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# Structured Proportionality, Unreasonableness and Managing the Line between Executive and Judicial Functions

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*In Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry the Federal Court applied a form of structured proportionality and more traditional unreasonableness review to determine that a regulation suspending live exports of cattle to Indonesia was invalid. The article considers the application of these forms of review to the highly polycentric context in which the challenged regulation was made. It argues that the Court's application of substantive review made its assessment indistinguishable from the policy judgments made by executive officials. The Court assessed the same risks as the Government, but it weighed the risks in a different manner. The article argues for some additions to the principles of substantive review of regulations that involve consideration of the administrative context in which decisions are made and enables courts to adjust their review by reference to that context.*

## I. INTRODUCTION

The High Court in *McCloy v New South Wales (McCloy)* suggested that structured proportionality applies to proportionality review in administrative law proceedings as well as in constitutional law.<sup>1</sup> This step was taken in *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry (Brett Cattle)*.<sup>2</sup> Forms of unstructured proportionality have been applied in judicial review of regulations in the past,<sup>3</sup> but not the structured form set out in *McCloy*. Rares J applied structured proportionality to a regulation by reference to a principle of legality value. He determined that the regulation suspending live exports of cattle to Indonesia (the “Suspension Order”)<sup>4</sup> was invalid.<sup>5</sup> Following from that conclusion, he also decided that the Minister engaged in misfeasance in public office.<sup>6</sup>

Legal scholars have expressed concerns about the *Brett Cattle* case.<sup>7</sup> Janina Boughey stated that the case raises fundamental questions about “where the line between judicial and executive power lies”.<sup>8</sup>

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<sup>1</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 195 [3]; [2015] HCA 34.

<sup>2</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 410–411 [295]–[300]; [2020] FCA 732.

<sup>3</sup> *Williams v Melbourne Corp* (1933) 49 CLR 142, 155; *South Australia v Tanner* (1988) 166 CLR 161, 165; *Attorney-General (SA) v Corp of the City of Adelaide* (2013) 249 CLR 1, 37 [56] (French CJ), 57 [117] (Hayne J, Bell J agreeing), 83–84, [199]–[201] (Crennan and Kiefel JJ); [2013] HCA 3.

<sup>4</sup> Explanatory Statement, *Export Control (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth).

<sup>5</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 425 [363]; [2020] FCA 732.

<sup>6</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 431–432 [391]–[395]; [2020] FCA 732.

<sup>7</sup> For commentary on the misfeasance in public office aspect of the case, see Ellen Rock, “A New Lease on Life for Misfeasance” (2020) 31 PLR 365, 369; Tom Major, “Live Export Ban Decision sets ‘Controversial’ Precedent and Could Win an Appeal, Legal Expert Says”, *ABC Rural*, 5 June 2020 <<https://www.abc.net.au/news/rural/2020-06-05/live-cattle-export-decision-controversial-professor-says/12319586>> quoting concerns raised by Jason Varuhas.

<sup>8</sup> Janina Boughey, *The Brett Cattle Case: Exploring the Limits of Delegated Law-Making Powers* (3 July 2020) AUSPUBLAW <<https://auspublaw.org/2020/07/the-brett-cattle-case>>. See also Janina Boughey, “Brett Cattle: New Limits on Delegated Law-Making Powers” (2020) 31 PLR 347, 354.

I agree with Dr Boughey that the case raises this question, and I will argue that Rares J's reasoning is an example of the line being crossed. Rares J's application of structured proportionality and legal unreasonableness principles involved him reviewing the policy decisions that provided the basis for the Suspension Order. I will develop this argument by examining the difficulties highlighted in *Brett Cattle* for structured proportionality review. I will also argue that Rares J applied traditional forms of unreasonableness review in a problematic manner. The reasoning in this aspect of the case suggests the need for some adjustments to substantive review of regulations to direct courts away from dealing with policy-based judgments.

I will focus on Rares J's application of the most intrusive forms of judicial review of administrative action (proportionality and unreasonableness) to administrative decision-making that according to traditional principles would be regarded as non-justiciable. The decisions underpinning the challenged Suspension Order were polycentric: they involved controversial and urgent animal welfare concerns, an export industry involving many people's livelihoods, Australia's relations with a foreign government (Indonesia), and impacts on Indonesian industry. The decision was made in substance by Cabinet and was subject to extensive debate in Parliament.

Polycentric decisions have in the past been regarded as non-justiciable but are now regarded as reviewable so long as a relevant legal standard can be isolated and applied to the decision. I do not argue for a return to non-justiciability, at least in an absolute form, for polycentric decisions but I do argue that *Brett Cattle* highlights the need for a better understanding of the terms on which non-justiciability on the grounds of polycentricity has developed. The evolution beyond absolute non-justiciability was based on courts exercising restraint when reviewing polycentric decisions by making their assessments on the clearest, most well-defined, legal grounds. Accordingly, I will draw on non-justiciability principles to attempt to clarify the relationships between judicial and administrative assessments in judicial review of polycentric decisions.

*Brett Cattle* is likely to be an important milestone in the evolution of judicial review of regulations due to the Court's application of structured proportionality. The fact that it is a decision of a single judge of the Federal Court is unlikely to diminish its significance. Although the Federal Court decision is clearly against the Commonwealth Government's interests, the Government announced it would not appeal due to not wanting to disrupt the cattle industry's success in the case. The Attorney-General's media release stated that the government "disagrees with some of the principles as they have been applied by the court" and that the Court's reasoning involved a "departure from existing legal principles" in relation to judicial review of regulations and misfeasance in public office.<sup>9</sup> As there was no appeal and the trial judge took important doctrinal steps, *Brett Cattle* is worth examining in depth.

The article is structured in the following manner. Part II explains the Suspension Order challenged in *Brett Cattle*, the polycentric nature of the decisions underpinning the Suspension Order, and the institutional contexts in which the decisions were made. Part III examines principles of non-justiciability on the ground of polycentricity and international relations, and its accepted current significance. This part is intended to draw out traditional understandings of the line between executive decision-making based on discretionary judgments and judicial decision-making and how approaches to drawing the line between the two have evolved. Part IV focuses on the application of structured proportionality and unreasonableness review in *Brett Cattle*.

## II. THE SUSPENSION ORDER – LEGAL FRAMEWORK, STAKEHOLDERS, and INSTITUTIONS

This part goes into some depth on the nature of the decision to make the challenged regulation, and the stakeholders and institutions that contributed to making it. Each of these aspects of the background is complex and require more than usual explanation. It is necessary to highlight the features of the Suspension Order that are relevant to why the Federal Court's application of structured proportionality and unreasonableness review stepped over the line into executive functions.

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<sup>9</sup> Attorney-General, "Federal Court of Australia Decision on Live Cattle Export Ban" (Media Release, 22 July 2020).

## A. Suspension Order – Response to an Urgent Problem

The catalyst for the Suspension Order was a television report (the “Four Corners report”) of inhumane slaughter of cattle in Indonesian abattoirs that was broadcasted on 30 May 2011.<sup>10</sup> The report was described by Rares J as “causing ‘an immediate public furore’ that presented the Government ‘with a major political crisis’.”<sup>11</sup>

The Suspension Order was one of a number of steps taken by the Government in response to animal welfare concerns with the live export of cattle to Indonesia exposed in the Four Corners report. The following steps were taken in the weeks after it:

- 2 June 2011 – *Export Control (Protection of Animal Welfare) Order 2011* (Cth): This Order required Ministerial approval to export live animals to particular places in Indonesia. The Minister was to grant approval if satisfied that abattoirs in those places operated in accordance with World Organisation for Animal Health standards or would be brought to those standards.
- 7 June 2011 – *Export Control (Export of Livestock to the Republic of Indonesia) Order 2011* (Cth) and *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth): These orders provided for a six-month suspension of live exports of animals to Indonesia.
- 13 June 2011: The Government established three reviews of the live export trade; two with industry<sup>12</sup> and one independent review.<sup>13</sup>
- 30 June 2011: The Government announced industry assistance packages.<sup>14</sup>
- 6 July 2011 – *Export Control Repeal Order 2011* (Cth) and *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth): These Orders repealed the Suspension Order and provided for a new live export system for Indonesia. The new system permitted live exports to Indonesia when the Minister is satisfied of the exporter’s compliance with international animal welfare standards and conditions imposed on approvals relating to transport, handling, slaughter, tracking and auditing of exported animals.

While these were the immediate steps taken following the Four Corners report and were the focus of the *Brett Cattle* proceedings, it is also important to recognise that the Government’s steps in this period were an important milestone in the regulatory framework for live exports.<sup>15</sup> It was in this period that the Government developed the Exporter Supply Chain Assurance System (ESCAS), a requirement for tracing each animal throughout the supply chain.<sup>16</sup> The ESCAS system was initially included in the regulations made on 6 July 2011 in relation to Indonesia and then was expanded during 2012.<sup>17</sup> It is currently included in the *Export Control (Animals) Order 2004* (Cth).

<sup>10</sup> “Four Corners: A Bloody Business” *Australian Broadcasting Corporation*, 30 May 2011 <<https://www.abc.net.au/4corners/4c-full-program-bloody-business/8961434>>.

<sup>11</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 366 [114]; [2020] FCA 732.

<sup>12</sup> The reports of the Industry Government Working Groups are no longer available. They are referred to in the following in *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 393 [219]; [2020] FCA 732. See also Claire Petri, “Live Export – A Chronology” (Research Paper Series 2019-20, Parliamentary Library, Parliament of Australia, 6 September 2019) 21; Celeste Black, “Live Export and the WTO: Considering the Exporter Supply Chain Assurance System” (2013) 11 *Macquarie Law Journal* 77, 81.

<sup>13</sup> Bill Farmer, *Independent Review of Australia’s Livestock Export Trade* (Report, 31 August 2011) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/lcatalog/00380692%22>>.

<sup>14</sup> Prime Minister and Minister for Agriculture, Fisheries and Forestry, “\$30 Million Assistance Package for Live Export Industry” (Media Release, 30 June 2011) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/896588%22>>; Petri, n 12, 20.

<sup>15</sup> Petri, n 12, 3–6.

<sup>16</sup> The system is explained in detail in Australian Government, *Exporter Supply Chain Assurance System Report*, Report (January 2015).

<sup>17</sup> *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011 (No 2)* (Cth); *Export Control (Animals) Amendment Order 2012 (No 1)* (Cth). See also Marie T Hastreiter, “Animal Welfare Standards and Australia’s Live Exports Industry to Indonesia: Creating an Opportunity Out of a Crisis” (2013) 12(1) *Washington University Global Studies Law Review* 181, 187–190.

It was the second step, the Suspension Order made on 7 June 2011, that was challenged in *Brett Cattle*. The Suspension Order was just two pages (including the title page) and included one important section stating:

**4 Prohibition of exports of live-stock**

- (1) The export of live-stock to the Republic of Indonesia is prohibited for a period of 6 months from the date of commencement of this Order.
- (2) Subsection (1) does not apply to breeder live-stock.

There was a second regulation, the *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth), that was made on the same day in similar terms but was made by the Secretary of the Department of Agriculture, Fisheries and Forestry. This regulation was regarded by Rares J as complementing the Suspension Order and was not examined separately in his judgment.<sup>18</sup>

The Suspension Order was made under the *Export Control Act 1982* (Cth) and the *Export Control (Orders) Regulations 1982* (Cth). These laws provided the Minister with a broad discretion to issue orders. While provisions enabling the making of regulations can in some cases be unclear as to whether the Act authorises prohibition of particular activities,<sup>19</sup> this Act was very clear that prohibition was permitted. The enabling provision in the Act, s 7 of the *Export Control Act* was titled “Prohibition on export of prescribed goods” and its provisions expressly extended to “prohibit the export of prescribed goods absolutely”.<sup>20</sup>

The Federal Court decision dealt with two primary issues – whether the Suspension Order was valid and whether in making the Order the Minister had acted with misfeasance in public office. I will focus on the findings in relation to the Court’s decision that the Suspension Order was invalid. Rares J determined that the enabling provision in the Act “in its natural and ordinary meaning, appeared to permit the Minister to make” the Suspension Order.<sup>21</sup> However, the Suspension Order did not pass Rares J’s application of structured proportionality that was made by reference to the principle of legality value referred to as the “right to carry on business in one’s own way within the law”.<sup>22</sup> While he regarded the Suspension Order as being made for the proper purpose of an interim step towards improved regulation of live exports to Indonesia,<sup>23</sup> the Order did not pass the second and third stages of the *McCloy* structured proportionality test. The Suspension Order was not necessary as there were less restrictive means for achieving the purpose of the Act.<sup>24</sup> The initial Order made by the Minister on 2 June in the days after the Four Corners report provided a discretion to determine exceptions to the prohibition and Rares J regarded it as an “obvious and compelling alternative” to the Suspension Order.<sup>25</sup> The Suspension Order was also regarded as being disproportionate in balancing the animal welfare purpose against the burden on businesses.<sup>26</sup>

I will argue that Rares J’s structured proportionality assessment led to him assessing the same question that was presented to the government; the risk of further inhumane practices in Indonesian abattoirs in relation to cattle live exported from Australia. That risk was made clear in the Four Corners report and was confirmed by the live export industry representatives in discussions with the Government leading to the Suspension Order. They explained their limited ability to control slaughtering practices and the abattoirs at which Australian cattle were to be slaughtered: “we cannot guarantee to immediately prevent

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<sup>18</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 425 [362]; [2020] FCA 732.

<sup>19</sup> See, eg, *Swan Hill Corp v Bradbury* (1937) 56 CLR 746, 762 (Dixon J); Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5<sup>th</sup> ed, 2017) 261.

<sup>20</sup> *Export Control Act 1982* (Cth) s 7(2)(a).

<sup>21</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 418 [330]; [2020] FCA 732.

<sup>22</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 409 [292]; [2020] FCA 732.

<sup>23</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 418 [329]; [2020] FCA 732.

<sup>24</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 423 [354]; [2020] FCA 732.

<sup>25</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 423 [352]; [2020] FCA 732.

<sup>26</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 424 [358]; [2020] FCA 732.

any instance of unsatisfactory welfare practices in Indonesia – we have no power to do so” and that “[w]ith a supply chain this long control is sometimes lost over where cattle are finally slaughtered”.<sup>27</sup> However, Rares J determined that for at least some exporters there was no realistic danger and that the suspension was unreasonable and disproportionate.<sup>28</sup>

## **B. Interests – Farmers, Animal Welfare Groups, Meat Industry, Indonesian Government**

As my analysis will focus on the polycentric nature of the decisions underpinning the Suspension Order, it is necessary to explain the range of interests at stake. This is not to suggest that one set of interests should be given more weight than others but to highlight the complexity of the issues dealt with by the Suspension Order.

The *Brett Cattle* proceedings were a class action brought by cattle producers. The class included persons and businesses that were producing cattle for live export or were exporting cattle to Indonesia at the date the Suspension Order was made. It also included persons or businesses providing “transport services, mustering services, feed, agistment and/or other incidental services to producers and exporters”.<sup>29</sup> Australia has a large live export trade. The Parliament of Australia Library has reported that it increased from approximately 80,000 head of cattle in 1988 to over a million head of cattle in 2018 and that in 2018 the value of the sheep and cattle trade was \$1.43 billion.<sup>30</sup>

The lead applicant, Brett Cattle Company Pty Ltd was highly dependent on the live export trade. Rares J’s judgment indicates that in 2011 the Indonesian live export trade was Brett Cattle’s only market and that this singular focus was raised as a risk by its bank.<sup>31</sup> Brett Cattle did not sell their product in Australia due to the distance from its property in western Northern Territory to markets in Australia’s eastern States. This distance was explained in Rares J’s reasons by reference to southern Queensland being over 3,300 kilometres away.<sup>32</sup> There was also particular time sensitivity for Brett Cattle’s exporting business due to having insufficient feed for cattle that were over 24 months old.<sup>33</sup> The Suspension Order resulted in Brett Cattle losing sales. It also had additional costs for resale of cattle that could not be exported while the Suspension Order was operating, additional agistment and cartage costs, and was required to make additional interest payments to its bank.<sup>34</sup>

Concerns about animal welfare in the live export trade have been held for decades. The Parliament of Australia Library reported in 2019 that there have been at least 10 government and parliamentary reviews of the live export trade and issues regarding animal welfare since the mid 1980’s.<sup>35</sup> Some animal welfare organisations argue that the live export trade should be wound down and replaced by export of meat instead.<sup>36</sup> In late 2010, prior to the Four Corners report and the making of the Suspension Order, animal welfare organisations expressed their concerns about the live export industry to the Minister.<sup>37</sup>

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<sup>27</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 375 [143], [145]; [2020] FCA 732.

<sup>28</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 425 [360]–[361]; [2020] FCA 732.

<sup>29</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture (No 3)* [2020] FCA 1628, [6].

<sup>30</sup> Petri, n 12, 1.

<sup>31</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 346 [14], 454 [491]; [2020] FCA 732.

<sup>32</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 346 [14]; [2020] FCA 732.

<sup>33</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 346 [15]; [2020] FCA 732.

<sup>34</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 449 [465]; [2020] FCA 732.

<sup>35</sup> Petri, n 12, 1.

<sup>36</sup> Moira Coombs and Hannah Gobbett, “Parliamentary Library Briefing Book: Key Issues for the 44th Parliament” (Parliament of Australia, 18 December 2013) 38.

<sup>37</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 351 [39]; [2020] FCA 732.

The Australian meat industry representative, the Australian Meat Industry Council, expressed to the Government its concerns with the live export trade during the development of the Suspension Order. Its concern was the impact around the world on Australia's meat trade of the images included in the Four Corners program.<sup>38</sup> It advocated for a suspension of the live export trade with Indonesia until Indonesia could achieve standards that were equivalent to Australia's standards.<sup>39</sup>

When considering the range of interests concerned about the Suspension Order it is also important to recognise that it only applied to live exports to Indonesia. The Indonesian government, and its meat industry, had interests that had to be considered. This was recognised by the Government, and the Government's dealings with Indonesia in relation to the live export trade are referred to by Rares J in numerous parts of his judgment.<sup>40</sup>

Rares J's judgment explains the Minister's and his Department's interactions with the various interest groups in much detail. Curiously the explanatory statement for the Suspension Order states that detailed consultation with the industry was not possible due to the circumstances in which it was made.<sup>41</sup> However Rares J's reasons for decision make clear that there was substantial engagement with the stakeholders prior to the Suspension Order being made. The explanatory statement must mean that there was no consultation on a draft of the Suspension Order.

### C. Institutions and Processes

The Federal Court suggested that the process for making the Suspension Order was unsatisfactory. Rares J's started his judgment by quoting Bismarck, "Laws are like sausages; it is better not to see them being made".<sup>42</sup> The lead applicant Emily Brett stated to the media that the suspension was a "knee-jerk reaction with devastating consequences for businesses across northern Australia" and that it was "a quick decision made to try and look as though the government was doing something".<sup>43</sup> Such views of the processes influenced Rares J's decision that the Suspension Order was disproportionate and legally unreasonable.<sup>44</sup>

However, it is important to understand the decision-making process for the Suspension Order. The process described in Rares J's judgment indicates that there was much discussion by the Minister and the Department with relevant stakeholders. The Suspension Order was also considered by Cabinet and the Parliament, the two institutions designed for deliberation on the major policy issues of the day.

#### **Minister and Department**

In the six months prior to the Four Corners report the Minister had been briefed on the live export cattle trade to Indonesia<sup>45</sup> and had corresponded and met with animal welfare groups regarding the risks inherent in the live export trade, a meat industry group, and livestock industry groups.<sup>46</sup> As would be expected, after the Four Corners report the meetings and correspondence increased dramatically. There were regular communications between industry groups representing cattle farmers and meat producers

<sup>38</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 367 [117]; [2020] FCA 732.

<sup>39</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 370 [129]; [2020] FCA 732.

<sup>40</sup> See, eg, *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 391 [213]–[214], 392–393 [218], 394 [223]–[226], 397–398 [234]–[239]; [2020] FCA 732.

<sup>41</sup> Explanatory Statement, *Export Control (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth) <<https://www.legislation.gov.au/Details/F2011L00969/Explanatory%20Statement/Text>>.

<sup>42</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 343 [1]; [2020] FCA 732.

<sup>43</sup> Sara Everingham and Kristy O'Brien, "Cattle Industry Launches Class Action against Federal Government Seeking Compensation over Live Export Ban", *ABC News*, 28 Oct 2014 <<https://www.abc.net.au/news/2014-10-28/cattle-industry-launches-class-action-over-live-export-ban/5845650?nw=0>>.

<sup>44</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 425 [359]; [2020] FCA 732.

<sup>45</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 350 [37]–[38]; [2020] FCA 732.

<sup>46</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 350–353 [35]–[49], 354–355 [54]–[58]; [2020] FCA 732.

and the Department, meetings with the Minister, and meetings with the Department of Prime Minister and Cabinet.<sup>47</sup> Legal advice was provided by the Australian Government Solicitor, the Attorney-General's Department and a non-government law firm.<sup>48</sup> When made, the Suspension Order was explained in public in numerous ways: an explanatory statement in the Federal Register of Legislation,<sup>49</sup> a media release and press conference, and interviews with the media.<sup>50</sup>

### **Cabinet**

It is also clear that Cabinet made the decision to suspend the live export trade with Indonesia and that this decision was implemented by the Suspension Order made by the Minister. Rares J's chronology of the decision-making process describes the Minister's decision to suspend the live export trade to Indonesia as being made straight after Cabinet's consideration of it on the evening before the Suspension Order was made.<sup>51</sup> Cabinet's role in regard to the substance of the decision was confirmed by the Prime Minister of the time, Julia Gillard, who stated in Parliament that the Suspension Order was a "decision of the government, through the cabinet meeting last week, to suspend live exports to Indonesia".<sup>52</sup>

### **Parliament**

The live export trade with Indonesia was raised numerous times in Parliament in response to the Four Corner's report. It was raised on the evening of the Four Corners report just after the program went to air.<sup>53</sup> The Minister was questioned about it in the Senate on the first sitting days after the Suspension Order was made.<sup>54</sup> The Prime Minister was also questioned by the Opposition Leader in the House of Representatives. The question related to the same concern raised in the Federal Court proceedings: the impact of the suspension on cattle producers in Northern Australia. The Prime Minister gave substantive answers regarding the suspension. In particular she explained how the Government understood the risks in the live export trade with Indonesia at the time:

There are two factors here – factor No. 1: the conditions in the abattoir; and factor No. 2: being able to track where Australian cattle go. So, unless we are able to track and ensure, if we say conditions are appropriate in one facility, that Australian cattle are going to that facility and that facility alone and not ending up in other facilities, then clearly we have not solved the problem. ... The government is working extensively on both in contact with the representatives of the industry.<sup>55</sup>

This explanation is consistent with the industry's explanation to the Minister that control was sometimes lost in the supply chains.<sup>56</sup>

Although there was a great deal of discussion and debate about the Suspension Order in these sitting days there was no vote to disallow the Suspension Order, as each house of the Parliament is empowered to do under what was then the s 42 of the *Legislative Instruments Act 2003* (Cth). The Opposition moved

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<sup>47</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 373 [135]–[140], 374–377 [143]–[152], 385 [185]–[187]; [2020] FCA 732.

<sup>48</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 364 [105]–[109], 372 [134], 378 [160]; [2020] FCA 732.

<sup>49</sup> Explanatory Statement, *Export Control (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth) <<https://www.legislation.gov.au/Details/F2011L00969/Explanatory%20Statement/Text>>.

<sup>50</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 389–391 [209]–[212]; [2020] FCA 732.

<sup>51</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 387 [193]; [2020] FCA 732. Rares J also stated that he assumed the decision to make the Suspension Order was made by Cabinet: *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 426 [369]; [2020] FCA 732.

<sup>52</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 June 2011, 5836 (Julia Gillard, Prime Minister).

<sup>53</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2011, 5249 (Ms Parke).

<sup>54</sup> Commonwealth, *Parliamentary Debates*, Senate, 14 June 2011, 2624–2626, 2628–2630, 2632–2637, 2638–2640; Commonwealth, *Parliamentary Debates*, Senate, 15 June 2011 2851–2853, 2855–2856 (Senator Ludwig).

<sup>55</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 June 2011, 5837 (Julia Gillard, Prime Minister).

<sup>56</sup> As referred to in Part IIA.

a motion that included that the Government revokes the Suspension Order, but the motion was not passed.<sup>57</sup>

The Parliament engaged with the live export issue in the period after the Four Corners report in other ways. Two non-government bills were introduced to Parliament, both seeking to close down the live export trade.<sup>58</sup> These Bills were referred to the Senate Rural Affairs and Transport References Committee which recommended not to pass them.<sup>59</sup>

The important point is that Parliament had unusually close engagement with the Suspension Order and the issues which prompted it. The Minister and Prime Minister were required to explain the Government's decision. As already mentioned, the Parliamentary debate did not lead to its disallowance powers being used. The process indicates that a broad range of executive officials were involved in the making of the Suspension Order, department officials, lawyers, the Minister and Cabinet. The decisions made by these executive institutions in regard to the Suspension Order were subject to an unusually high level of scrutiny by Parliament. While the Suspension Order was formally made within the executive, and potentially a largely behind the scenes administrative process, the controversial nature of its subject matter led to it moving to centre stage and exposed to the spotlight of national political attention.

### III. MANAGEABLE STANDARDS: PRIMARY AND SECONDARY NON-JUSTICIABILITY

The Government's decisions in making the Suspension Order included characteristics that courts have understood to be non-justiciable. The decision had polycentric characteristics<sup>60</sup> and it raised issues concerning foreign relations, Australia's relationship with Indonesia.<sup>61</sup> It is also important to recognise that the decision underpinning the Suspension Order was made by Cabinet; confirming its high policy significance.

Recent scholarship analysing case law on non-justiciability since the 1980s commonly recognises it as having primary and secondary forms.<sup>62</sup> Primary non-justiciability precludes the court from dealing with the plaintiff's case. Secondary non-justiciability, the form that is arguably relevant to the Suspension Order, requires particular consideration by the court of the judicial review grounds to be applied to the administrative action.<sup>63</sup> Professor Bruce Harris, whose work has been influential in this area, refers to procedural grounds being preferable over grounds focusing on the rationality of the decision.<sup>64</sup> In some cases the polycentric nature of the decision may mean that some grounds of review require narrowing of their scope.<sup>65</sup>

<sup>57</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 June 2011, 2882.

<sup>58</sup> Explanatory Memorandum, *Live Animal Export (Slaughter) Prohibition Bill 2011* (Cth); Explanatory Memorandum, *Live Animal Export Restriction and Prohibition Bill 2011* (Cth).

<sup>59</sup> Senate Rural Affairs and Transport References Committee, Parliament of Australia, *Animal Welfare Standards in Australia's Live Export Markets* (Final Report, November 2011) 17.

<sup>60</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278–279 (Bowen CJ).

<sup>61</sup> *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449; [2010] FCAFC 69; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 307–308 (Wilcox J).

<sup>62</sup> BV Harris, "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 *Cambridge Law Journal* 631, 644–646. See also Paul Daly, "Justiciability and the 'Political Question' Doctrine" [2010] *Public Law* 160; Rayner Thwaites, "The Changing Landscape of Non-Justiciability" [2016] *New Zealand Law Review* 31, 36–37, 58 referred to as preclusive and presumptive non-justiciability; Anthony Mason, "The High Court as Gatekeeper" (2000) 24 *Melbourne University Law Review* 784, 796.

<sup>63</sup> Harris, n 62, 644.

<sup>64</sup> Harris, n 62, 656–657. See also Mason, n 62, 790; Jason Varuhas, "The Principle of Legality" (2020) 79 *Cambridge Law Journal* 578, 611; *The Independent Review of Administrative Law* (Final Report, March 2021) 33–34.

<sup>65</sup> See, eg, *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* (2008) 302 ALR 299, 315–325 [73]–[90] (Spigelman CJ); [2008] NSWCA 356 (limiting the content of procedural fairness due to the polycentric nature of the decision); *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14, [13]–[16] (Basten JA) (affecting interpretation of the Act and the relevant considerations).

The sensitivities inherent in the Suspension Order are not non-justiciable in the primary sense. As delegated legislation made under statute, there is always the legal question as to whether it is authorised by the empowering Act. However, the polycentric nature of the decision to suspend the live export trade and the foreign relations aspect of it, indicate that the decisions to make it were particularly sensitive and can be regarded as having characteristics of secondary non-justiciability. That raises for consideration the nature of the grounds of review to be applied to it.

The factual background in *Brett Cattle* provides a clear example of a polycentric decision. As explained in Part IIB there was a range of different and conflicting interests. Regulating in such contexts raises complexities that make judicial resolution of them difficult. This point is commonly made by reference to Lon Fuller's famous article, "The Forms and Limits of Adjudication"<sup>66</sup> examining why polycentric decisions are unsuited to adjudicative forms of decision-making by courts and tribunals that use adversarial procedures. Fuller's point was that polycentric problems can only be resolved effectively by a policy judgment. Officials simply have to make a call as to how they should be resolved. Fuller referred to this as being a matter of "managerial direction" for which "a good deal of 'intuition' is indispensable" and for which political processes are appropriate to enable the different interests to be accommodated.<sup>67</sup> The important point is that polycentric decisions are unsuited to adjudicative decision-making as there is no specific standard that centres the parties' arguments and the decision-makers' deliberation.<sup>68</sup>

The Suspension Order was clearly a polycentric problem that would make it particularly unsuited to a form of merits review. However, the Court was not exercising merits review – it was exercising judicial review in which the Court was testing the Suspension Order by reference to judicial review standards. As a matter of secondary non-justiciability, that raises questions about the legal standards applied by the Court.<sup>69</sup>

The Suspension Order also has a foreign relations aspect as it applied only to live exports to Indonesia. The animal welfare issues addressed by the Suspension Order occurred in Indonesian abattoirs. Australian laws designed to protect the welfare of cattle produced in Australia for live export necessarily required consideration of transport and slaughtering in Indonesia. That required making assessments of Indonesian industry practices. It also meant that Australian government officials had to engage with the Indonesian government. Rares J explained aspects of this engagement during and after the development of the Suspension Order.<sup>70</sup> These parts of Rares J's judgment provided evidence of the Australian government's concerns about the Indonesian government's reactions to the Suspension Order. In particular, it was important to explain to the Indonesian Government that the trade would be suspended and that there was potentially a need for auditors to monitor Indonesian abattoirs.<sup>71</sup> There would no doubt also be tensions due to the Suspension Order being a form of criticism of the Indonesian industry and the inadequacy of Indonesian regulation.

The relevance of foreign relations to judicial review proceedings can raise concerns that the Court's analysis could harm the relationship between Australia and another nation. On the basis of international comity, courts are restrained from determining cases that impair international relations.<sup>72</sup> The *Brett*

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<sup>66</sup> Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353.

<sup>67</sup> Fuller, n 66, 398, 400.

<sup>68</sup> Fuller, n 66, 369.

<sup>69</sup> See Harris, n 62, 631, 644. See also Chris Finn, "The Justiciability of Administrative Decisions: A Redundant Concept?" (2002) 30 *Federal Law Review* 239, 251, 260–262.

<sup>70</sup> See *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 391 [213]–[214], 392–393 [218], 394 [223]–[226], 397–398 [234]–[239]; [2020] FCA 732.

<sup>71</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 394 [223]; [2020] FCA 732.

<sup>72</sup> See *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [No 2]* (1988) 165 CLR 30, 40–41, 44; *Habib v Commonwealth* (2010) 183 FCR 62, 97–98 [118]–[119]; [2010] FCAFC 12. Note that the review of the Suspension Order in *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337; [2020] FCA 732 (*Brett Cattle*) does not raise the Act of State principle – that is whether a foreign State has breached law may be non-justiciable: *Moti v The Queen* (2011) 245 CLR 456, 474–476 [47]–[52]; [2011] HCA 50 (*Moti v The Queen*); *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354; [2003] FCAFC 3. The High Court has recently determined that a breach of law by the

*Cattle* proceedings did not reach that point and the fact that international relations are relevant to a challenged decision does not necessarily make it non-justiciable. The justiciability of the case depends on the issue to be resolved by the court:<sup>73</sup> in particular, whether there is a discrete legal question to be determined<sup>74</sup> and whether there are “clear and identifiable standards” for the court to apply.<sup>75</sup> According to these principles, review of the Suspension Order was clearly justiciable in the primary sense, at least to determine whether it was authorised by the relevant enabling provision. The international relations aspect of the Suspension Order meant there were reasons to be careful in regard to any analysis that could involve Indonesia, but they did not mean the case itself was non-justiciable. The international relations aspect of the case exacerbated the polycentric nature of the considerations relevant to the making of the Suspension Order and indicated that particular restraint was appropriate in judicial review of it.

The decisions underpinning the Suspension Order were made by Cabinet. Its critical involvement in the making of the Suspension Order does not exclude judicial review. Decisions made in substance by Cabinet have been subject to judicial review in well-known administrative law cases.<sup>76</sup> There are constraints on reviewing Cabinet decisions due to public interest immunity. The steps in Cabinet’s decision-making process and precisely what was considered will not be available<sup>77</sup> but these constraints do not prevent judicial review. Most importantly Cabinet’s role in the making of the Suspension Order indicates that the Government’s policies regarding the live export trade generally and the Suspension Order in particular were treated as high policy rather than a matter of technical administration to be handled by the Minister and department.

This is confirmed by Parliament’s role in reviewing and debating the Suspension Order. While administrative lawyers may be sceptical of ministerial responsibility in practice, in regard to the Suspension Order it operated in an effective manner. The courts are not restricted from considering parliamentary deliberations when reviewing Acts and Regulations.<sup>78</sup> While not matters of primary non-justiciability they may be understood as matters of what Professor Harris refers to as secondary non-justiciability – indications of high policy that raise particular sensitivities for judicial review.

It is therefore clear that there were features of the decision-making background for the Suspension Order that raised the kinds of sensitivities for judicial review that put it into the category of secondary non-justiciability. Rares J did not treat these aspects of the context of the Suspension Order as sensitivities that would affect judicial review principles. The question that arises is, how can they affect judicial review principles and their application? That involves examining what secondary non-justiciability means in practice for judicial review of regulations.

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foreign state may be considered if it is relevant as a preliminary aspect of an issue that is justiciable by the Court: (*Moti v The Queen*, 476 [52]). The principle was clearly not engaged in *Brett Cattle*. There was no concern that Indonesia had breached any laws.

<sup>73</sup> Mason, n 62, 792.

<sup>74</sup> *Re Diftort; Ex parte Deputy Commissioner of Taxation (NSW)* (1988) 19 FCR 347, 372.

<sup>75</sup> *Habib v Commonwealth* (2010) 183 FCR 62, 98 [119]; [2010] FCAFC 12.

<sup>76</sup> See, eg, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *South Australia v O’Shea* (1987) 163 CLR 378. Compare *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 280–281 (Sheppard J).

<sup>77</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 301–302 (Wilcox J).

<sup>78</sup> The restrictions in *Parliamentary Privileges Act 1987* (Cth) s 16 do not extend to judicial consideration of parliamentary debates to determine the purpose of a regulation. Parliamentary speeches, reports and other materials have been referred to by the High Court in cases relating to constitutional forms of proportionality review: see *Clubb v Edwards* (2019) 267 CLR 171, 195 [48], 213 [121] (Kiefel CJ, Bell and Keane JJ), 228 [171], 233 [188] (Gageler J), 345 [500] (Edelman J); [2019] HCA 11; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 34–35 [71]–[72] (French CJ); [2010] HCA 4; *Brown v Tasmania* (2017) 261 CLR 328, 347 [36] (Kiefel CJ, Bell and Keane JJ); [2017] HCA 43. The UK Supreme Court considers parliamentary speeches in human rights proportionality cases involving regulations, see, eg, *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 700, 766–768 [12] (Lord Sumption JSC).

#### IV. SUBSTANTIVE JUDICIAL REVIEW, SECONDARY NON-JUSTICIABILITY AND ADMINISTRATIVE LAW GUIDELINES

Rares J's review of the Suspension Order in *Brett Cattle* was based on the broadest of administrative law grounds without considering the Suspension Order's secondary non-justiciability characteristics and the nature of substantive review in such circumstances. I will argue that his use of the principle of legality value of harm to business and principles of legal unreasonableness were not manageable legal standards in the circumstances of the case. Modern scholarship on non-justiciability highlights that for decisions that are polycentric and involve international relations it may be appropriate for courts to exclude substantive grounds of review<sup>79</sup> and to take particular care in delineating applicable grounds of review being conscious of the separation of powers concerns present in the circumstances.<sup>80</sup> The risk, that eventuated in *Brett Cattle*, is that application of substantive grounds of review without such delineation results in the court stepping beyond the accepted boundaries of judicial power and into dealing with matters of policy constitutionally associated with executive and legislative functions.<sup>81</sup>

Australian administrative law often includes steps requiring judges to consider the nature of the decision and the decision-maker when determining the characteristics of the grounds of review and applying them to the circumstances of the case. I will refer to these considerations as "administrative law guidelines". They help courts to identify circumstances of secondary non-justiciability and take steps to ensure the appropriate degree of restraint.

These guidelines are common aspects of Australian administrative law that have not been sufficiently factored into forms of substantive review. *Brett Cattle* highlights that they are a necessary addition. Review of an administrative decision that is in the category of secondary non-justiciability is dependent on there being a manageable legal standard. There is a risk in substantive review of regulations of that not being the case or the judge overlooking the need for one. Administrative law guidelines are a familiar aspect of judicial review of administrative decision-making that highlights to the court when particular steps are necessary in judicial review to ensure that it does not cross the line into executive assessments.

##### A. Structured Proportionality and the Principle of Legality

Administrative law is different to other legal contexts in which structured proportionality has been applied. There are no particular administrative law standards by which decisions are tested according to the structured proportionality methodology. There are legal standards when structured proportionality is applied by courts in human rights cases. In that context particular human rights are identified by legislation as being protected subject to the qualification of being justified in a democracy.<sup>82</sup> Administrative law values such as rationality, participation, and transparency<sup>83</sup> are protected through the grounds of judicial review rather than proportionality assessments. In *Brett Cattle*, Rares J applied structured proportionality by reference to a principle of legality value "the right to carry on business in one's own way within the law" (the "business rights value").<sup>84</sup>

The principle of legality is familiar in review of regulations cases primarily as a method for resolving interpretive questions as to whether the enabling provision of the Act authorises regulations that impact on fundamental values.<sup>85</sup> However there is a real question as to its appropriateness for structured

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<sup>79</sup> Mason, n 62, 790.

<sup>80</sup> Finn, n 69, 260–261.

<sup>81</sup> Anthony Mason, "Judicial Review: A View from Constitutional and other Perspectives" (2000) 28 *Federal Law Review* 331, 336.

<sup>82</sup> See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See also Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, 2<sup>nd</sup> ed, 2019) 61–62; Bruce Chen, "Delegated Legislation and Rights-Based Interpretation" in Janina Boughey and Lisa Burton Crawford, *Interpreting Executive Power* (Federation Press, 2020) 100–101; Janina Boughey, *Human Rights and Judicial Review in Australia and Canada the Newest Despotism?* (Hart Publishing, 2017) 199–201.

<sup>83</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action* (Lawbook Co, 6<sup>th</sup> ed, 2017) 4.

<sup>84</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 409 [292]; [2020] FCA 732.

<sup>85</sup> See, eg, *Evans v New South Wales* (2008) 168 FCR 576; [2008] FCAFC 130.

proportionality.<sup>86</sup> Dr Boughey has highlighted that applying the principle of legality in structured proportionality review involves a shift from being a value used in interpreting statutory provisions to a substantive limit on the power granted to the administrative official.<sup>87</sup> Her analysis helps us to see that principle of legality values are different to the human rights laws that provide the legal standards traditionally applied in structured proportionality review. The principle of legality values are not legal standards. They are values that support determining the meaning of unclear statutory provisions. *Brett Cattle* raises questions about the principle of legality value that provided the reference point for structured proportionality review of the Suspension Order and whether it was a manageable standard.

There was no issue in *Brett Cattle* as to whether the statutory provisions granting the Minister power to make orders expressly authorised prohibitions on the export of particular goods to a specified place.<sup>88</sup> Rares J recognised that the provisions of the *Export Control Act* were satisfied,<sup>89</sup> which meant that the principle of legality was not relevant in its traditional context; interpreting vague and ambiguous statutory provisions delegating powers to make regulations. The principle of legality requires “express authorisation”,<sup>90</sup> and “plain words of necessary intentment” in order for courts to accept that fundamental rights and principles have been affected by legislation.<sup>91</sup> In *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd (Progress Advertising)*, the case referred to by Rares J for the business rights basis for the principle of legality, O’Connor qualified the principle of legality by reference to the need for “plain words” or “necessary implication”.<sup>92</sup> This is critical to the justification of the principle of legality applying as a matter of statutory interpretation. When statutory provisions are vague or ambiguous the courts have an interpretive choice<sup>93</sup> and it is appropriate for that choice to be made by the courts by reference to the protected value.

Rares J did not examine whether the enabling provisions of the Act were vague or ambiguous in his use of the principle of legality in relation to structured proportionality. The *Export Control Act* establishes a system for regulating exports from Australia by common methods – licences and permissions, prohibitions, and offences. The Act is very clear that it extends to prohibiting particular exports to particular countries. As explained in Part IIA above, the Act enables regulations to be made that prohibit the export of particular goods “absolutely” and to a “specified place”.<sup>94</sup> Rares J did not include in his explanation of the principle of legality whether there was sufficient vagueness or ambiguity in the enabling provisions of the Act to support its relevance for review of the Suspension Order. The Act is also clear that animal welfare in the live export trade is intended to be regulated. In 2004 Part IIA of the Act added provisions relating to accreditation of veterinarians conducting a range of tasks for live exports. Other than these provisions, the Act deals with exports generally rather than by particular goods.

There is also a question as to the reason why business rights should have the status of a fundamental right or freedom as is usually the case for principle of legality values. Rares J supported his application of it by citing O’Connor J’s reasons in the *Progress Advertising* case. While the list of principle of legality values in the primary Australian text on statutory interpretation, Dennis Pearce’s *Statutory Interpretation in Australia*,<sup>95</sup> includes “limiting ability to carry on one’s business or trade” under the heading of “business rights”, there is no explanation for why it is recognised as a fundamental value

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<sup>86</sup> See, eg, Dan Meagher, “The Principle of Legality and Proportionality in Australian Law” in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114, 134–137; Bruce Chen, “The Principle of Legality: Issues of Rationale and Application” (2015) 41 *Monash University Law Review* 329, 362–372.

<sup>87</sup> Boughey, *Brett Cattle: New Limits on Delegated Law-Making Powers*, n 8, 353–354.

<sup>88</sup> *Export Control Act 1982* (Cth) s 7(2)(a), (b).

<sup>89</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 418 [330]; [2020] FCA 732.

<sup>90</sup> *Coco v The Queen* (1994) 179 CLR 427, 437.

<sup>91</sup> *Annetts v McCann* (1990) 170 CLR 596, 598.

<sup>92</sup> *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464.

<sup>93</sup> *Evans v New South Wales* (2008) 168 FCR 576, 592–593 [68]; [2008] FCAFC 130.

<sup>94</sup> *Export Control Act 1982* (Cth) s 7(2)(a), (b).

<sup>95</sup> Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, Butterworths, 9<sup>th</sup> ed, 2019) 259.

in that text or in the *Progress Advertising* case. O'Connor J merely referred to it as a "well-known" principle without reference to case law or additional justification.<sup>96</sup> None of the other four judgments in *Progress Advertising* referred to it. As recognised by Rares J, it was cited in a footnote in the High Court's decision in *Wentworth v NSW Bar Association (Wentworth)* as an example of a common law right, but again without explanation.<sup>97</sup> Rares J also did not justify the basis for the business rights value in principle or its relevance within the statutory scheme for exporting goods. He simply referred to O'Connor J in the *Progress Advertising* case and the *Wentworth* case.

However, the business rights principle of legality value is unlikely to be within the values now recognised as being protected by the principle of legality. The core values that are protected now tend to be recognised as relating to structural features of the political and legal system such as representative and responsible government and the rule of law,<sup>98</sup> rather than commercial matters. Business interests are often deliberately restricted and regulated by legislation.<sup>99</sup> If business rights can be regarded as a common law right for the purposes of the principle of legality, which seems unlikely, it is clear that the *Export Control Act's* purpose is to regulate, potentially to the extent of prohibition, common law business rights of live-stock producers and exporters.

Rares J's application of the business rights value should therefore be recognised as controversial. It shifted the application of the principle of legality from being an interpretive principle to being the reference standard in a structured proportionality assessment. It is questionable as a matter of public law doctrine to transform an interpretive value into a legal standard, as Dr Boughey has explained.<sup>100</sup> It is also questionable whether business rights should be recognised as a principle of legality value, particularly in the context of a polycentric decision. Modern non-justiciability case law and scholarship indicates that in that context, the legal grounds for testing administrative action must be clearly delineated standards and that substantive grounds of review should be avoided.<sup>101</sup>

What then does the reasoning in *Brett Cattle* highlight as to the consequences of applying such a standard in a polycentric context? The business rights principle of legality value was the reference standard for stages two and three of Rares J's structured proportionality assessment. In his reasoning for stage two of the proportionality assessment dealing with necessity, Rares J recognised that prohibition was an option under the Act<sup>102</sup> but also stated that its "practical operation" had detrimental economic impact on the live export industry.<sup>103</sup> In particular, it prevented live exports by exporters who already had, or could easily establish, export systems with animal welfare protections.<sup>104</sup> It was clear that there were regulatory means that were less restrictive for the live export industry. The Minister's first Order made immediately after the Four Corner's report included exceptions for live exports to abattoirs that could meet international welfare standards.<sup>105</sup> Rares J regarded the first Order as less restrictive means that would equally achieve the government's purposes.<sup>106</sup>

The business rights value also influenced Rares J's reasoning for his stage three proportionality balancing assessment. He stated that the impact of the suspension order on the parts of the live export industry

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<sup>96</sup> *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464.

<sup>97</sup> *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 251.

<sup>98</sup> See, eg, *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ); [2013] HCA 39.

<sup>99</sup> See, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36] (McHugh J); [2003] HCA 33.

<sup>100</sup> Boughey, *Brett Cattle: New Limits on Delegated Law-Making Powers*, n 8, 353–354.

<sup>101</sup> Harris, n 62, 656–657.

<sup>102</sup> *Export Control Act 1982* (Cth) s 7(1).

<sup>103</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 418 [330]; [2020] FCA 732.

<sup>104</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 419 [333]; [2020] FCA 732.

<sup>105</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 420 [342], 422–423 [351]–[352]; [2020] FCA 732.

<sup>106</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 423 [352]–[354]; [2020] FCA 732.

whose Indonesian supply chain could achieve animal welfare standards was “unduly and impermissibly burdensome”.<sup>107</sup>

Both of these assessments were made by testing the Suspension Order against the business rights principle of legality value. But this simply raises the question as to whether the business rights value was a manageable legal standard. If not, the Court is effectively conducting a policy-based exercise. It resolves the polycentric issue according to a policy that weighs the balance between the various interests by favouring one set of stakeholders and disadvantages others.

This clashes with orthodox principles for substantive grounds of review in Australian administrative law, that are designed to limit courts from assessing administrative official’s discretionary judgments. Some of the primary explanations of unreasonableness review emphasise that the court’s role does not extend to balancing competing interests and relevant considerations. For example, Brennan J explained in a passage immediately following his famous statement of the law-merits distinction as the primary principle of judicial review of administrative action:

[T]he judicature is but one of the three coordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented as well as interests which are represented must often be considered.<sup>108</sup>

Rares J’s application of structured proportionality by reference to the business rights value involved this kind of balancing of interests. Business interests are recognised in administrative law to support standing,<sup>109</sup> procedural fairness,<sup>110</sup> and may be relevant to whether a particular factor is a mandatory consideration.<sup>111</sup> However, in those contexts they are considerations relevant to particular grounds of review along with other matters such as the relevant statutory provisions and case law principles. Business rights are not a discrete legal standard for testing administrative decision-making, as is the case when used as the reference standard for structured proportionality.

The significance of this aspect of Rares J’s reasons for principles of non-justiciability is that the business rights principle of legality value was not a manageable legal standard to centre the structured proportionality assessment. Recognition of the evolution of non-justiciability principles would have raised concerns in the proceedings as to whether this principle of legality value was acceptable in the context in which the decisions underpinning the Suspension Order were made. For review of decisions that are in the secondary category of non-justiciability a carefully delineated legal standard is necessary. The principle of legality value applied in *Brett Cattle* was not such a manageable standard. It was a value with policy significance, presented as a legal standard, that was the primary influence on the Court’s assessment of the polycentric problem confronted by the government.

## B. Unreasonableness Review, Risk Assessments and Administrative Law Guidelines

Rares J referred to structured proportionality as a method for assessing the rationality and reasonableness of statutory laws that is suited to review of regulations.<sup>112</sup> In making his proportionality balancing

<sup>107</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 424 [358]; [2020] FCA 732.

<sup>108</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37 (Brennan J). See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J); Meagher, n 86, 134–135.

<sup>109</sup> *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 394; [2014] HCA 50.

<sup>110</sup> *Kioa v West* (1985) 159 CLR 550, 582 (Mason J); 616 (Brennan J).

<sup>111</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 45 (Mason J).

<sup>112</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 410–411 [295], [300]; [2020] FCA 732.

assessment he drew on general administrative law principles relating to unreasonableness review.<sup>113</sup> Rares J's use of the language of unreasonableness review can be seen in the following conclusion regarding the Suspension Order:

There was *no rational or reasonable justification* for the Minister to exercise his powers under the *Export Control Act* to prohibit the export of livestock to Indonesia that were in no realistic danger of being mistreated. ... The omission of any power in it to allow the issue of an export permit where the Minister was satisfied that there was no real chance that the exporter would expose livestock to such mistreatment up to the point of their slaughter, given what he knew about the impact on the industry of an absolute, even if temporary, prohibition, was *capricious, irrational and unreasonable*. The absolute prohibition could not obviate any risk of mistreatment to which cattle would be exposed if they were to be exported as part of a supply chain that complied throughout with standards of animal welfare at least consistent with the [World Organisation for Animal Health] Code.<sup>114</sup>

He also referred to the Government's concerns about the lack of control in the supply chain as "crying to the moon" and that for one live export company "there was no reasonable basis to suggest that there was a realistic risk of the cattle going elsewhere".<sup>115</sup>

Rares J's application of unreasonableness concepts to the Government's decisions underpinning the Suspension Order involved his own assessments of the risks. It is clear from the quoted passages that Rares J concluded that there was no significant risk of mistreatment if a permit system and international standards were used to regulate live exports to Indonesia rather than an absolute prohibition. The Government, as we saw in Part IIC, assessed the risk differently based on the concern that there was uncertainty about the control of particular animals in the supply chain. That concern was consistent with information provided to the Government by the live export industry.<sup>116</sup> The Prime Minister's answer to questions in Parliament indicated that the Government understood the lack of control to mean there was uncertainty as to whether Australian cattle would be slaughtered at abattoirs that complied with such standards.<sup>117</sup> The Minister explained the reason for the Suspension Order in the same way in a radio interview:

The simple explanation is, for every head of cattle that leave Australia, we need to ensure their welfare outcome, right up to the point of slaughter. To do that, we need a system to ensure that you know where that cattle has gone.<sup>118</sup>

This particular risk was confirmed by one of the reviews into Australia's live export trade that was established by the Government in 2011 in response to the Four Corner's report.<sup>119</sup>

Rares J's assessment of the risk simply conflicted with the judgment made by the Government. In deciding on the Suspension Order as the appropriate option the Government made the risk assessment putting more weight on the uncertainty of animal welfare in the live export trade to Indonesia. Rares J would have accepted a different means to regulate live exports given his view of the risks to animal welfare. The important point is that the risk assessment made by the Court involved the same considerations as the assessment made by executive officials but were weighed in a different manner. Fuller's analysis of decision-making in the circumstances of polycentricity indicates that a judgment call has to be made. For a court simply to re-evaluate a risk assessment is a form of judicial overreach. The overreach is

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<sup>113</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 407–409 [285]–[289]; [2020] FCA 732 including particular reference to, *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 30 [57]; [2017] HCA 33 and *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353, 360.

<sup>114</sup> *Brett Cattle Company Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 425 [360]; [2020] FCA 732 (emphasis added). In the previous paragraph Rares referred to the Minister being not able to make Orders based on a "whim": *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 425 [359]; [2020] FCA 732.

<sup>115</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 419 [336]–[337]; [2020] FCA 732.

<sup>116</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 375 [143]; [2020] FCA 732.

<sup>117</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 June 2011, 5837 (Julia Gillard, Prime Minister).

<sup>118</sup> Fran Kelly, *Agriculture Minister Confirms Suspension of Live Cattle Exports to Indonesia*, ABC News, 8 June 2011.

<sup>119</sup> Farmer, n 13, 70.

exacerbated when it is recognised that the Government’s judgment call was made by Cabinet and when that policy judgment was reviewed by Parliament, but the corresponding regulation was not disallowed. These are the institutions within our system of government with the function of making policy judgments on current public controversies.

The principles of unreasonableness review in Australian administrative law include terminology designed to ensure that courts exercise restraint. Rares J referred to some of these concepts in the case law. He rejected an argument by the Commonwealth that for delegated legislation the Court’s review standard was ‘even higher than *Wednesbury*’.<sup>120</sup> He also recognised that the Court should not substitute its own judgment for that of the government<sup>121</sup> but it is hard to see Rares J’s reasoning as not involving such a substitution. On the other hand, he did not refer to the polycentric nature of the decisions underpinning the Suspension Order; the factor suggesting the decisions had the status of secondary non-judiciality.

This aspect of Rares J’s reasoning suggests that the principles of unreasonableness review in Australian law lacks sufficient guidance to trial judges as to how judicial restraint should be factored into review of regulations. The traditional terminology of *Wednesbury* unreasonableness; “so unreasonable that no reasonable authority could ever have come to it”<sup>122</sup> is circular and has largely been abandoned.<sup>123</sup> The alternative language of an administrative decision “which lacks an evident and intelligible justification”<sup>124</sup> is more helpful and has a long history in substantive review of regulations.<sup>125</sup> As we have seen, the Government provided a justification for the Suspension Order and were questioned about it in Parliament and in media interviews.

What was missing from Rares J’s judgment, and may not be sufficiently clear in the case law regarding substantive review of regulations, were assessments that are commonly made in other areas of administrative law for courts to consider expressly the nature of the administrative decision under review and the decision-maker. Just as administrative law grounds of review commonly require courts to consider the subject matter, scope and purpose of the legislation, so too the nature of the administrative decision and the decision-maker are required considerations for some of the grounds of judicial review. Variations of these guidelines are included in the bias rule,<sup>126</sup> acting under dictation,<sup>127</sup> and authorising an administrative official to act as an agent.<sup>128</sup> These administrative law guidelines are helpful because the grounds of judicial review are in most cases stated in very general terms and require adaptation to the legislative framework and circumstances of particular cases.<sup>129</sup> The administrative law guidelines enable judges to delineate grounds of judicial review for the particular case and apply them in a manner that is sensitive to the task delegated to the decision-maker and the decision-maker’s institutional location.

<sup>120</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 424 [357]; [2020] FCA 732.

<sup>121</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, 412 [303]; [2020] FCA 732.

<sup>122</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 230.

<sup>123</sup> *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 [68] (Hayne, Kiefel and Bell JJ); [2013] HCA 18. See also Aronson, Groves and Weeks, n 83, 371–372.

<sup>124</sup> *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ); [2013] HCA 18; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 573 [82], 574 [84] (Nettle and Gordon JJ); [2018] HCA 30.

<sup>125</sup> *Kruse v Johnson* [1898] 2 QB 91, 99–100 (Lord Russell of Killowen); *Parramatta City Council v Pestell* (1972) 128 CLR 305, 323 (Menzies J).

<sup>126</sup> *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 539–540 [102]–[105]; [2001] HCA 17.

<sup>127</sup> *Bread Manufacturers (NSW) v Evans* (1981) 180 CLR 404, 429.

<sup>128</sup> *O’Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1, 11 (Gibbs J). See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 38 and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2014) 88 NSWLR 125, 129 [11]–[12]; [2014] NSWCA 377.

<sup>129</sup> Mark Aronson, “Nullity” in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 139, 148: “Judicial review doctrine is generally stated at a remarkable level generality to allow for a high degree of flexibility or adaptability to context.”

Some of the older review of regulations cases include such an assessment but it seems to no longer feature in the cases.<sup>130</sup> It was considered in *Kruse v Johnson*;<sup>131</sup> an influential 19th century case dealing with unreasonableness review of bylaws, a form of regulation. Lord Russell justified consideration of the nature of the decision maker as being relevant due to some by-law makers being elected officials, such as local councils, and others not elected. His examples of the latter were railway, and similar, companies with by-law making powers.<sup>132</sup> He stated that for companies exercising such powers “courts should jealously watch the exercise of these powers” and that bylaws made by elected officials should be “supported if possible” and be “benevolently interpreted”.<sup>133</sup>

Lord Russell’s recognition of there being a range of officials that are delegated regulation-making powers is also currently true. It was even the case for the legal framework for the Suspension Order. The various regulations in the legal framework for the live export trade were to be made according to powers delegated to the Governor-General,<sup>134</sup> the Minister,<sup>135</sup> and the Secretary of the Department of Agriculture, Fisheries and Forestry.<sup>136</sup>

The nature of the decisions leading to the Suspension Order involved a high degree of polycentricity and the relevance of foreign relations. The decisions were made by Cabinet, and subject to questioning and explanation in Parliament and to the media. Political institutions were engaged in the process far beyond what is usually the case for regulations. These aspects of the decision, the decision-maker, and the decision-making process are relevant to delineating the review grounds in judicial review of regulations. They should be made clearer in substantive review doctrine.

Factoring in these considerations is consistent with public law theories that recognise that judicial review should vary by reference to the forms of political accountability operating for the decision or legislation being challenged. Stephen Gageler has argued that when institutional structures and political accountability are strong courts should exercise restraint and when institutional structures and political accountability are weak they should exercise vigilance.<sup>137</sup> The institutional structures for holding the government politically accountable were strong in the particular circumstances of the Suspension Order. They were particularly appropriate for reviewing the policy decisions that the Suspension Order was based on.

Administrative law has methods for factoring into judicial review of administrative action the nature of the institutional structures and political accountability. The administrative law guidelines enable a reviewing court to be informed that a decision is in the category of secondary non-justiciability and that forms of restraint are appropriate. Once engaged it would mean focusing review of such decisions against statutory criteria and procedural grounds, and generally avoiding substantive principles. It would also mean assessing regulations, and the decisions they are based on, by keeping front of mind that the discretionary aspects of the decision are to be determined by administrative officials rather than courts.

## V. CONCLUSION

The steps taken in *Brett Cattle* regarding structured proportionality and the principle of legality exposes the difficulties of their application in administrative law. As Dr Boughey has made clear, the principle

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<sup>130</sup> Pearce and Argument, n 19, 357–358.

<sup>131</sup> *Kruse v Johnson* [1898] 2 QB 91, 99 (Lord Russell of Killowen), 104 (Sir FH Jeune). See also *Slattery v Naylor* (1888) 13 AC 446, 453.

<sup>132</sup> *Kruse v Johnson* [1898] 2 QB 91, 99.

<sup>133</sup> *Kruse v Johnson* [1898] 2 QB 91, 99.

<sup>134</sup> *Export Control Act 1982* (Cth) s 25.

<sup>135</sup> *Export Control (Orders) Regulations 1982* (Cth) s 3.

<sup>136</sup> The *Australian Meat and Live-Stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth) was made by the Secretary of the Department of Agriculture, Fisheries and Forestry under s 17 of the *Australian Meat and Live-Stock Industry Act 1997* (Cth).

<sup>137</sup> Stephen Gageler, “Beyond the Text: A Vision of the Structure and Function of the Constitution” (2009) 32 *Australian Bar Review* 138, 152. See also JJ Spigelman, “Public Law and the Executive” (2010) 34 *Australian Bar Review* 10, 13.

of legality involves legal values that inform interpretation of statutory provisions rather than substantive limits for the exercise of discretionary powers, as seems to have occurred in Rares J's reasoning in *Brett Cattle*. These concerns were exacerbated in *Brett Cattle* due to the decision-making steps that underpinned the Suspension Order involving a complex, polycentric, problem. Resolving such problems are constitutionally a matter for the executive initially and, if primary legislation is necessary, then Parliament. The evolution of principles of non-justiciability indicates that judicial review of such decisions is permissible so long as the courts distinguish their review role from administrative functions by carefully delineating the applicable legal standards. The application of structured proportionality and more traditional principles of legal unreasonableness in *Brett Cattle* did not provide such standards.

It is therefore understandable that the Commonwealth Attorney-General in his media release regarding the *Brett Cattle* case stated that the Government disagreed with the Federal Court's application of principles.<sup>138</sup> The result is that future courts should treat *Brett Cattle* with caution when structured proportionality and substantive review more generally are raised in relation to review of regulations.

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<sup>138</sup> Attorney-General, n 9.