



Welcome!

HOBART CPD DAY

14 NOVEMBER 2025

Case updates and trends in institutional abuse matters:

- *Bird v DP and where to next?*
 - *Historical forced adoption cases in Tasmania – recent developments*
 - *What's the point of reviews? The Review into Paul Reynolds a year or so on*
-

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REGINA WEISS

Royal Commission into Institutional Responses to Child Sexual Abuse

Redress and civil litigation report recommendations (2015)

*85. State and territory governments should introduce legislation to **remove any limitation period that applies to a claim for damages brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child.***

86. State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past.

87. State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.

88. State and territory governments should implement these recommendations to remove limitation periods as soon as possible, even if that requires that they be implemented before our recommendations in relation to the duty of institutions and identifying a proper defendant are implemented.

Limitation Act 1974

5B No limitation period where sexual or physical abuse of minor

1 [...]

(a) an action for damages for personal injury to a person arising from or related to the sexual abuse, or serious physical abuse, of the person when the person was a minor

2 A reference in this section to the sexual abuse, or serious physical abuse, of a person when the person was a minor includes any psychological abuse that arises from the sexual abuse or the serious physical abuse.

UN Convention on the Rights of the Child

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Bird v DP [2024] HCA 41, at [46] per Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ.

In Australia, an employer may be liable for the acts of its employees, but there is no vicarious liability, in the sense that it is being discussed now, for the acts of those not in a relationship of employment, namely acts of third parties outside of that context. If the act complained of is not that of an employee, then the defendant is not, without more, liable. [...] The relevant inquiry is, therefore, twofold: whether the alleged tortfeasor was an employee of the defendant, and then the separate question whether the relevant act or omission took place in the course or scope of that employment. [footnotes omitted].

Kondis v State Transport Authority (1984) 154 CLR 672 at [687]
(followed in *State of NSW v Lepore* [2003] HCA 4 at [512])

*In these situations the special duty arises because the person on whom it is imposed has undertaken **the care, supervision or control of the person** or property of another or is so placed in relation to that person or his property as to **assume a particular responsibility for his or its safety**, in circumstances where the person affected might reasonably expect that due care will be exercised.*

Civil Law (Wrongs) Act 2002 (ACT)

114BE Organisations vicariously liable for child abuse perpetrated by employees

(1) An organisation that is responsible for a child is vicariously liable for child abuse perpetrated against the child by an employee of the organisation if—

(a) the apparent performance by the employee of a role in which the organisation placed the employee supplies the occasion for the perpetration of the child abuse by the employee; and

(b) the employee takes advantage of the occasion to perpetrate the child abuse.

(2) In determining whether the apparent performance by the employee of a role in which the organisation placed the employee supplied the occasion for the perpetration of child abuse against a child, a court must take into account whether the organisation placed the employee in a position in which the employee has one or more of the following:

(a) authority, power or control over the child;

(b) the trust of the child;

(c) the ability to achieve intimacy with the child.

(3) This section does not affect, and is in addition to, the common law in relation to vicarious liability.

Civil Law (Wrongs) Act 2002 (ACT)

114BC Meaning of *employee*—pt 8A.1A

- (1) In this part: **employee**, of an organisation, includes an individual who—
- (a) is akin to an employee of the organisation; or
 - (b) is associated with the organisation.
- (2) For this section, an individual is **akin to an employee** of an organisation if the individual carries out activities that are—
- (a) a part of the ordinary activities carried out by the organisation; and
 - (b) for the benefit of the organisation.
- (3) For this section, an individual **associated** with an organisation includes—
- (a) an office holder, officer, owner, volunteer or contractor of the organisation; and
 - (b) **if the organisation is a religious organisation—a religious leader, such as a priest or minister, or other member of the personnel of the organisation, whether or not the individual is ordained; and**
 - (c) an individual, or an individual belonging to a class of individuals, prescribed by regulation.
- (4) An individual who is associated with an organisation to which the exercise of care, supervision or authority over a child has been delegated, in whole or in part, is also taken to be an individual associated with the organisation from which the exercise of care, supervision or authority was delegated.
- (5) A regulation may prescribe circumstances in which an individual is akin to an employee or not akin to an employee.

Reynolds Review recommendations

- 1. The establishment of a restorative engagement framework for Reynolds' victim survivors and victim survivors of other police officers' abuse who participated in the Review.*
- 2. That Tasmania Police establish a permanent restorative engagement framework for persons who have experienced grooming and/or sexual abuse by Tasmania Police officers.*
- 3. That Tasmania Police establish a framework which **strengthens community engagement and builds trust between Tasmania Police**, vulnerable community groups and Tasmanian sport and recreation organisations for the purpose of preventing, identifying and reporting grooming, sexual abuse and unacceptable sexualised conduct in sport.*
- 4. That Tasmania Police establish a dedicated victim management team which is funded and resourced to operate separately of the Professional Standards Command to support victims of reported sexual offending or misconduct where the perpetrator is a current serving or previously serving police officer.*
- 5. That consideration be given by Tasmania Police to making a recommendation to the Tasmanian Government for amendments to the Integrity Commission Act 2009 to ensure that all notifications made to the Integrity Commission in respect of members of Tasmania Police who are alleged to have groomed and/or sexually abused persons [serious misconduct] can be investigated independently by the Integrity Commission.*

Admin Law 101!

Nick Poynder, Barrister

Rosny Chambers, Hobart



Hobart CPD Day



FRI 14 NOV 2025

THE TASMAN HOTEL
5 CPD POINTS FOR ATTENDANCE

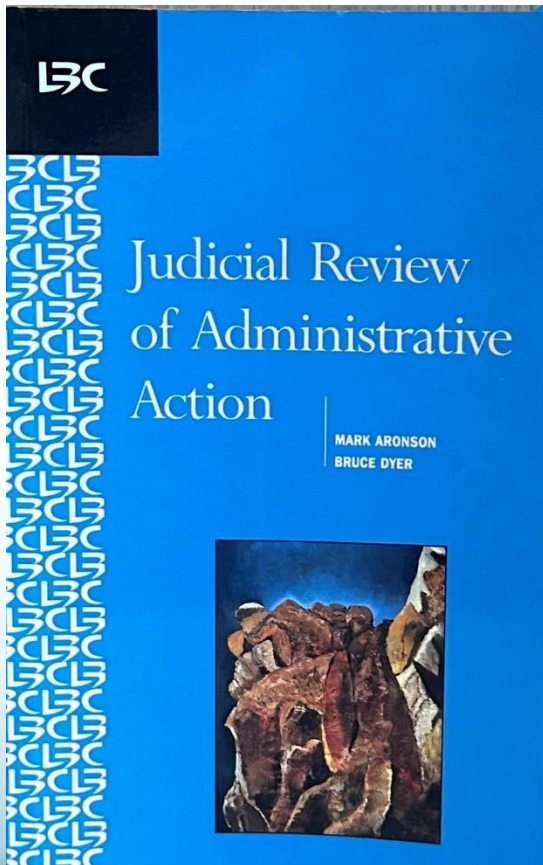
Scope of this presentation

“Administrative Law is the body of law that regulates government decision making” (Australian Attorney-General’ Department website)

- good government practice: e.g., freedom of information, codes of conduct
- investigatory bodies (non-criminal) – e.g., ombudsman, anti-corruption commission
- merits review - government agencies, tribunals
- judicial review - courts

Scope of this presentation

Today we will be looking at **Judicial Review**:



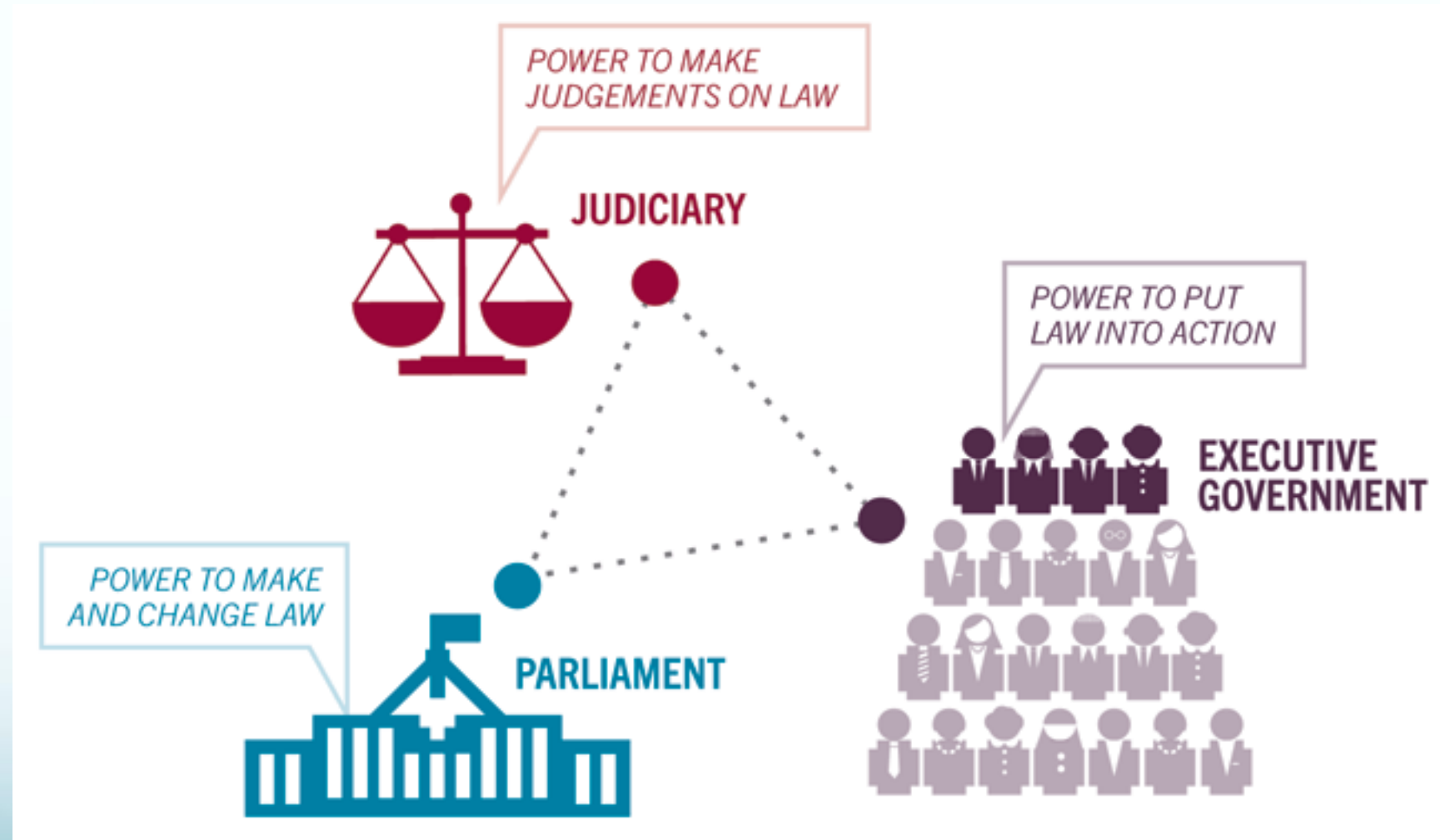
1. Basic principles
 2. JR at a Commonwealth level (esp. migration law)
 3. JR at a State (Tas) level
- * including some interesting cases



What is Judicial Review?

- **Judicial review is:**
 - *the determination by the **Judiciary** (ie, the courts) of the legality of...*
 - *...the exercise of power by the **Executive** (ie, government administrators and tribunals)...*
 - *...in the application of laws enacted by the **Parliament**.*

Separation of Powers



Judicial Review vs. Merits Review

- *Judicial review is to be contrasted with **merits review**, which is where a person or body other than the primary decision-maker reconsiders the facts, law and policy aspects of the original decision and determines what is the “correct or preferable decision”: Drake v Minister for Immigration (1979) 46 FLR 409 at 419.*
- *At a Federal level, merits review is conducted by the Executive pursuant to Chapter II of the Constitution.*

Avenues of Judicial Review: Commonwealth AD(JR) Act

Administrative Decisions (Judicial Review) Act 1977, s 5.

- (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit and Family Court of Australia for an order of review in respect of the decision on any one or more of the following grounds:
- (a) that a **breach of the rules of natural justice** occurred in connection with the making of the decision;
 - (b) that **procedures** that were required by law to be observed in connection with the making of the decision were not observed;
 - (c) that the person who purported to make the decision **did not have jurisdiction** to make the decision;
 - (d) that the decision was **not authorized** by the enactment in pursuance of which it was purported to be made;
 - (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
 - (f) that the decision involved **an error of law**, whether or not the error appears on the record of the decision;
 - (g) that the decision was induced or affected by **fraud**;
 - (h) that there was **no evidence** or other material to justify the making of the decision;
 - (j) that the decision was **otherwise contrary** to law.

Avenues of Judicial Review: Commonwealth AD(JR) Act

Administrative Decisions (Judicial Review) Act 1977, s 5.

(2) The reference in paragraph (1)(e) to an **improper exercise of a power** shall be construed as including a reference to:

- (a) taking an **irrelevant consideration** into account in the exercise of a power;
- (b) failing to take a **relevant consideration** into account in the exercise of a power;
- (c) an exercise of a power for a **purpose other than a purpose** for which the power is conferred;
- (d) an exercise of a discretionary power in **bad faith**;
- (e) an exercise of a personal discretionary **power at the direction or behest** of another person;
- (f) an exercise of a discretionary power in accordance with a **rule or policy** without regard to the merits of the particular case;
- (g) an exercise of a power that is so **unreasonable** that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the **exercise of the power is uncertain**; and
- (j) any other exercise of a power in a way that constitutes **abuse of the power**.

Avenues of Judicial Review: Commonwealth AD(JR) Act

Administrative Decisions (Judicial Review) Act 1977, s 3(1):

A ***decision to which this Act applies*** means a decision of an administrative character made, proposed to be made, or required to be made....:

(a) under an enactment...

...

other than:

...

(d) a decision included in any of the classes of decisions set out in Schedule 1.

Schedule 1 – includes, inter alia, migration decisions

Avenues of Judicial Review: Commonwealth Federal Court

Judiciary Act 1903 (Cth), s 39B

- (1) Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of **mandamus** or **prohibition** or an **injunction** is sought against an officer or officers of the Commonwealth.

Does not include:

- criminal prosecutions: s 39B(1B) and (1C); and
- civil proceedings in the Federal Circuit and Family Court of Australia and court of a State or Territory: s 39B(1EA).

Avenues of Judicial Review: Commonwealth High Court

Commonwealth of Australia Constitution Act s 75(v):

In all matters:

...

*(v) in which a writ of **Mandamus** or **prohibition** or an **injunction** is sought against an **officer of the Commonwealth**; the **High Court** shall have original jurisdiction.*

- **Certiorari** regarded as an “ancillary” or “incidental” remedy to the writs of **mandamus** and **prohibition**

*Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at 90–91 [14]
(Gaudron and Gummow JJ)*

Avenues of Judicial Review: Migration Cases

Migration Act 1958: s. 476(1):

...the Federal Circuit and Family Court of Australia (Division 2) has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.

Avenues of Judicial Review: Migration Cases

Migration Act 1958: s 476(a):

- (1)...The Federal Circuit and Family Court of Australia (Division 2) has no jurisdiction in relation to the following decisions:
- (a) A primary decision **[decision of delegate reviewable by ART]**; or
 - (b) a privative clause decision...of the ART on review under section 500 **[character cases, protection visa refusals under exclusion clauses]**; or
 - (c) a privative clause decision...made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA **[character cases]**; or
 - (ca) a non-privative clause decision mentioned in subsection 474(4A) **[question of law referred by ART to the Federal Court]**;
 - (d) a privative clause decision...mentioned in subsection 474(7) **[various subsidiary powers of Minister]**.

Avenues of Judicial Review: Migration Cases

Migration Act 1958: s 476A:

- (1) ...the **Federal Court** has **original jurisdiction** in relation to a **migration decision** if, and only if:
- (a) the Federal Circuit and Family Court of Australia (Division 2) transfers a proceeding...under section 39 of the Federal Circuit and Family Court of Australia Act 2021 [**matter of general importance – FCC Rules, Rule 8.02**]; or
 - (b) the decision is a privative clause decision...of the ART on review under section 500 [**character cases, protection visa refusals under exclusion clauses**]; or
 - (c) the decision is a privative clause decision...made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA [**character cases**]; or
 - (d) the Federal Court has jurisdiction in relation to the decision under section 176 (**Federal Court has jurisdiction**) or subsection 185(3) (**referring questions of law**) of the ART Act.

Avenues for Judicial Review of migration cases:

Summary

- High Court: Has overall jurisdiction, but will transfer matter down to Federal Court or Federal Circuit and Family Court (Division 2) if possible
- Federal Court:
 - Transfers from Federal Circuit Court and Family Court on matters of general importance
 - Decisions of ART in character cases and protection visa refusals under exclusion clauses;
 - Decisions made personally by Minister in character cases
 - Appeals on a matter of law under the ART Act

Avenues for Judicial Review of migration cases: Summary

Federal Circuit Court and Family Court (Division 2):

- Will usually be the first port of call.
- Jurisdiction over all migration decisions, other than those limited cases where the Federal Court has jurisdiction.

Avenues of Judicial Review: Tasmania

Judicial Review Act 2000 (Tas), s 18(2):

An application may be made on any one or more of the following grounds:

- (a) *that a **breach of the rules of natural justice** has happened, is happening, or is likely to happen, relating to the conduct;*
- (b) *that **procedures** that are required by law to be observed relating to the conduct have not been, are not being, or are likely not to be, observed;*
- (c) *that the person proposing to make the decision **does not have jurisdiction** to make the proposed decision;*
- (d) *that the enactment under which the decision is proposed to be made **does not authorise** the making of the proposed decision;*
- (e) *that the making of the proposed decision would be an **improper exercise of the power** conferred by the enactment under which the decision is proposed to be made;*
- (f) *that **an error of law** –*
 - (i) has been, is being, or is likely to be, committed in the course of the conduct; or*
 - (ii) is likely to be committed in the making of the proposed decision;*
- (g) *that **fraud** has taken place, is taking place, or is likely to take place, in the course of the conduct;*
- (h) *that there is **no evidence** or other material to justify the making of the proposed decision;*
- (i) *that the making of the proposed decision would be **otherwise contrary to law**.*

Avenues of Judicial Review: Tasmania

Judicial Review Act 2000 (Tas), s 20:

In...section 18(2)(e) , a reference to an improper exercise of a power is taken to include –

- (a) taking an **irrelevant consideration** into account in the exercise of a power; and*
- (b) failing to take a **relevant consideration** into account in the exercise of a power; and*
- (c) an exercise of a power for a **purpose other than a purpose** for which the power is conferred; and*
- (d) an exercise of a discretionary power in **bad faith**; and*
- (e) an exercise of a personal discretionary power **at the direction of another person**; and*
- (f) an exercise of a discretionary power in **accordance with a rule** without regard to the merits of the particular case; and*
- (g) an exercise of a power that is so **unreasonable** that no reasonable person could so exercise the power; and*
- (h) an exercise of a power in such a way that the result of the exercise of the power is **uncertain**; and*
- (i) any other exercise of a power in a way that is an **abuse of the power**.*

Avenues of Judicial Review: Inherent power of the Supreme Court



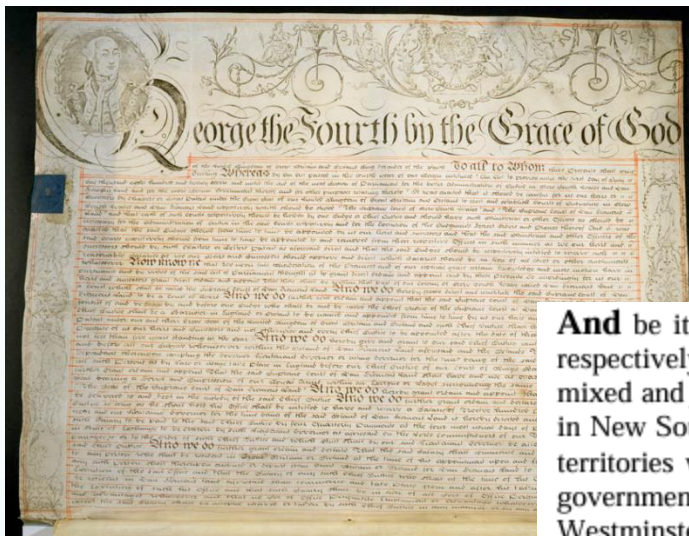
Court of King's Bench – Westminster (1808)

Avenues of Judicial Review: Inherent power of the Supreme Court

- The Court of King's Bench had an inherent (common law) power to grant the **prerogative writs** of certiorari, mandamus, and prohibition.
- Upon establishment, each Supreme Court of the Australian States were granted the same jurisdiction.

Avenues of Judicial Review: Inherent power of the Supreme Court of Tasmania

Australian Courts Act 1828 (9 Geo 4 c 83):



And be it further **enacted** that the said [PAGE 4 OF ORIGINAL ENDS HERE] courts respectively shall be courts of record and shall have cognizance of all pleas civil criminal or mixed and jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in New South Wales and Van Diemen's Land respectively and all and every the islands and territories which now are or hereafter may be subject to or dependent upon the respective governments thereof as his majesty's courts of king's bench Common Pleas and Exchequer at Westminster or either of them lawfully have or hath in England and the said courts respectively shall also be at all times courts of oyer and terminer and gaol delivery in and for New South Wales and Van Diemen's Land and the dependencies thereof respectively and the said judges so appointed shall have and exercise such and the like jurisdiction and authority in New South Wales and Van Diemen's Land and the dependencies thereof respectively as the judges of the courts of king's bench common pleas and exchequer in England or any of them lawfully have and exercise and as shall be necessary for carrying into effect the several jurisdictions powers and authorities committed to the said courts respectively **And** be it

Avenues of Judicial Review: Inherent power of the Supreme Court of Tasmania

- **The power of the Supreme Court of Tasmania to grant relief in the nature of prerogative writs has been preserved under the *Australian Courts Act 1828*:**
see, *Tasman Quest Pty Ltd v Evans* [2003] TASSC 110; (2003) 13 Tas R 16 (Blow J, Evans and Slicer agreeing).
- **It is beyond the legislative power of a State parliament to enact legislation that deprives its Supreme Court of its supervisory power to enforce the limits of the State executive power:**
see, *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; (2010) 84 ALJR 154 at [99]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Avenues of Judicial Review:

Inherent power of the Supreme Court of Tasmania

- “33. The combination of *Plaintiff S157/2002 v Commonwealth* and *Kirk* mean that Judicial Review for jurisdictional error is constitutionally entrenched in Australian law...
34. The constitutional basis of *Kirk* is that because State courts are mentioned in Chapter III of the Constitution, they must meet and continue to meet their defining characteristics, as determined at Federation. The power to grant prerogative relief for jurisdictional error is one such defining characteristic. Therefore, a State legislature is unable to pass a law that would have the effect of trenching on that characteristic.”

Michael O’Farrell SC, *Judicial Review in Tasmania*, paper presented to the 2025 Litigation Convention St Helens (8 November 2025)



Avenues of Judicial Review: Inherent power of the Supreme Court of Tasmania

Procedures for applications under the JRA and prerogative relief



Supreme Court Rules 2000

*Division 1A - Proceedings under the **Judicial Review Act 2000***

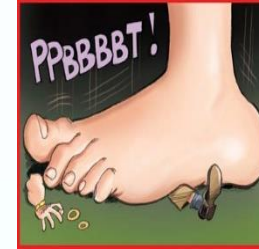
Prerogative “Constitutional” Writs

*The term "prerogative writ" has been used as a convenient shorthand, particularly to differentiate in s 75(v) writs of mandamus and prohibition from an injunction. But it is an inapt description of any remedy granted by a court exercising the judicial power of the Commonwealth. If any shorthand expression is to be used, **"constitutional writ"** would be preferable.*

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at 92–93 [21] (Gaudron and Gummow JJ)

The Constitutional writs

- **Certiorari** – QUASHES the decision.



- **Prohibition** – PROHIBITS the decision-maker from acting on the decision.



- **Mandamus** – DEMANDS that the decision-maker re-determine the decision according to law.



The Constitutional writs

The practical result:

- *The decision will be set aside (quashed) and the matter will be remitted to the decision-maker to re-decide in accordance with the law as stated by the Court.*
- *Usually by a different decision-maker, to avoid any perception of bias.*

Take THAT, decision-maker!



Jurisdictional/Non-jurisdictional Error

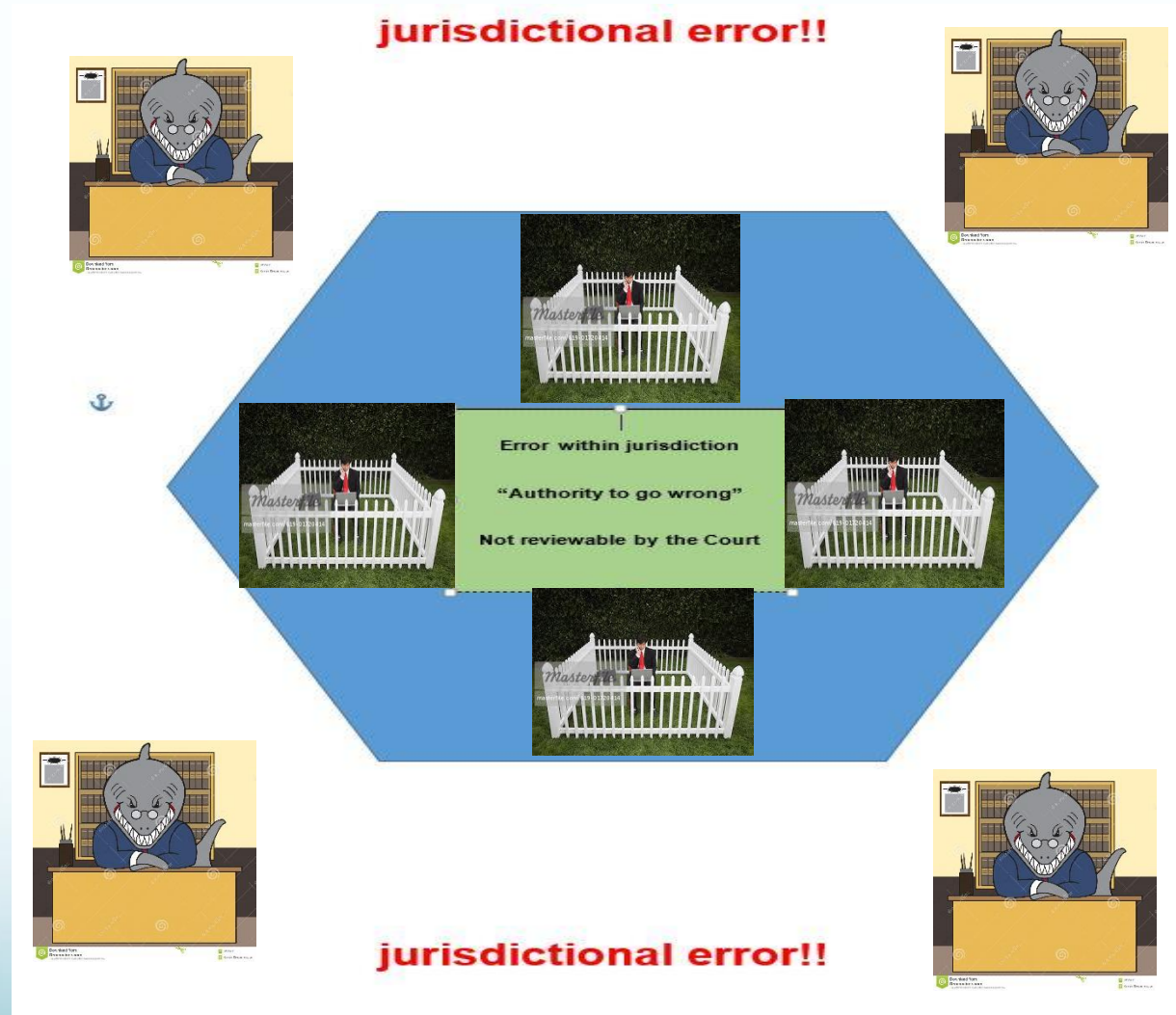
The Constitutional writs will only be granted if the applicant can establish jurisdictional error

Jurisdictional error is where the decision maker goes outside the limits of the functions and powers conferred, or does something which he or she lacks power to do.

Non-jurisdictional error, or “error within jurisdiction”, is where the decision-maker incorrectly decides something which he or she is authorised to decide (sometimes called “authority to go wrong”).

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at 141 [162] (Hayne J); citing *Craig v South Australia* (1995) 184 CLR 163 at 177-178.

Jurisdictional/Non-jurisdictional Error



Examples of jurisdictional error

Jurisdictional error is best illustrated by considering “species” of error:

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at 141 [163] (Hayne J)

Some “species” of error referred to in Craig v South Australia (1995) 184 CLR 163 at 179:

- Identifying a **wrong issue**/asking a **wrong question**/applying **incorrect test**

Appellant S395/2002 v Minister for Immigration (2004) 216 CLR 473 at [82] (Gummow and Hayne JJ):

But to say that an applicant for protection is “expected” to live [in Bangladesh] discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal...The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection...No less importantly, if the Tribunal makes such a requirement, it has failed to address...the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.

- Ignoring **relevant** material/relying on **irrelevant** material:

Applicant WAEE v Minister for Immigration (2003) 256 FCR 59 (French, Sackville and Hely JJ):

Family of Sabian Mandaean feared persecution in Iran because of their religion. Separate claim in relation to the marriage of their son to a Muslim woman not dealt with by Tribunal

Examples of jurisdictional error

The list of “species” of error is **non-exhaustive** - *Minister for Immigration v Yusuf* (2001) 180 ALR 1, at [82]. Also includes:

- **Fail to consider claims:** *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389
Tribunal identified applicant’s claim to belong to the particular social group of “businessmen in Russia”. In fact, his claim was to belong to the particular social group of “businessmen who publicly criticised and sought reform of the law enforcement authorities to compel them to take effective measures to prevent crime in Vladivostok”
- Breach of rules of **natural justice:** *Kioa v West* (1985) 185 CLR 550:
Attempted deportation of non-citizens with no hearing
- Fail to follow **mandatory procedures:** *SAAP v Minister for Immigration* (2005) 228 CLR 294:
Tribunal failed to provide applicant with evidence obtained separately from his daughter in breach of statutory procedural fairness provisions in s 424A of the Migration Act.
- **Actual or apprehended bias:**
 - Actual bias: *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473 at [27]-[28]
 - Apprehended bias: *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 at [72]
- **Illogical/irrational/unreasonable:** *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Minister for Immigration v Li* (2013) 297 ALR 225; [2013] HCA 18

What is not Jurisdictional Error?

- **Findings of fact/factual errors:** *Minister for Immigration; ex parte Cohen* (2001) 177 ALR 473, per McHugh J at [36].
- **Credibility findings:** *Re Minister for Immigration; Ex parte Durairajasingham* (2000) 74 ALJR 405 at [67]

Although note recent developments where the Courts have been prepared to find that findings of fact and adverse credibility findings must have a sound evidentiary basis

- *EVI19 v Minister for Immigration* [2022] FCA 518 (Stewart J)
- *CQO23 v Minister for Immigration* [2025] FCA 97 (Needham J)

What is not Jurisdictional Error?

- **Findings which are “unfair” or “unjust”**: Attorney General for the State of NSW v **Quin** (1990) 170 CLR 1 at 35-36 (Brennan J):

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The Constitutional writs are discretionary

- *The Constitutional writs are the “prerogative” of the court - they are granted at the discretion of the court.*
- *It is possible to establish the grounds for Constitutional writs yet still not be granted the writ on discretionary grounds.*
- *Examples where the courts have exercised the discretion to refuse to grant a writ where grounds have been established include:*
 - *Where it would be futile to remit the matter because the decision arrived at was clearly correct on the material before it, or the same result would be inevitable on remitter; for example, because an applicant would be unable on remitter to satisfy a mandatory requirement for a visa: SZBYR v Minister for Immigration (2007) 81 ALJR 1190 at 1207; [2007] HCA 26 at [87]–[89] (Kirby J). (The “**Futility Rule**”).*
 - *Where the applicant has behaved unconscionably or has otherwise engaged in conduct which is inconsistent with the application for relief; for example by excessive delay in bringing proceedings or having waived or acquiesced in the decision: SZQBN v Minister for Immigration (2013) 213 FCR 297 at [39]–[60]; SAAP v Minister for Immigration (2005) 228 CLR 294 at 322 [80] (McHugh J).*

Over to you for questions



Dealing with a 65DAAA Discrete Issue Hearings

Matthew Strong – Barrister, Svenson Barristers (List S)
24 October 2025

- FAMILY LAW ACT 1975 - SECT 65DAAA
- Radecki & Radecki [2024] FedCFamC1A 246
- Discrete Hearing Procedural Orders
- Evidence

FAMILY LAW ACT 1975 - SECT 65DAAA

- Reconsideration of Final Parenting Orders
- (1) If a final parenting order is in effect for a child, a court must not reconsider it unless:
 - (a) the court has evaluated whether there has been a significant change in circumstances since the order was made; and
 - (b) the court is convinced that, considering all circumstances (including any significant change since the order was made), reconsidering the order is in the best interests of the child.
- (2) To determine satisfaction as described in paragraph (1)(b), and without limiting section 60CC, the court may consider any relevant matters, including:
 - (a) the reasons for the original final parenting order and the evidence supporting it;
 - (b) whether new material is available that was not presented to the original court;
 - (c) the likelihood that reconsideration will result in a new parenting order significantly affecting the current order (whether by varying, discharging, suspending, wholly or partly, or otherwise);
 - (d) any potential benefits or harms to the child from reconsidering the order.
- (3) Notwithstanding subsection (1), the court may reconsider a final parenting order with the consent of all parties involved.
- (4) Failure to comply with subsection (1) does not invalidate any order made by the court.

Radecki & Radecki [2024] FedCFamC1A 246

- AUSTIN & WILLIAMS JJ
- The parties began their relationship in 2011, married in 2012, and separated in February 2014. They had one child, born in 2013, now nearly 12 years old.
- Following separation, the respondent obtained final parenting orders in December 2015 granting the child's primary residence with her and limited time (one night per fortnight) with the appellant. These orders were made without the appellant's attendance and without a hearing on the merits.
- The 2015 orders anticipated a review before the child started school, but no such review occurred.
- After separation, the parties maintained a cooperative co-parenting relationship for several years, and the child spent more time with the appellant than the orders provided.
- In September 2022, the respondent stopped this informal arrangement and restricted the appellant's contact, citing concerns about his behaviour, intoxication, and criminal conduct.
- The appellant sought to vary the orders in July 2023, requesting significantly more time with the child.
- The respondent applied to dismiss the application under the rule in Rice & Asplund (which limits re-litigation of parenting orders unless there has been a material change in circumstances).
- The case was heard on 24 May 2024 without cross-examination, and on 27 June 2024, the primary judge dismissed the appellant's application.

Leave to appeal

- The order being appealed (which dismissed an application for parenting orders) is not itself a parenting order and therefore not a “child welfare matter” under the Regulations.
- The order is interlocutory, as it does not finally determine the parties’ rights—future applications may still be made if circumstances change.
- Because it is interlocutory, leave to appeal is required.
- The test for granting leave to appeal (from *Medlow & Medlow* (2016) FLC 93-692) is whether:

The decision is attended by sufficient doubt to justify reconsideration by the appellate court, and

Substantial injustice would result if leave were refused, assuming the decision was wrong.

- To decide if sufficient doubt exists, the court must examine the merits of the appeal based on the grounds put forward.

- *“31 The controversy which has arisen since the introduction of the amendments to the Act is whether the wording of s 65DAAA creates a meaningful distinction and departure from application of common law principles or whether it codifies the common law principles.*
- *32 A literal reading of “consider” in s 65DAAA(1)(a), contrary to the rule in Rice and Asplund, does not require a change of circumstances nor mandate the Court to make a finding of fact about a prima facie change of circumstances, rather the requirement is to “consider” whether or not there has been a change of circumstances.*
- *33 In practical terms, whilst applying the first stage of the rule in Rice and Asplund, the dilemma is whether the Court is still required to make a finding about changed circumstances or alternatively, merely “consider”, whether or not there has been any change.”*

- 36 Orders made in parenting proceedings are never unequivocally final, because the Court is empowered by s 65D(2) of the Act, to discharge, vary, suspend or revive some or all parenting orders. Parenting orders can be varied by consent of the parties or by a court determination. Parenting orders are only “final” in so far as they determine an existing cause of action brought under Pt VII of the Act
- 38 The threshold test was first enunciated by the Full Court of the Family Court in *In the Marriage of Hayman* (1976) 14 ALR 216 (“Hayman”), where the majority of the Full Court held that an unsuccessful litigant in a parenting dispute could not repeatedly return to court, in order to obtain a more favourable outcome. In order to succeed, it must be established there has been a material change in circumstances, since the previous hearing
- 39 That approach was approved and adopted by the Full Court in *Rice and Asplund*, where Evatt CJ, with whom Pawley SJ and Fogarty J agreed, stated the rule in the following terms (at 78,905):
- [The court] should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation for change is an ever-present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that ... there is some changed circumstance which will justify such a series step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material...
- 43 The rule in *Rice and Asplund* has been routinely followed ever since its enunciation, and has been the subject of judicial consideration, elaboration and clarification.

- 44 The requirement to make a finding of change of circumstances, however variously described, when applying the first stage of the rule, has been approved and followed in decisions subsequent to Rice and Asplund.
- 45 Warnick J said in SPS and PLS (2008) FLC 93-363 (“SPS and PLS”), at [84] that the essential question to be asked is, **assuming the evidence of the appellant is accepted, are the “new events” sufficient to provoke a new enquiry.**
- 46 In Miller & Harrington (2008) FLC 93-383 the Full Court said at [105]:
- Adapting the language used by Warnick J in SPS and PLS [supra], the question for consideration is: **assuming the evidence of the [appellant] is accepted, is there a sufficient change of circumstances shown to justify embarking on a hearing?**
- 47 The Full Court said in Marsden & Winch (2009) 42 Fam LR 1 (“Marsden & Winch”) at [58]:
- (1) **For a prima facie case of changed circumstances to have been established;** and
- (2) **For a consideration as to whether that case is a sufficient change of circumstances to justify embarking on a hearing.**
- 48 In Bretton & Bondai [2013] FamCAFC 168, May J at [106] referred to the first requirement (of the rule), as “**that there be a prima facie case**”
- 49 In Carriel & Lendrum (2015) FLC 93-640 the Full Court of the Family Court at [63] referred to “**whether or not a sufficient change of circumstance to warrant further litigation was demonstrated**”

- 50 In *Searson & Searson* (2017) FLC 93-788 at [16] and *Shan & Prasad* (2020) 61 Fam LR 440 at [41] the remarks of the Full Court in *Marsden & Winch* were applied.
- 51 More recently, in *Defrey & Radnor* [2021] FamCAFC 67 at [22] (“*Defrey & Radnor*”) the Full Court of the Family Court (*Ainslie-Wallace, Watts and Tree JJ*) articulated the practical application of the rule thus:
- ... **The primary judge’s task was a two staged process. First, to make findings of fact as to what changes there had been in circumstances since the making of the of the 2015 orders and secondly, to assess whether or not the [appellant] had established that these changes are sufficient to provoke a new inquiry, or put in another way, whether the [appellant] has established a prima facie case of changed circumstances that would justify embarking on a second contested parenting hearing as being in the child’s best interests.**

- The judges then went through an analysis of the decisions that had been delivered up until this point since 65DAAA and concluded
- 63 For the reasons that follow, we consider there is no discernible difference between the first stage test or threshold to be applied under the new statutory regime, and the common law principles espoused by the rule in *Rice and Asplund*.
- 64 The starting point for statutory interpretation is s 15AA of the Acts Interpretation Act 1901 (Cth) (“the Interpretation Act”) which states **BORING**

- Their Honours then refer to the Explanatory Memorandum to the Family Law Amendment Bill 2023 (“the Amendment Bill” and find that at 73 *“There is no ambiguity to be found in the Explanatory Memorandum, which specifically refers to both the intention to codify the common law rule established by Rice & Asplund and the first stage of application of the rule, requiring an applicant to establish that there has been a significant change in circumstances since the making of anterior parenting orders.”*
- At 76 *“The wording of the Second Reading Speech, and in particular **“making it clear... a significant change in circumstances must have occurred”**, is similarly at odds with a literal interpretation of s65DAAA...”*
- At 79 their Honours find that the *“The word “consider” in s 65DAAA should be construed to mean the Court is required to contemplate the evidence and to make findings of fact as to what changes in circumstances (if any) there have been since the making of the anterior parenting orders. **If there is no positive finding of changed circumstances, that is the end of the matter.***
- *“If there is a positive finding as to changed circumstances, the second stage of the process requires the Court to make its determination, subject to the overarching best interests principle, as prescribed by s 65DAAA(1)(b) and otherwise having regard to relevant s 60CC considerations and the matters referred to in s 65DAAA(2).”*

- Carew J stated at

- 1 **The use of the term “consider” in s 65DAAA(1) should be understood in the context of the Court being asked to accept the applicant’s evidence taken at its highest but only for the purposes of the application.** The suggestion that a court would consider whether there has been a significant change in circumstances without it having any consequence is an interpretation which would give no effect to s65DAAA(1). Further, it has always been the case that applying the rule in Rice and Asplund is but a manifestation of the best interest principles and s 65DAAA(1)(b) and (2) merely reflect that part of the rule.
- (1)(b) the court is convinced that, considering all circumstances (including any significant change since the order was made), reconsidering the order is in the best interests of the child.
 - (2) To determine satisfaction as described in paragraph (1)(b), and without limiting section 60CC, the court may consider any relevant matters, including:
 - (a) the reasons for the original final parenting order and the evidence supporting it;
 - (b) whether new material is available that was not presented to the original court;
 - (c) the likelihood that reconsideration will result in a new parenting order significantly affecting the current order (whether by varying, discharging, suspending, wholly or partly, or otherwise);
 - (d) any potential benefits or harms to the child from reconsidering the order.

- THE COURT ORDERS THAT:

- S65DAAA Hearing
- 1. The matter is set down for discrete hearing pursuant to s 65DAAA of the Family Law Act 1975 (Cth) (the Act) for not more than one day commencing at 10:00am AEST on DATE in the location Federal Circuit and Family Court of Australia (Division 2).
- 2. Not later than 4.00pm on DATE the Applicant is to file and serve:
 - (a) a single consolidated affidavit relevant to issues of the changes in circumstance asserted by them since the making of the last parenting orders on DATE; and
 - such other affidavits relevant to the determination of the discrete issue pursuant to s65DAAA of the Act, including affidavits of any expert witnesses.
- 3. Not later than 4.00pm on DATE the Respondent is to file and serve one consolidated affidavit of evidence in chief for each party and witness solely addressing the discrete issue pursuant to s65DAAA of the Act.

- 4. Not later than 4 00pm on DATE each party is file and serve on each other party, a case outline setting out:
 - (a) a precise minute of the orders sought;
 - (b) a list of documents to be relied upon at the discrete issue hearing;
 - (c) a list of witnesses required for cross examination; and
 - (d) a list of the issues arising in the application (both factual and legal) by reference to ss 60CC and 65DAAA(2) of the Act and, for each issue so identified, a detailed reference to the evidence (in each affidavit relied upon by that party) upon which that party intends to rely in respect of that issue
- Notations
- A The Court is required to determine whether or not the final parenting orders made by Senior Judicial Registrar on 1 April 2022 should be varied The Respondent opposes the application filed by the Applicant on DATE
- B Upon determination of the discrete issue pursuant to s 65DAAA of the Act, the presiding Judge may consider making further orders and directions for case management
- C Pursuant to s67ZBH(1) the court must admit into evidence any particulars documents or information provided under an order made under section 67ZBD or under subsection 67ZBD(5), on which the court intends to rely

- Evidence
- Child Impact Report/Family Report
- Psych assessments
- Medical, health records, School Records
- Police and DFFH 67ZBD
- Change of circumstances taken at its highest.
- (a) the reasons for the original final parenting order and the evidence supporting it;
- **By consent/Final Hearing**
- (b) whether new material is available that was not presented to the original court;
- **Medical/Health/Mental Health**
- (c) the likelihood that reconsideration will result in a new parenting order significantly affecting the current order (whether by varying, discharging, suspending, wholly or partly, or otherwise);
- **Are we talking about a small change in time/significant**
- (d) any potential benefits or harms to the child from reconsidering the order.



Recent Estate and TFM Outcomes

HOBART CPD DAY
14 NOVEMBER 2025
CAMERON SCOTT
BARRISTER

Jones v Public Trustee as Executor of Estate of Mavis Pauline Jones and Jones [2025] TASSC 1

- **Facts:** Testatrix died in 2022 leaving a will that did not provide for her adult son Michael Jones, instead leaving it all to her other son Shane Jones.

The estate was worth \$538k, comprised mostly of a house at Goodwood worth \$530k. After liabilities the estate had a net worth of \$460k.

The Applicant was 62 at hearing, married, owned a home at Newtown worth \$750k with a small mortgage. He has \$10k in super and \$8k in savings. His income was \$65k per annum working fulltime. His expenses were about \$950-1050 per week.

The Applicant has had health problems since 2011, including atrial fibrillation and acute coronary syndrome. Following the death of the testator in 2022, the Applicant had stopped work due to illness and had relied on his super (then \$65k) to survive.

Disclosure

Daly AsJ was critical of the Applicant for failing to disclose his wife's financial circumstances.

Daly AsJ said: "That obligation extended to the circumstance of Hamish Jones living in the applicant's home "rent-free" while the applicant cannot cover his own weekly expenses: at [14].

→ You will need to disclose the circumstances of a spouse and potentially adult children living at home.

Competing Claim

The competing claim of Shane Jones is he was 57, and a disability pensioner with type 2 diabetes, chronic heart disease, severe back issues.

Shane lived with the Testatrix until she went into a home in 2022, he provided her with care and support while living with her.

Shane was financially dependent on his mother.

At [20]: This [financial dependence] is a significant element to Shane Jones' strong competing claim on the estate.

Jurisdictional Question and Quantum

Decided in favour of the Applicant.

At [22]: At [the date of death], a wise and just testatrix would have given close consideration to the fact that the applicant's health had worsened over the years and at that date had a significant impact on his present and future capacity to work and earn money. The applicant's wife's poor health at this time also should have raised reasonable concerns about her present and future capacity to financially contribute.

At [26]: My assessment of all the circumstances relevant to the question of the proper maintenance and support for the applicant is that the sum of \$100,000 amounts to adequate provision.

Barker v Cann [2025] TASSC 37

Facts:

Testatrix was the mother of the two Applicant sons, Brendan and Damien.

The estate was comprised of several properties, and the testatrix had run an AirBnB business with her de facto Husband Mr Cole.

Each son was given a gift of about \$132k from an estate of \$1.96m. This gift came from a one quarter share each of the residue. The testatrix left various other real property and chattels to her husband, younger son, and her sister.

Daly dismissed the TFM application.

The Percentage of the Gift is Irrelevant

[17]: ...I reject the applicants' submission that, having regard to the size of the estate, **the "small percentage... in and of itself" shows that the provision was inadequate.** No authority for such an approach was cited and to adopt it would be contrary to the statute and the principles which the Court must apply.

Adult sons were able to provide for themselves

[43]: I find that each applicant is able to maintain and support himself and his dependents. I also find that each applicant is established in a stable marriage and stable in his employment. Neither applicant gave evidence that they struggle to adequately provide for their dependents from their available resources. The applicants did not claim that they contributed to building up the testatrix's estate. Nor was either of them in any way dependent upon the testatrix at the date of her death. Neither applicant gave evidence that he had any expectation that he would receive a share of the testatrix's estate or that he acted upon any such expectation. Neither applicant gave evidence of any problems associated with poor health, nor that he has any reasonable apprehension of such problems. Each applicant has been in full time employment since leaving school and both applicants are skilled and capable men.

Buffer against unknown future contingencies

At [51]: The evidence relating to the degree of future need of each applicant did not provide detailed estimates of the reasonably anticipated future expenses involved in the future care for children and what impact that might have on the current or anticipated financial position of either applicant. However, the **jurisdiction under the Act is predicated on the adequacy – not simply the utility** – of the provision made under the will, having regard to all the circumstances.

The Applicants relied on a series of interstate cases, which Daly distinguished: at [57].

At [59]: The flaw in this aspect of the applicants' case is that they **have not established that they have needs which they cannot meet from their existing resources.**

Relevant principles

[63] Counsel for the respondent put the following propositions, which are accepted:

(a) Generally, **the community does not expect a parent to look after a child for the rest of the child's life**: *Chapman v Ingold* [2015] NSWSC 1604 at [115].

(b) Mr Cole's relationship with the testatrix was a loving one, involving joint contribution to the operation of the testatrix's Airbnb business and he helped the testatrix build up her estate.

(c) The applicants' submissions suggest that the Court should take an approach equivalent to fairness, rather than what was adequate and proper provision: *Steinmetz v Shannon* [2019] NSWCA 114; [2019] 99 NSWLR 687 at [95] per Brereton JA. There, Brereton JA stated:

"It may readily be accepted that the legislation does not authorise a redistribution of an estate according to indeterminate and unreliable concepts such as 'fairness or equality', and that it authorises interference only to the extent of making adequate provision for proper maintenance, education and advancement in life."

(d) The facts permit the Court to conclude that the testatrix saw that each of the applicants was making his way well in the world. Further, that she had one son, Aaron, who was not doing as well as the applicants were, together with her spouse who was not anywhere near as young as the applicants.

(e) The testatrix had a duty to Mr Cole as his spouse: see *Lord v Lord* [2003] TASSC 99, at [9], Cox CJ referring to *Golosky v Golosky* [1993] NSWCA 111, page 10 at line 25.

Relevant principles

[67] The Act does not permit the Court to effect a redistribution of an estate in order to satisfy notions of familial generosity.

This is the case even if an applicant has few resources and the competing claim is by a person who is relatively well off

Piscioneri v Whitehouse, Piscioneri and Gates [2025] TASSC 8

Testatrix made a will in 2019, bequeathing \$10k to each of her 15 grandchildren, and the remainder to her 6 children in equal parts.

One of the adult children (the plaintiff) challenged the final will.

The plaintiff alleged undue influence, and lack of testamentary capacity.

This case was ultimately dismissed due to a total lack of evidence for undue influence, and lack of testamentary capacity.

At [26]: the testatrix knew what she was doing and had the testamentary capacity to make her April 2018 will and codicils and to make her May 2019 will

Principles relating to capacity

At [25], Daly AsJ stated:

As Cavanough J said in *Haberfield and Ors v Larsson* [2023] VSC 161 at [21]:

"Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the onus probandi lies upon the party impeaching the will to show that it ought not to be admitted to proof.

...

To displace a prima facie case of capacity and due execution mere proof of serious illness is not sufficient; there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property."

Principles continued, and Costs

Having regard to the evidence in this case, Daly AsJ ruled that there was no doubt in his mind that the testatrix knew what she was doing and had the testamentary capacity to make her 2018 will and its codicils, as well as the will of May 2019.

It was erroneous to suggest that the testatrix could not read or see the will or that she did not understand its contents [at 26].

Indemnity costs were awarded against the Plaintiff: *Piscioneri v Whitehouse, Piscioneri and Gates (No 2)* [2025] TASSC 13

[9] An order for indemnity costs against the plaintiff is justified because of the special and unusual feature of the plaintiff's action being that she raised a series of totally unmeritorious claims (including allegations of fraud) against the validity of the 2019 will, the 2018 will and its codicils, which were without any prospect of success, and which were wholly unsupported by any evidence of any probative value, or any evidence at all.

*4 days of hearing time, plus written submissions were required for this case.

Muhl v Bailey [2025] TASSC 24 (per Pearce J)

Successful TFM application by an adopted daughter against the estate of her late stepmother.

There was a net estate of \$481k.

The Testatrix made no provision for the Applicant, but did make provision for her siblings.

The Applicant was a 69 year old divorced lady, with 3 adult children, she had \$452k in super at the time of hearing, she owned her home which may have had a value of between \$1.5m-\$1.9m. She owned a 1974 BMW valued at \$17k.

In 2024 her living expenses were \$71,920.49. She said she needed to undertake substantial repairs to her home, including replacement of the pool fence.

She was in reasonable health, albeit needing to spend \$25,000 on dental work.

There was actuarial evidence that you need \$51,630 per annum for a comfortable retirement.

Adequate provision?

Pearce J said that despite the Applicant not being dependent on the Testatrix, nor being destitute or in any need of urgent financial assistance, she was left without adequate provision for her proper maintenance and support.
[41]

The Respondent criticised the Applicant for a lack of disclosure including [42]:

- adduced insufficient evidence about the value of her home;
- did not accurately represent the amount of her superannuation fund at the date of the death of the testator by failing to disclose the likely increase to the value resulting from her family property settlement;
- offered no corroboration of the values of her accounts, superannuation and the amount due to her under the settlement, and was generally imprecise about values;
- adduced insufficient evidence about the need for and costs of repairs and renovations to her home;
- failed to adequately explain her expenditure during the financial years ended 2023 and 2024 or account for the source of the funds, suggesting that either she has an undeclared source of income or her savings must have been substantially higher than she deposed.

Priority of Children of first marriages

[45] ...

I agree with the observations of Nettle J in *McKenzie v Topp*^[21]:

"Other things being equal, right thinking members of society are likely to accept that the needs of the widow of a second marriage should rank in priority ahead of the claims of the children of a first marriage; although of course it is always a question of fact. But equally, upon the death of the widow, and as it were in the event of a surplus, most would surely say that the children of the first marriage should rank for their fair share. For once the widow is gone, and therefore no longer in need of provision, her needs no longer warrant that the children rank behind her or thus her chosen successors.

Of course that is to speak in terms of broad generality and upon the assumption not only of an estate of sufficient value to provide for the children of the first marriage but also of a need for their provision."

[46] ... Although Nita, during her life, did not assume any responsibility for the financial and emotional security of the applicant, the circumstances I have outlined imposed a moral duty upon her in favour of the applicant arising from the relationship between the applicant and her father, the absence of any provision for the applicant during the life of her mother and her father, the size and nature of the estate and the ability to provide for the applicant without affecting those beneficiaries with any competing moral claim.

Estrangement and family politics

The Applicant was the adopted daughter of the Testatrix's husband. She was the adopted daughter from his first marriage.

She did not like her step mother, and was “disgusted” when the step mother moved in with her father shortly following her mother's death in 1980. They had had little to do with each other.

[49] The respondent, correctly in my respectful view, conceded that there was nothing in the evidence regarding the applicant's relationship with her late father which would have the effect of lessening his moral obligation to the applicant under the Act. There was a long period of estrangement between the applicant and her father. However, estrangement or even hostility between a testator or testatrix and an applicant does not terminate the obligation of the testator or testatrix to provide for the applicant. Relationships may be complex and nuanced, and an overall view of the relationship between parent and child is to be considered and appraised in each case.

Premature Distribution

[54] The respondent fully distributed the estate before the expiration of the three month time limit for applications provided for by the Act, s 11.

Ultimately the Applicant received a payment of \$90,000.00