specified in Queensland,[26] Tasmania[27] and Western Australia.[28] An evaluation is required, which, in the absence of specified criteria, is routinely undertaken by reference to the principles stated in decisions of the High Court in *Australian Broadcasting Tribunal v Bond*[29] and *Hughes and Vale Pty Ltd v New South Wales (No 2)*.[30] Those principles were summarised in *AJO v Director-General Department of Transport*[31] in the following terms:

> In *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 at [25]; (1990) 170 CLR 321, Chief Justice Mason explained that, at 380:
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> 'The question whether a person is fit and proper is one of value judgment. In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker. So too is the weight, if any, to be given to matters favouring the person whose fitness and propriety are under consideration.'
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> Toohey and Gaudron JJ said at 380 [26]–[27]:
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> 'The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.'
>
> A person's fitness is to be gauged in the light of the nature and purpose of the activities that the person will undertake. In *Hughes and Vale Pty Ltd v New South Wales (No 2)* [1955] HCA 28; (1955) 93 CLR 127 the High Court said (at 156–7):
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> 'The expression "fit and proper" is of course familiar enough as traditional words when used with reference to offices and perhaps vocation. But their very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty, knowledge and ability ... When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances.'

24 *Firearms Act 1973* (WA) s 11(1)(c).
25 *Firearms Act 1996* (ACT) s 58(1)(b), to be considered by reference to criteria specified in ss 17, 18 (discretionary criteria) and 19 (mandatory criteria).
26 *Weapons Act 1990* (Qld) s 10B.
27 *Firearms Act 1996* (Tas) s 29(2).
28 *Firearms Act 1973* (WA) s 11(3).
29 [1990] HCA 33; (1990) 170 CLR 321.
30 [1955] HCA 28; (1955) 93 CLR 127. See, for example, *CAT v Queensland Police Service* [2017] QCATA 43; *Stretton v Queensland Police Service* [2018] QCATA 37; *ZZN v Firearms Appeals Committee (Review and Regulation)* [2017] VCAT 1563; *Polizzi v Commissioner of Police* [2014] WASAT 144.
31 [2012] NSWADT 101.

In *Sobey v Commercial and Private Agents Board* 20 SASR 70 Walters J said:

> 'In my opinion what is meant by that expression is that the Applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities evolving upon him as the holder of a particular licence ... but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public ... as a person to be entrusted with the sort of work which the licence entails.'[32]

Those principles, and the statutory criteria where specified, focus on the attributes of the individual, in the broader context of public expectations of the holder of the relevant licence or authority.

While there are differences across jurisdictions, all except Western Australia provide for the public interest as a separate consideration. Again, the test is expressed in different forms. In New South Wales, an application for a licence may be refused if the decision-maker considers that the issue of the licence 'would be contrary to the public interest'.[33] Tasmania and the Northern Territory are similar.[34] Victoria provides that a licence must not be issued 'unless … satisfied that … the issue of the licence is not against the public interest'.[35] In Queensland, the public interest consideration is subsumed in the consideration of whether the applicant is a fit and proper person, to be considered in addition to the applicant's mental and physical fitness, whether there is a domestic violence or similar order, whether the person has provided false or misleading information, and criminal intelligence information.[36]

In the ACT, the public interest consideration arises where there is information held by a law enforcement agency in relation to an individual that indicates it would be contrary to the public interest for the individual to have access to a firearm.[37] Section 37(2)(a) of the *Firearms Act 1996* (ACT) enables the Minister to make guidelines about the making of decisions about the public interest under s 18(1)(c).[38]

In South Australia, s 12(6)(a) of the *Firearms Act 1977* provided that a ground on which the Registrar 'may only refuse' a licence included '(vi) to grant the application would, in the Registrar's opinion, be contrary to the public interest'. The *Firearms Act 2015*, which came into force on 1 July 2017, has changed that test: s 15(1) provides that the Registrar may only refuse an application for a licence if the Registrar is not satisfied '(l) that to grant the licence would be in the public interest'. The significance of the change was described by the President of the South Australian Civil and Administrative Tribunal in *Breeding v Registrar of Firearms*:

> Under the 1977 Act, against which the Delegate assessed the application, the Registrar may only refuse a licence if, amongst other things, he or she is of the opinion that that to grant it would be contrary to the public interest. The 2017 Act has altered that ground by requiring that the Registrar may only refuse if he or she is not satisfied that to grant the licence would be in the public interest. This is consistent with the scheme that emphasises the concept of firearms possession as a privilege, as set out in the principles and objects in s 3

32 Ibid [25]–[27].
33 *Firearms Act 1996* (NSW) s 11(7).
34 *Firearms Act 1996* (Tas) s 36(1); *Firearms Act 1997* (NT) s 10(8).
35 *Firearms Act 1996* (Vic) s 17(1)(c)(v).
36 *Weapons Act 1990* (Qld) s 10B(1)(d).
37 *Firearms Act 1996* (ACT) s 18(1)(c).
38 A search of the ACT Legislation Register and the ACT Firearms Registry website does not disclose any such guidelines.

> that were not present in the 1977 Act. In other words, the test has become more difficult for an applicant to meet since the application was refused. No submission was put as to why it would be in the public interest to grant this licence. I infer from Mr Breeding's submissions that the pleasure he takes in hunting, and perhaps in participating in a social activity, constitutes that public interest. Against that, I balance the interest that the public has in having the risk of harm from the misuse of firearms minimised by ensuring that those who might misuse them are not granted licences.
>
> I am not satisfied that it would be in the public interest to grant this licence.[39]

Western Australia has no separate criterion expressed in terms of 'public interest', s 11(1)(b) of the *Firearms Act 1973* providing that a licence cannot be issued if the Commissioner 'is of the opinion that … it is not desirable in the interests of public safety'.

While all jurisdictions require some consideration of the public interest, in those diverse ways, what they have in common is that that term is not defined. In the absence of a definition, the first question is whether, and if so to what extent, the public interest test requires or permits consideration of factors other than those relevant in determining whether an applicant is a fit and proper person to hold a licence.

The NSW Civil and Administrative Tribunal (NCAT) and its predecessor, the Administrative Decisions Tribunal (ADT), have taken the position that there is a difference between the factors relevant to each inquiry. The approach was explained by the Appeal Panel of the former ADT in *Commissioner of Police v Toleafoa* (*Toleafoa*):

> The 'public interest' is an inherently broad concept giving the appellant the ability to have regard to a wide range of factors in choosing whether to exercise a discretion adversely to an individual. As the possibility of refusing an application on the ground of character is dealt with elsewhere in the same section, it is reasonable to infer that the Parliament intended that the public interest discretion operate in areas to which the character ground was not relevant or, possibly, in circumstances where an objection on character grounds would not be sufficient in its own right to warrant refusal.[40]

Toleafoa was a decision under the *Security Industry Act 1997*, and the reasoning has been applied in proceedings under the Firearms Act.[41] In *Constantin v Commissioner of Police*[42] the Appeal Panel held:

> The 'public interest' allows, we consider, for issues going beyond the character of the applicant to be taken into account. These may include concerns in relation to public protection, public safety and public confidence in the administration of the licensing system.[43]

In *Kocic v Commissioner of Police NSW Police Force*[44] (*Kocic*), where the issue was whether the Tribunal was entitled to take into account spent convictions in circumstances where the

39 [2017] SACAT 40 [95]–[96].
40 [1999] NSWADTAP 9 [25].
41 See, for example, *Ward v Commissioner of Police* [2000] NSWADT 28.
42 [2013] NSWADTAP 16.
43 Ibid [33].
44 [2014] NSWCA 368.

primary decision-maker was expressly prohibited from doing so,[45] Basten JA held that no 'bright line' can be drawn between the factors relevant to the public interest consideration in s 11(7) and those addressed under other subsections, including the 'fit and proper' criterion in s 11(3)(a).[46] There may be characteristics of the applicant which might not lead to refusal under those other provisions but which would nevertheless permit refusal under s 11(7), an example being where some weight might be given to spent firearm convictions, including with respect to the credibility of the applicant. Leeming JA held that forming a view that the issue of a licence is 'contrary to the public interest' is a very different concept to character or fitness under s 11(7).[47] While in dissent on the issue of whether a spent conviction could be taken into account, White J held in relation to the public interest criterion:

> The matters that can be taken into account in making an assessment of the public interest pursuant to s 11(7) are not limited to matters not otherwise dealt with by s 11(3). Such considerations may include an applicant's fitness or character if that is relevant to an assessment of the public interest (as it would usually be), notwithstanding that an applicant's fitness or character is a separate matter to be considered under s 11(3)(a) and notwithstanding that in applying s 11(3)(a) the Commissioner cannot have regard to the spent convictions or the conduct underlying them.[48]

If the inquiry is not restricted to, and not entirely separate from, the factors relevant to the 'fit and proper' criterion, the question is what matters may be relevant to a consideration of the public interest. In *Websdale v Chief Commissioner of Police* (*Review and Regulation*)[49] (*Websdale*), Acting President Judge Hempel drew on the freedom of information authorities referred to above and listed nine matters relevant to the public interest test applicable to the making of a firearms prohibition order:

> These statements of principle indicate that the following matters require consideration:
>
> (a) public interest embraces standards of conduct acknowledged to be for the good order of society and the well-being of its members;
>
> (b) it is the interests of the public, as distinct from the interests of individuals, which must be considered;
>
> (c) there is a difference between mere individual interest which does not involve a public interest, and individual interests which do involve a public interest;

45 That issue was the subject of the High Court decision in *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16. ASIC, as primary decision-maker, was expressly precluded by s 80(2) of the *National Consumer Credit Protection Act 2009* (Cth) from taking into account spent convictions in determining whether an applicant is a 'fit and proper person' to engage in 'credit activities'; whereas, by operation of s 85ZZH(c) of the *Crimes Act 1914* (Cth), the provision in s 85ZW of that Act that a person whose conviction is spent does not need to disclose it, does not apply to disclosure of information to a court or tribunal established under Commonwealth, state or territory law for the purpose of making a decision. The High Court held that in determining whether an applicant is a 'fit and proper person' the AAT could not take into account spent convictions. Kiefel CJ, Keane and Nettle JJ at [28]–[32] gave detailed consideration to the Court of Appeal decision in *Kocic v Commissioner of Police NSW Police Force* [2014] NSWCA 368, agreeing with Basten and Leeming JJA that it was counterintuitive that an applicant should be disadvantaged in the review by having spent convictions taken into account, compared to the position before the original decision-maker. The High Court did not address the issue of the distinction between 'fit and proper' and the 'public interest'.

46 *Kocic v Commissioner of Police NSW Police Force* [2014] NSWCA 368 [41].

47 Ibid [92].

48 Ibid [106].

49 [2019] VCAT 666.

(d) a broader range of circumstances than those that are of immediate consequence to the person affected must be considered;

(e) consideration of what is in the public interest requires a discretionary value judgment to be made by reference to undefined factual matters;

(f) public interest requires consideration of 'fact/value complexes', not merely facts;

(g) the scope and purpose of the Act are to be taken into account when considering what matters are relevant to the exercise of the discretion;

(h) public interest will seldom be seen as one dimensional — a number of competing arguments about, or features of, the public interest will likely need to be considered; and

(i) when human rights are engaged, public interest considerations extend to human rights considerations.[50]

The statutory context of *Websdale* should be noted. The decision-maker had to be satisfied it was in the public interest to make a firearms prohibition order, having regard to one of four criteria specified in s 112E of the Firearms Act: the criminal history of the person, their behaviour, the people with whom they associate, or the threat or risk they may pose to public safety. To the extent that those factors focus on matters that might also go to whether the individual is 'fit and proper', the legislation does not provide the 'bright line' to which Basten JA referred in *Kocic*.

Of more significance to the general point about how a tribunal can determine what 'the public interest' is and requires is that the Acting President went on to say:

> In considering what 'in the public interest' means in the Act, it is convenient to start with a consideration of the purposes of the Act and the consequences of the making of an order. It is clear Part 4A was intended to apply to circumstances where Parliament considered that the pre-existing restrictions on a person's right to acquire, possess, carry or use a firearm were inadequate to protect against the escalating and changing nature of firearm related crime.[51]

Other decisions of the Victorian Civil and Administrative Tribunal (VCAT) and those in other jurisdictions demonstrate a similar reliance on the legislative statements of objects and purpose to discern what is the public interest. In *O'Sullivan v Firearms Appeals Committee*[52] (*O'Sullivan*) a review of a decision to refuse a junior firearms licence, Vice President Judge Dove explained the public interest in the following terms:

> In the context of this Act, the public interest arises because of a general community interest in, and awareness of, the need for safety in relation to the use of firearms. It is related to an interest common to the public at large or a significant portion of the public. That acknowledgement of public interest by Parliament is demonstrated by the purposes set out in section 1 of the Act, where the primary purpose is identified as being to give effect to the principle that the possession, carriage, use, acquisition and disposal of firearms are conditional on the need to ensure public safety and peace.[53]

50 Ibid [25].
51 Ibid [26].
52 [2004] VCAT 1662.
53 Ibid [31].

In *Stretton v Queensland Police Service*[54] the Appeal Tribunal of the Queensland Civil and Administrative Tribunal noted that the legislation did not prescribe the factors to be taken into account in considering whether it was in the public interest to revoke a licence, and the 'discretion should therefore be exercised in a way that promotes the principles and objects of the Weapons Act'.[55]

In New South Wales, NCAT has also drawn on the purpose of the legislation as evidenced in the statement of legislative objects. For example, in *Commissioner of Police*, *NSW Police v Lee*[56] the Appeal Panel noted:

> The purpose of the firearms legislation is clear from the statutory principles and objects of the Firearms Act. The possession and use of firearms is subject to the 'overriding need to ensure public safety': Firearms Act s 3(1)(a). Public safety is improved by 'imposing strict controls on the possession and use of firearms' and by 'promoting the safe and responsible storage and use of firearms': Firearms Act s 3(1)(b). The objects of the Act include 'to establish an integrated licensing and registration scheme for all firearms;' 'to require each person who possesses or uses a firearm . . . to prove a genuine reason for possessing or using the firearm;' and 'to provide strict requirements that must be satisfied in relation to licensing of firearms and the acquisition and supply of firearms': Firearms Act s 3(2)(b), (c) and (d).[57]

These decisions confirm that when required to consider whether it is or is not in the public interest for an applicant to be issued a firearms licence, a review tribunal will be able to discern what is in the public interest by recourse to the statement of objects and principles in the legislation. That is made easier in the case of the firearms legislation by the detailed statement of both principles and objects in the legislation of most jurisdictions, reflecting the legislative history.[58] An illustration is s 3 of the *Firearms Act 1996* (NSW):

> **3 Principles and objects of Act**
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> (1) The underlying principles of this Act are:
>
> (a) to confirm firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety, and
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> (b) to improve public safety:
>
> (i) by imposing strict controls on the possession and use of firearms, and
>
> (ii) by promoting the safe and responsible storage and use of firearms, and
>
> (c) to facilitate a national approach to the control of firearms.
>
> (2) The objects of this Act are as follows:
>
> (a) to prohibit the possession and use of all automatic and self-loading rifles and shotguns except in special circumstances,

54 [2018] QCATA 37.
55 [2018] QCATA 37 [34].
56 [2016] NSWCATAP 234.
57 Ibid [24].
58 *Firearms Act 1996* (NSW) s 3; *Weapons Act 1990* (Qld) s 3; *Firearms Act 1996* (Vic) s 1; *Firearms Act 1996* (ACT) s 5. There is no express statement of objects in the legislation of Tasmania, Western Australia or the Northern Territory.

(b) to establish an integrated licensing and registration scheme for all firearms,

(c) to require each person who possesses or uses a firearm under the authority of a licence to prove a genuine reason for possessing or using the firearm,

(d) to provide strict requirements that must be satisfied in relation to licensing of firearms and the acquisition and supply of firearms,

(e) to ensure that firearms are stored and conveyed in a safe and secure manner,

(f) to provide for compensation in respect of, and an amnesty period to enable the surrender of, certain prohibited firearms.

That statement is similar to those in the legislation of the ACT and South Australia,[59] which also state that possession and use of firearms is a privilege. Queensland is similar, s 3 of the Weapons Act stating that possession and use are subordinate to the need to ensure public and individual safety. In Victoria, possession of a firearm is conditional on the need to ensure public safety and peace.[60]

Where there is no express statement of principle, such as in Western Australia, the state Administrative Tribunal has relied on the long title to the Act,[61] stating that the broad purpose of the legislation 'is to protect the public'.[62] Decisions of the Court of Appeal have referred to the amendment and strengthening of the firearms legislation after the events of Port Arthur, including reference to the resolutions of the Australasian Police Ministers' Council in May 1996 aimed at achieving more stringent and uniform firearms laws across Australia, and the Minister's second reading speech.[63]

Recourse to legislative statements of principles and objects, or to secondary material such as parliamentary debates, in the exercise of a 'public interest' discretion is of course an orthodox approach to statutory interpretation.[64] It is consistent with the High Court decision in *O'Sullivan* and supported by the proposition that when the legislature passes laws it is presumed to have made a determination about where the public interest lies in that particular context.[65]

In the context of firearms legislation, the relevant 'public interest' is protection and improvement of public safety, considered as distinct from individual or private interests; and the relevant 'public' is the community as a whole.

The 'public interest' in other legislation

The need to consider 'the public interest' is not confined to administrative review tribunals. Other legislative contexts may raise different issues for that consideration. In another

59 *Firearms Act 1996* (ACT) s 5; *Firearms Act 2015* (SA) s 3.
60 *Firearms Act 1996* (Vic) s 1(a).
61 'An Act to make provision for the control and regulation of firearms and ammunition, the licensing of persons possessing, using, dealing with, or manufacturing firearms and ammunition, the repeal of the *Firearms and Guns Act 1931*, and for incidental and other purposes.'
62 *Polizzi v Commissioner of Police* [2014] WASAT 144 [48].
63 *McGee v Chitty* [2011] WASCA 125 [38], [39].
64 D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) Chs 2, 3.
65 Appleby and Reilly (n 2) 305.

example of relatively uniform legislation, in the field of professional disciplinary proceedings, the Health Practitioner Regulation National Law as implemented in each of the states and territories provides a national scheme for regulation of registration, accreditation and discipline of health professionals in 15 health professions.[66] While the majority of formal complaints against health practitioners are handled within the professional board system, more serious complaints of professional misconduct are referred for determination to the 'responsible tribunal' in each jurisdiction.[67]

The legislation of each jurisdiction specifies in s 3 objects which include 'to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered', as well as 'to facilitate workforce mobility across Australia' and 'to facilitate access to services provided by health practitioners'. New South Wales and Queensland have added to their versions of the legislation an additional objects section, s 3A, which provides that 'the health and safety of the public is the paramount guiding principle'. Millbank comments that this provision was inserted possibly because of concern that 'access to health services' would be seen as competing with or overriding safety considerations.[68] Millbank notes that 'protection of the public' is also expressed as a 'primary consideration' in balancing the objects of the scheme under the Australian Health Practitioner Regulation Agency's *Regulatory Principles for the National Scheme*.

A decision-maker (including a tribunal exercising a disciplinary function) applying s 3A, and having regard to s 3 and to the Regulatory Principles, will be adopting a similar understanding of the public interest to that evident in the firearms legislation — namely, the protection of public safety. However, as discussed below, the 'public interest' in health practitioner regulation may extend beyond protection of public safety. And the 'public', if not the community as a whole, will be the broad range of persons who may access the services of the relevant health practitioners; and may include the section of the public who are other health professionals.[69]

The Health Practitioner Regulation National Law includes an express reference to 'the public interest' in the provisions enabling the relevant authority to take immediate or interim action.[70] In New South Wales, s 150(1) of the Health Practitioner Regulation National Law (NSW) No 86a enables the relevant professional council in responding to a complaint to

66 The Health Practitioner Regulation National Law is a Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld), implemented as the Health Practitioner Regulation National Law (NSW) No 86a; *Health Practitioner Regulation National Law (Victoria) Act 2009; Health Practitioner Regulation National Law (ACT) Act 2020; Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT)*; Health Practitioner Regulation National Law (Tasmania) Act 2010; Health Practitioner Regulation National Law (South Australia) Act 2010; and Health Practitioner Regulation National Law (WA) Act 2010.*

67 In New South Wales, Victoria, Queensland, the ACT and the Northern Territory, that is the Civil and Administrative Tribunal; in Western Australia, the State Administrative Tribunal; and in Tasmania and South Australia, the Health Practitioners Tribunal.

68 J Millbank, 'Health Practitioner Regulation: Has the National Law Produced National Outcomes in Serious Disciplinary Matters?' (2019) 47 *Federal Law Review* 631, 634, referring to K Elkin, 'Medical Practitioner Regulation: Is it All About Protecting the Public?' (2014) *Journal of Law and Medicine* 682.

69 For an illustration, see *Liu v Chinese Medicine Council of NSW* [2019] NSWCATOD 71 [102].

70 Other references are identified in *Health Care Complaints Commission v Grygiel (Termination Application)* [202] NSWCATOD 53.

suspend a practitioner's registration or impose conditions if satisfied that 'it is appropriate to do so for the protection of the health and safety of any person or persons … or if satisfied the action is otherwise in the public interest', with a right of appeal to NCAT. The question of what is otherwise 'in the public interest' for the purposes of interim action under s 150 has been held to include the need for patients and others to have confidence in the competence of health practitioners and that practitioners will exhibit traits consistent with the 'honourable practice of an honourable profession'.[71] The 'public interest' is to be differentiated from what is required for protection of the health or safety of the public, and is a broader concept, 'encompassing wider community interests such as the standards to which human conduct is to be held'.[72]

In other jurisdictions which have not added their own variations to the National Law, s 156 enables a national board to take 'immediate action' if it reasonably believes under subs (1)(a) that, because of the practitioner's conduct, performance or health, they pose a serious risk to persons and it is necessary to take immediate action to protect public health and safety; or under subs (1)(e) that 'the action is otherwise in the public interest'. Section 156 includes an 'Example of when action may be taken in the public interest' — namely, that the practitioner is charged with a serious criminal offence unrelated to their practice for which immediate action is required 'to maintain public confidence in the provision of health services by health practitioners'. As noted in *Medical Board of Australia v Liang Joo Leow*[73] (*Liang Joo Leow*), by cl 10 of Sch 7 to the National Law such an 'example' is not exhaustive and does not limit, but may extend, the meaning of a provision, and the example and the provision 'are to be read in the context of each other' and other provisions, with the provision prevailing in the event of inconsistency.[74]

In the decision the subject of the appeal in *Liang Joo Leow*, VCAT had, by majority, decided that immediate action was not in the public interest and lifted the suspension imposed on the practitioner. VCAT had identified as public interest factors supporting the practitioner returning to practice after having been charged with serious criminal offences that he was presumed innocent and the interim action would be in place for a significant period of time; there had been no subsequent complaints warranting investigation; continuing in practice served the public interest in members of the health profession in whom training and expenditure had been made being able to practise; and his referees spoke of his delivery of exemplary medical services.[75] In dismissing the appeal, Niall JA noted that the phrase 'public interest' lacks a fixed and precise content and had no singular construction. The example attached to s 156(1)(e) provided an important aspect of the context in which that phrase appeared but did not exhaust that context — an important part of the broader context being 'the nature and purpose of the power conferred by s 156'. Niall JA concluded that, in circumstances where the allegations if substantiated may reflect on the practitioner's fitness to hold registration, the board could conclude that it is in the public interest to take immediate action in order to address the question of public confidence.[76] The tribunal had not erred in proceeding on the

71 *Karimi v Medical Council of New South Wales* [2017] NSWCATOD 180 [123], referring to *Hanna v Medical Council of NSW* [2018] NSWCATOD 27, *Crickitt v Medical Council of NSW (No 2)* [2015] NSWCATOD 115.
72 *Pharmacy Council of New South Wales v Ibrahim* [2020] NSWSC 708 [35].
73 [2019] VSC 532.
74 Ibid [18].
75 *CJE v Medical Board of Australia (Review and Regulation)* [2019] VCAT 178 [105]–[108].
76 Ibid [82].

basis that public confidence in the provision of services by health practitioners is an aspect of the public interest.[77]

As is the case with the firearms legislation, the health practitioner regulation legislation both requires a tribunal to consider 'the public interest' and provides in its detailed list of objects and purposes a principled basis for identifying what that is, assisted in some instances by an 'example' to guide decision-making. The public interest dimensions are broadly framed and include maintenance of public confidence in the high standards of health professionals and the need to ensure compliance with professional standards.[78]

In other contexts the legislation may not provide a readily discernible identification of the relevant public interest or interests. The issue then is what is the appropriate path for a tribunal to adopt. The courts have recognised that a cautious approach to articulation of the public interest should be adopted, both by courts and by tribunals, particularly where there is a political dimension to or ministerial involvement in the decision-making process.

In *South Australia v O'Shea*[79] the issue was whether the decision of the Governor in Council not to release a sex offender, despite the Parole Board's recommendation that he be released, was subject to procedural fairness. Chief Justice Mason noted[80] that in the making of that decision the public interest was plainly a relevant consideration; and that, even if all the medical opinions supported a recommendation by the Board for release, the Cabinet, in tendering advice to the Governor in Council, could conclude that in the public interest the offender should not be released because, in the light of his history, his release would entail a level of risk that was unacceptable. In concluding that there was no obligation to accord procedural fairness, Mason CJ expressed the view that the legislature had no doubt chosen the procedure for determination 'because it considers that political assessment of the public interest is to be preferred to judicial assessment'.[81]

In *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[82] the High Court posited a similarly deferential approach for a tribunal, in an appeal from Federal Court determination of appeals from the Australian Competition Tribunal's review of declarations made by the Minister under s 44K of the *Trade Practices Act 1974* (Cth). A mining company seeking access to infrastructure owned by others had made application under s 44F for a recommendation by the National Competition Council that the service be declared by the Minister. The Council could not make such a recommendation unless it was satisfied of six specified criteria under s 44G, one of which was that access (or increased access)

77 Other examples of action being 'otherwise in the public interest' include *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405, where the practitioner had published multiple comments on social media or internet forums denigrating medical practitioners who provided terminations of pregnancy services or treated gender dysphoria, sentiments of violence toward racial and religious groups, and demeaning views regarding LGBQTI persons; and *Farshchi v Medical Board of Australia (Review and Regulation)* [2018] VCAT 1619, where the practitioner had been charged with 'forced labour' offences under the *Crimes Act 1900* (Cth).

78 See *Prakash v Health Care Complaints Commission* [2006] NSWCA 153 [91] (Basten JA), discussed in *Health Care Complaints Commission v Grygiel (Termination Application)* [2020] NSWCATOD 53.

79 (1987) 163 CLR 378.

80 Ibid 388.

81 Ibid 390.

82 [2012] HCA 36; (2012) 246 CLR 379.

to the service 'would not be contrary to the public interest'.[83] Section 44H(4) provided that the Minister could not declare the service unless the Minister was satisfied of the same six criteria as were specified by s 44G(2).

Chief Justice French and Gummow, Hayne, Crennan, Kiefel and Bell JJ held:

> [42] Criterion (f) was 'that access (or increased access) to the service would not be contrary to the public interest'. It is well established [referring to *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *McKinnon v Secretary*, *Department of Treasury* (2006) 228 CLR 423 at 443–444 [55]; *Osland v Secretary*, *Department of Justice* (2008) 234 CLR 275, 300 [57], 323 [137]; *Osland v Secretary*, *Department of Justice* [No 2] (2010) 241 CLR 320, 329 [13]; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505] that, when used in a statute, the expression 'public interest' imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is 'neither arbitrary nor completely unlimited' but is 'unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view'. It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.[84]

In considering the Tribunal's approach to criterion (f), the majority held:

> In neither case is it to be expected that the Tribunal, reconsidering the Minister's decision, would lightly depart from a ministerial conclusion about whether access or increased access would not be in the public interest. In particular, if the Minister has not found that access would not be in the public interest, the Tribunal should ordinarily be slow to find to the contrary. And it is to be doubted that such a finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits.[85]

As French CJ noted in *Hogan v Hinch*,[86] '[t]he court is not free to apply idiosyncratic notions of public interest'; and the assessment of public interest, both for a court and a tribunal, is ultimately the context of the statutory scheme and the scope and purpose of the legislation as a whole.[87]

Conclusion

There can be no issue if a tribunal which is required, or permitted, by the legislation governing the matter before it to have regard to the 'public interest' adopts a course of considering any legislative statement of what is the 'public interest'; and, if there is no such statement, having

83 Para (f).
84 [2012] HCA 36; (2012) 246 CLR 379, 400–401.
85 Ibid [112]. Heydon J held ([187], 451) that criterion (f) authorised a narrow inquiry only, agreeing with the appellants' submissions that it was directed only to whether there could be concrete harm to an identified aspect of the public interest which was not otherwise caught by criteria (a)–(e), which largely related to competition, efficiency and safety, and that the residual matters criterion (f) might capture could include matters of national security, national sovereignty and environmental harm.
86 [2011] HCA 4.
87 Ibid [31].

regard to any statement of objects and purposes or principles in the legislative scheme, either express or implied, assisted if necessary by recourse to extrinsic materials.

An administrative review tribunal may, in accordance with accepted principle, consider any relevant statements of government or ministerial policy. There is nothing unorthodox in doing so, consistent with a recognition of the distinctive position of tribunals as exercising administrative or executive power, and with tribunal jurisprudence since *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*.[88] The decision of the High Court in *Frugtniet v Australian Securities and Investments Commission*[89] is the most recent confirmation that the role of a tribunal undertaking administrative review of government decision-making is to determine whether the decision is the correct or preferable decision, to be determined on the material before the tribunal, but subject to the same general constraints as the original decision-maker. As stated by Kiefel CJ and Keane and Nettle JJ, the tribunal 'should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision'.[90] In the terms used by the plurality, Bell, Gageler, Gordon and Edelman JJ, the tribunal 'exercises the same power or powers as the primary decision-maker, subject to the same constraints'.[91]

In the absence of an express or implied understanding in the legislation of what is the 'public interest', and in the absence of any appropriate guidance in the form of extrinsic materials or ministerial guidelines, there can be a dilemma for a tribunal in applying that legislation. That is so for a tribunal engaged in administrative review, which is exercising executive power but not as part of the executive, subject to its accountability mechanisms. However, it is also an issue for tribunals exercising other functions, such as in professional or occupational disciplinary proceedings or other protective functions, in providing reasoned and principled justification for their decisions. Tribunal constitution requirements, such as including members of the relevant health profession, or others with relevant specialist expertise, can help. Provisions enabling formulation of guidelines about the making of decisions about the public interest,[92] can also help. Ultimately, what is required is clarity in legislative drafting, and confidence in the ability of a tribunal correctly to apply the law by reference to accepted principles of interpretation.

88 (1979) 2 ALD 60.
89 [2019] HCA 16.
90 Ibid [14].
91 Ibid [51].
92 Such as the *Firearms Act 1996* (ACT) s 37.