

INJUNCTIONS IN PUBLIC LAW: CIVIL ENFORCEMENT INJUNCTIONS AND DISPENSING WITH CONVENTIONAL REQUIREMENTS

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I INTRODUCTION

Injunctions and declarations have long been available as remedies in judicial review, in the same way that these equitable remedies have been issued to enforce duties of fiduciaries and charitable trusts.¹ The court's discretion to grant the remedies is the main limitation upon their availability. As the High Court of Australia explained in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,² the common rationale for the availability of the remedies is "to vindicate the public interest in the maintenance of due administration." Despite its equitable roots, the availability of an injunction in judicial review to restrain unlawful government action is limited by principles that structure the court's

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1. *Bateman's Bay Local Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd*. (1998) 194 CLR 247, 257-8[24]-[27] (referring to Sir Anthony Mason "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 1 *LQR* 238, 280[93] (per McHugh J) (taking a different view as the implications for the role of the Attorney-General in connection with standing rules)).

2. (1998) 194 CLR at 257[25] (per Gaudron, Gummow and Kirby JJ) (contra per McHugh J) at 276[81] (taking the view that the function of the civil courts is to enforce rights of individuals rather than the public law of the community). Followed in *Abebe v Commonwealth* (1999) 197 CLR 510, 55[104] (per Gaudron J); *Smethurst v Comm'r of Police* (2020) 272 CLR 177, 247-8[172] (per Gordon J).

discretion. The court may decline to grant an injunction to restrain a public authority if it is not satisfied that the authority intends to continue to engage in the unlawful conduct, if there is no imminent danger of damage to another person, or if such relief would have no utility. The position is very different in civil enforcement proceedings. The cause of action and the remedies are specifically provided for as an integral component of a regulatory scheme. Many of the discretionary limitations upon the availability of an injunction are expressly dispensed with.

To capture the radical nature of the remedy in civil enforcement regimes, this paper commences in Part II by describing the historical background and rationale for the injunction in public law. By way of illustration, Part III describes the use of the injunction in civil enforcement proceedings under a statutory scheme regulating credit activity. Part IV raises some questions. The regulatory schemes providing for civil enforcement injunctions evince a legislative intent that the public interest in stamping out unlawful contraventions is to be pursued by lifting some discretionary limitations upon the availability of relief. Yet, in the general public law arena, no such relaxation of conventional equitable principles has evolved so as to facilitate the restraint of unlawful government action.

II *HISTORICAL SCOPE AND RATIONALE OF INJUNCTION IN PUBLIC LAW*

A. In judicial review in Supreme Courts of States and Territories

Relying on its jurisdiction to restrain municipal corporations from misapplying funds held by charitable or statutory trusts, Chancery restrained statutory authorities from exceeding their powers to apply their funds.³ This jurisdiction was subsequently extended to the restraint of statutory authorities from exceeding their statutory powers to interfere with public rights, the Attorney General at that time being regarded as the appropriate plaintiff to bring such proceedings.⁴ Embodying the fundamental

3. *Bateman's Bay* (1998) 194 CLR 247, 258-9[29].

4. *London Cnty. Council v Attorney-General* [1902] AC 165, 168. For earlier English authority, see *Smethurst v. Comm'r of Police* (2020) 376 ALR 575 (n 231) [172], discussed

idea of the Judicature Acts, the power in s 24(7) of the *Supreme Court of Judicature Act* 1873 (Eng) enabled the grant of all remedies to finally determine the controversy in proceedings and avoid multiplicity of legal proceedings. This included power to grant injunctions, exercisable by force of s 25(8) of that Act, in all cases in which it appeared to the Court to be just or convenient that such order should be made.⁵ Power to grant an injunction was equivalent to that exercised by courts of equity and later by courts of law, pursuant to s 79 of the *Common Law Procedure Act* 1854 (Eng).⁶ The formula for conferring power to grant remedies, in particular injunctions, was quickly adopted for Supreme Courts in Australia.⁷

The Crown, as distinct from its officers or authorities, was not amenable to the remedy of injunction, a situation that was rectified by the enactment of Crown proceedings legislation.⁸ While historically injunctive relief was granted to protect a right that was proprietary in nature, where damages would not be an adequate remedy, in public law there is no need to establish that a proprietary legal right is threatened, as was confirmed in *Bateman's Bay*.⁹ Equitable remedies in public law are subject to the same discretionary considerations as equitable remedies in private law,¹⁰ but the settled requirement in private law that the plaintiff must have a legal right which the injunction will protect,

in W Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but no Certiorari?" (2014) 42 *Fed L Rev* 24, 247-8.

5. 36 & 37 Vict c 66. See *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd.* (1981) 148 CLR 457, 489; *Plaintiff S297/2013 v Minister for Immigr. and Border Prot.* (no 2) (2015) 255 CLR 231, 249[45]; *Smethurst* (2020) 272 CLR at 237-8[145] (per Nettle J).

6. *Mayfair Trading Co Pty Ltd. v Dreyer* (1958) 101 CLR 428, 454; *Smethurst* (2020) 272 CLR at 237-8[145] (per Nettle J).

7. See *Aon Risk Servs Austl. Ltd. v Australian Nat'l Univ* (2009) 239 CLR 175, 184-5[12]. It was not adopted in NSW until the enactment of the Supreme Court Act 1970 (NSW). However, relief by injunction was available in NSW against statutory authorities that exceeded their power. See generally *Jeanneret v Hixson* [1890] NSWLR 8; *Attorney-General v Borough of N Sydney* [1893] NSWLR 49 (where the Owen CJ in Eq in the Supreme Court of NSW issued an injunction to restrain a municipality from borrowing funds for gasworks without the necessary authorisation by the Governor).

8. See generally *Claims Against the Government and Crown Suits Act* 1912 (NSW) ss 4, 9 (Austl.), followed by the *Crown Proceedings Act* 1988 (NSW) s 5 (Austl.).

9. (1998) 194 CLR 247, 258[27]. See also *Egan v Willis* (1998) 195 CLR 424, 438[5]; *Cardile v LED Builders Pty Ltd.* (1999) 198 CLR 380, 395[30]; *Minister for Immigr. and Multicultural and Indigenous Affairs v VFAD of 2002* (2002) 125 FCR 249 at 267[100]; *Smethurst* (2020) 272 CLR at 237-8[145] (per Nettle J, 250-1[179] per Gordon J).

10. *Corp. of the City of Enfield v Dev Assessment Comm'n* (2000) 199 CLR 135, [58] (per Gaudron J) ('*City of Enfield*').

should find expression in different, public law requirements.¹¹ This received scant recognition in the opinion on this issue that prevailed in *Smethurst v Commissioner of Police*,¹² considered below. The availability of the injunction is still the subject of development in courts exercising equitable jurisdiction, generally, and in public law.¹³

B. In the High Court

Jurisdiction to issue an injunction against an officer of the Commonwealth is expressly conferred in the Australian High Court's original jurisdiction under s 75(v) of the Commonwealth Constitution. The inclusion of the remedy of injunction, alongside the constitutional writs of prohibition and mandamus, calls for an explanation. The remedy of injunction did not appear in the original drafting of s 75(v). Following the Constitutional Convention debates in 1897 and 1898, s 75(v) was removed from the draft Constitution in 1898 but promptly re-inserted in an expanded version that included injunction, in addition to prohibition and mandamus.¹⁴ It is "not quite apparent"¹⁵ why the

11. *Austl. Broad Corp v Lenah Game Meats Pty Ltd.* (2001) 208 CLR 199 (n 153), 232[6] (per Gaudron J); *Smethurst* (2020) 272 CLR at 225-6[113] (per Gageler J), 250-1[179] (per Gordon J), 269-70[235]-[238] (per Edelman J). See also Sykes "The Injunction in Public Law" (1953) 2 *UQLJ* 114.

12. (2020) 272 CLR 177, 214[77], 216-7[85] (per Kiefel CJ, Bell and Keane JJ), 237-8[145] (per Nettle J).

13. *Cardile v LED Builders Pty Ltd.* (1999) 198 CLR 380, 395[30]; *Truth About Motorways Pty Ltd. v Macquarie Infrastructure Inv. Mgmt. Ltd.* (2000) 200 CLR 591, 628-9[97]-[98]; *Austl. Broad Corp v Lenah Game Meats Pty Ltd.* (2001) 208 CLR 199, 241[90] (per Gummow and Hayne JJ).

14. *Off Rec of the Debates of the Austl. Fed Convention* (Melbourne, 4 March 1898) 1885; J M Williams, *The Australian Constitution: A Documentary History* (MUP, 2005) 846.

15. J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 783 (one suggested explanation is that injunctive relief was available at that time in the United States and the United Kingdom to restrain threatened ultra vires activity of the executive branch interfering with public rights, in contrast to certiorari which was available only with respect to judicial acts rather than acts of an administrative or ministerial nature) Quick and Garran took a narrow view of the injunctions as a remedy in private suits and otherwise being analogous to mandamus, overlooking the use of the injunction in England to enforce public trusts and protect private property against abuse by public authorities. *Id.*; see also W Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but no Certiorari?" (2014) 42 *Fed L Rev* 241 at 248, 250-1. Another suggestion is that the objective of the framers of the Constitution was to ensure no narrow view could be taken of the High Court's jurisdiction to ensure Commonwealth officers adhered to the limits of their power as determined by the High Court, allowing equity to supplement the deficiencies of the common law remedies. M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, Federation Press, 2020) 249.

remedy of injunction was added, although one member of the 1898 Convention described the provision as a “safeguard,” and another said that it only gave rights against an officer of the Commonwealth as arose out of “known principles of law.”¹⁶

The general purpose of s 75(v) was to ensure that officers of the Commonwealth act within the scope of the authority conferred on them by the Constitution or by statute.¹⁷ To further that purpose, the remedy of injunction was included to ensure that an officer of the Commonwealth could also be restrained from acting inconsistently with an applicable legal constraint, even when acting within the scope of the authority conferred on the officer by the Constitution or by statute. The High Court has accepted at least that the framers of the Constitution included the injunction to address concerns that the basis for the issue of prohibition and mandamus might be too narrow. Technicalities associated with the prerogative remedies rendered them inadequate in some respects, and equitable relief might be available when a prerogative remedy was not.¹⁸

The jurisdiction of the High Court under s 75(v) to grant injunctions included jurisdiction like that in England, where the Attorney General could bring proceedings with or without a relator to protect the public interest, by restraining a statutory authority from exceeding its power by actions interfering with public rights.¹⁹ An injunction lies to prevent the implementation of an unlawful exercise of power.²⁰ As is the case with the “constitutional writs” of prohibition and mandamus under s 75(v), the injunction mentioned in s 75(v) should be described as the “constitutional injunction” to give appropriate emphasis to the generality of the Court’s jurisdiction to issue it and the absence of

16. *Off Rec of the Debates of the Austl. Fed Convention*, Melbourne, 4 March 1989, pp 1877, 1883-4. For discussion see *Smethurst v Comm’r of Police* (2020) 376 ALR 575, 619-620[174]-[175] (per Gordon J), 634[229] (per Edelman J).

17. See *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 (per Dixon J); *Smethurst v Comm’r of Police* (2020) 272 CLR 177, 221[97].

18. *Smethurst* (2020) 272 CLR 177, 220[95] (per Kiefel CJ, Bell and Keane JJ), 269[234] (per Edelman J).

19. *London Cnty Council v A-G* [1902] AC 165; *Attorney-General (NSW) v Brewery Emp Union of NSW* (1908) 6 CLR 469, 550-553, 598; *Bateman’s Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* (1998) 194 CLR 247, 258-9[29].

20. *Fed Comm’r of Tax’n v Futuris Corp Ltd.* (2008) 237 CLR 146, 162[47]; *Smethurst* (2020) 272 CLR at 220-1211[96]. The express provision for the issue of injunctions in s 75(v) apparently overcame, at least in the federal context, the doctrine of Crown immunity from civil proceedings. See *Commonwealth v Mewett* (1997) 191 CLR 471, 545-551.

implied limitations as to its availability derived from historical limitations applying when the Constitution was framed.²¹ This is consistent with the constitutional injunction having been included in s 75(v) with a content known and governed by existing principles as to the issue of injunctions, rather than some undefined new content, whilst allowing for evolution of the principles rather than their being frozen according to practices as to grant of such relief that prevailed in 1900.²²

Section 32 of the *Judiciary Act* 1903 (Cth) gives the High Court, in the exercise of its original jurisdiction in a matter pending before it, power to grant:

absolutely, or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto . . . are entitled to in respect of any legal or equitable claim properly brought forward by them respectively . . . so that as far as possible all matters in controversy between the parties regarding the cause of action or arising out of connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided.

Section 32 in part reproduces s 24(7) of the *Judicature Act* 1873 (Eng).²³ Provided that there is a matter in the original jurisdiction of the Court, this includes power to grant injunctions.²⁴

21. *Re Minister for Immigr and Multicultural and Indigenous Affs; Ex parte Lam* (2003) 214 CLR 1 at [65]; *Smethurst* (2020) 272 CLR at 225-7577[112]-[114], 235[140] (Gageler, J., dissenting as to the availability of the remedy), 269[235] (per Edelman J).

22. *Smethurst* (2020) 272 CLR at 238[146] (per Nettle J), 252[182] (per Gordon J), 266-9699[227]-[233], [235] (per Edelman J); W Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but No Certiorari?" (2014) 42 *Fed L Rev* 241, 247-8, 249-250.

23. This provision is modelled on s 24(7) of the *Judicature Act* 1873 (Eng), which empowered the common law courts and courts of Chancery combined by the Judicature Acts to grant all remedies to which any of the parties appeared to be entitled so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning such matters avoided. See also *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd.* (1981) 148 CLR 457, 489; *Aon Risk Servs Austl. Ltd. v Australian Nat'l Univ* (2009) 239 CLR 175 at 184-85[11]-[12]; *Plaintiff S297/2013 v Minister for Immigr and Border Prot (No 2)* (2015) 255 CLR 231, 249[44]. Section 32 also bears some affinity to the *Judiciary Act* 1789 (US) ("All Writs Act") s 14. *Re McBain; Ex parte Austl. Cath Bishops Conf* (2002) 209 CLR 372, 403[56], 410[80], 411-2[84], 467-8[268]-[270].

24. *Smethurst* (2020) 272 CLR at 236-88388[144]-[145] (per Nettle J), [182], 633[227] (per Edelman J). See also *Phillip Morris Inc* 148 CLR at 477; *Edwards v Santos Ltd.* (2011) 242 CLR 421, 425[4]-[5], 427-88288[15]-[16], 441-22422[56], [58], 444[64].

In *Abebe v Commonwealth*,²⁵ Gaudron J said that while “in general terms” mandamus and prohibition are available only to correct jurisdictional error, as distinct from errors within jurisdiction, “it may well be” that an injunction lies under s 75(v) to prevent an officer of the Commonwealth from giving effect to a decision involving legal error, even if that error is not a jurisdictional error. The High Court had previously held, and since *Abebe* has consistently confirmed, that an injunction may issue under s 75(v) for non-jurisdictional error.²⁶ The “entrenched minimum provision of judicial review” enshrined in s 75(v) of the Constitution must include injunctive relief for legal error that is not jurisdictional.²⁷ This promotes the purpose of s 75(v), with availability of the injunction compensating for the technicalities of the prerogative remedies, as discussed in *Bateman’s Bay*.

An injunction is available not only to restrain a non-jurisdictional error but also on grounds including fraud, bribery, dishonest or other improper purposes.²⁸ Procedural error that does not result in invalidity of a decision may attract injunctive relief to restrain the decision-maker from proceeding until the procedural error is rectified.²⁹ An example is *Project Blue Sky Inc*

25. (1999) 197 CLR 510 at 551-2[103], [105]. See also *Re Refugee Rev Tribunal; Ex parte Aala* (2000) 204 CLR 82, 91[16] (per Gaudron and Gummow JJ): “prohibition in s 75(v) is concerned with the prevention of ultra vires activity by officers of the Commonwealth,” followed by the conclusion (CLR 91[17]) that a denial of procedural fairness may result in a decision made in excess of jurisdiction in respect of which prohibition will issue under s 75(v).

26. *Church of Scientology v Woodward* (1982) 154 CLR 25, 57, 64-5; *Muin v Refugee Rev Tribunal* (2002) 76 ALJR 966, 977-88788[47]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508[82] (per Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Fed Comm’r of Tax’n v Futuris Corp Ltd.* (2008) 237 CLR 146, 162[47]-[48] (per Gummow, Hayne, Heydon and Crennan JJ); *Plaintiff M68/2015 v Minister for Immigr and Border Prot* (2016) 257 CLR 42, 95[126] (per Gageler J); *Smethurst* (2020) 272 CLR at 236-77677[144] (per Nettle J), 246[169], 250-11511[178], [180] (per Gordon J), 269[234] (per Edelman J).

27. *Re Minister for Immigr and Ethnic Affs; Ex parte Miah* (2001) 206 CLR 57, 122-3[210]-[211] (per Kirby J) (discussing Gaudron J’s dictum in *Abebe*). In *Plaintiff S157/2002 v Commonwealth* the court nonetheless held that the constitutional writs of prohibition and mandamus were available only for jurisdictional error. (2003) 211 CLR 476, 508[83].

28. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR at 508[82]. See also *Smethurst* (2020) 272 CLR at 220-11211[96] (per Kiefel CJ, Bell and Keane JJ), 270[237] (per Edelman J, referring to “abuses of public power”).

29. *Project Blue Sky Inc v Austl. Broad Auth* (1998) 194 CLR 355, 393[100]; *Muin v Refugee Rev Tribunal* (2002) 76 ALJR 966 at 977-88788[46]-[47] (per Gaudron J) (the relief actually granted in *Muin* being prohibition, certiorari and mandamus).

v Australian Broadcasting Auth.,³⁰ where a regulatory agency's failure to comply with a statutory requirement did not result in invalidity of its decision for procedural ultra vires. However, since the non-compliance was a breach of the statute and therefore unlawful, relief was available by declaration and, in an appropriate case, by injunction, to restrain the agency from taking any further action based on its unlawful action.

C. Availability of Injunctions

Equitable relief may be available where a prerogative remedy is not in particular in the case of a challenge to a recommendation made by an investigative authority. Equity proceeds on the footing of the inadequacy of the prerogative remedies to achieve that task, on account of technical rules as to their availability, and compensates for that inadequacy.³¹ It should not be surprising or incongruous that equitable relief is available when prerogative relief is not.³² While equitable remedies in public law are subject to discretionary considerations as they are in private law, other limitations on their availability, such as those applying to prerogative remedies, are not imported.³³ This in part explains why it is in the context of injunctions and declarations that the rules of standing to seek judicial review have undergone liberalisation.³⁴

Frequently, injunctions are sought to restrain a threatened breach of some regulatory requirement. A court may grant an injunction to protect benefits and advantages that could not be regarded as having any resemblance to proprietary rights. That

30. (1998) 194 CLR at 393[100] (per McHugh, Gummow, Kirby and Hayne JJ in obiter). *Project Blue Sky* was commenced in the High Court under s 75(iii) of the Constitution and remitted to the Federal Court, which exercised its general law judicial review jurisdiction.

31. *Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* (1998) 194 CLR 247, 257[25] (per Gaudron, Gummow and Kirby JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 551-52[104] (per Gaudron J); *Corp of the City of Enfield v Dev Assessment Comm'n* (2000) 199 CLR 135, 144[18]-[19] (per Gleeson CJ, Gummow, Kirby and Hayne JJ), 156[54], 157-8[56]-[58] (per Gaudron J); *Truth about Motorways Pty Ltd. v Macquarie Infrastructure Inv. Mgmt. Ltd.* (2000) 200 CLR 591, 628[96]-[97] (per Gummow J); *Smethurst* (2020) 272 CLR at 220[95] (per Kiefel CJ, Bell and Keane JJ), [172] (per Gordon J). See also Hanbury "Equity in Public Law" in *Essays in Equity* (1934) 80, 112; Sykes "The Injunction in Public Law" (1954) 2 *UQLJ* 114, 117.

32. *Corp of the City of Enfield v Dev Assessment Comm'n* (2000) 199 CLR 135, 157-58[58] (per Gaudron J).

33. *City of Enfield* (2000) 199 CLR at 158[58] (per Gaudron J).

34. *Bateman's Bay* (1998) 194 CLR at 267[50]-[51], 275[78].

is understandable. Statutory prohibitions in regulatory schemes directed to protecting public health and safety, or to planning, are imposed not for the benefit of particular individuals but for the benefit of the public, or at least sectors of the public. For example, in *Cooney v Ku-ring-gai Corporation*³⁵ equitable relief was sought to restrain an apprehended breach of prohibitions under planning laws.

The breadth of equitable relief to restrain contravention of laws enacted for the benefit of the public is accompanied by a wide discretion of the court. Yet, in circumstances where a decision has already been made in breach of a statutory prohibition, condition, or requirement, the absence of any apprehension of further breach may stand in the way of equitable relief. In other cases, the respondent may change its stance, leaving the proceedings futile. Futility arises as one of the discretionary grounds for refusing relief that applies across all remedies in judicial review. The grounds on which such discretion may be exercised are delay;³⁶ bad faith such as misleading the court;³⁷ acquiescence;³⁸ futility;³⁹ the existence of an equally convenient and beneficial avenue of review;⁴⁰ and hardship to the respondent that is disproportionate to the ends sought to be achieved by the statute.⁴¹ The concern in this paper is not with

35. (1963) 114 CLR 582, 603-05 (per Menzies J with Kitto, Taylor and Windeyer JJ agreeing); *Bateman's Bay* (1998) 194 CLR at 258[27], 267[49]-[51]. Prior to *Cooney*, see *Ramsay v Aberfoyle Manufacturing Company* (1935) 54 CLR 230, with Starke J in dissent holding that while the principle on which the equitable jurisdiction of English courts was exerted by way of injunction in public law was ill-defined, the Attorney-General could sue for an injunction to restrain a breach of provisions enacted for the benefit of or in the interests of the public generally, such as provisions for public health or safety, planning or keeping statutory authorities within the ambit of their powers. (discussed by W Friedmann, "Declaratory Judgments and Injunctions as Public Law Remedies" (1949) 22 *ALJ* 446, 448-52).

36. *Associated Mins Consol v Wyong Shire Council* [1975] AC 538 at 560; *Day v Pinglen Pty Ltd.* (1981) 148 CLR 289, 300-01; see also *Day v. Pinglen Pty Ltd.* (1981) 45 LGRA 168 at 179.

37. *Fairfield City Council v Djurdjevic* (1990) 72 LGRA 140 at 142-43; *Mulcahy v Blue Mountains City Council* (1993) 81 LGRA 302, 304-45.

38. *Cf. Kuringai Mun. Council v Arthur H Gillott Pty Ltd.* (1968) 15 LGRA 116 at 122-23.

39. *R v Nixon; Ex parte Protean Holdings Ltd.* (1982) 43 ALR 460 at 463-34. *Cf. Ryde Mun Council v Wagemaker* [1970] 1 NSW 487, 489.

40. *Saitta Pty Ltd. v Commonwealth* (2000) 106 FCR 554, 575[104].

41. *Attorney-General v Greenfield* [1960] 62 SR (NSW) 393, 396 (per Myers J), *aff'd*, [1961] NSW 824 (Austl.); *Attorney-General v JN Perry Constrs Pty Ltd.* [1961] NSW 422, 429; *Attorney-General v BP (Australia) Ltd.* [1964-1965] NSW 2055 at 2064; *Devonport Municipality v Spence Prods Pty Ltd.* [1970] Tas SR 264, 278; *ACR Trading Pt Ltd. v Fat-Sel* (1987) 11 NSWLR 67, 82; *Warringah Shire Council v Sedevic* (1987) 10

that discretion, exercised at the end of the day, but with the more general substantive discretionary principles applying in relation to the availability of an injunction. However, futility is a discretionary factor that seems to belong to both contexts.

Equitable relief may be sought in proceedings that are not judicial review proceedings, but that raise judicial review issues collaterally. In State and Territory Supreme Courts, which have inherent broad equitable jurisdiction, injunctions and declarations may be sought in proceedings brought in the equity division of the Court rather than in the Court's common law division, where judicial review proceedings are brought. An example is *Corporation of the City of Enfield v Development Assessment Commission*,⁴² where a local council brought proceedings against a planning authority and a developer seeking a declaration that a provisional development plan issued by a planning authority was ultra vires by reason of failure to obtain the council's consent. The council also sought an injunction to restrain the developer from taking action pursuant to the consent or in reliance upon it. The ground argued was a jurisdictional error by reason of the absence of a jurisdictional fact, and the council invoked the jurisdiction of the South Australian Supreme Court in equity rather than its judicial review jurisdiction.⁴³ The relief sought "to restrain apprehended breaches of the law and to declare relevant rights and obligations", was held to be appropriate.⁴⁴

Outside judicial review proceedings, equitable relief is also important in relation to disciplinary decisions of domestic bodies. Certiorari is not available against these bodies. However, equitable relief is regularly granted in actions for breach of contract brought against domestic bodies. Equitable relief lies in respect of a threatened or actual breach of an express or implied term of the contract between the body's members. This allows for enforcement of terms requiring compliance with the hearing rule

NSWLR 335, 340; *Strathfield Mun Council v Alpha Plastics Pty Ltd.* (1988) 66 LGRA 124, 129-30. Cf. *Parramatta City Council v Locker* (1989) 68 LGRA 334, 340; *NRMCA (Qld) Ltd. v Andrew* [1993] 2 Qd R 706, 713 (holding that in some circumstances it is proper to weigh against the grant of an injunction the defendant's having made efforts to arrange to bring the illegality to an end by obtaining planning consent).

42. (2000) 199 CLR 135, 143-35[16]-[20].

43. Supreme Court Act 1935 (SA) s 17(2), not Supreme Court Rules 1987 (SA) r 98.01.

44. (2000) 199 CLR 144[18]-[19], 157-59[55]-[60] (*City of Enfield*).

and the bias rule of procedural fairness or that the domestic body is to act reasonably.⁴⁵

D. Threatened Breach of the Criminal Law

Whether the action is brought by the Attorney General of his own motion, by a related action, or by an individual, the courts have displayed restraint in exercising civil jurisdiction of judicial review to grant an injunction to restrain an actual or threatened breach of the criminal law.⁴⁶ In *Gouriet v Union of Post Office Workers*,⁴⁷ Lord Wilberforce said that the civil jurisdiction to enforce the criminal law was one of great delicacy, to be used with caution. To disobey an injunction is contempt of court, carrying a discretionary penalty which may exceed that applicable to the threatened crime. The standard of proof in granting the injunction is the civil one. The defendant is deprived of other protections afforded in criminal proceedings, which, if they later ensue, may be prejudiced. The situations where the courts are more likely to grant relief are those where the statutory penalty for the offence is inadequate, and there is persistence in offending, in flagrant disregard of the statute, or in a case of emergency.⁴⁸ Nor will an injunction be granted where it

45. See *Dixon v Austl. Soc'y of Accts.* (1989) 87 ACTR 1 (although the remedies were not granted here because the ground was not established). Other causes of action include "actions for recovery of moneys exacted colore officii or paid by mistake, and those for trespass, detainue and conversion where the plaintiff challenges the validity of the authority relied upon by the defendant as an answer to the allegedly tortious acts."; *Comm'r of Austl. Fed Police v Propend Fin Pty Ltd.* (1997) 188 CLR 501, 558 (per Gummow J); (2000) 199 CLR at 143-34[17] (*City of Enfield*).

46. *A-G v Harris* [1961] 1 QB 74 (Austl.); *Ramsay v Aberfoyle Mfg. Co. Pty Ltd.* (1935) 54 CLR 230 (Austl.); *Cooney v Ku-ring-gai Mun Council* (1963) 114 CLR 582 (Austl.); *Gouriet v Union of Post Off Workers* [1978] AC 435, 481 (per Lord Wilberforce); *Commonwealth v John Fairfax & Sons Ltd.* (1980) 147 CLR 39, 49-50; *Oatmont Pty Ltd. v Austl. Agric. Co. Ltd.* (1991) 75 NTR 1, 10; *Bateman's Bay* (1998) 194 CLR 247 (Gaudron, Gummow and Kirby JJ); *Cf. Onus v Alcoa of Austl. Ltd.* (1981) 149 CLR 27, 57, 63, 65-6666.

47. (1978) AC 435, 481 (*Gouriet*). See also at 498-99 (per Lord Diplock), 491 (per Viscount Dilhorne).

48. *Ramsay v Aberfoyle Mfg. Co. Pty Ltd.* (1935) 54 CLR 230 (Austl.); *A-G v Harris* [1961] 1 QB 74 (Austl.); *Cooney v Council of Ku-ring-gai* (1963) 114 CLR 582 (Austl.); *Commonwealth v John Fairfax & Sons Ltd.* (1980) 147 CLR 39 at 50 (Austl.); *Peek v NSW Egg Corp* (1986) 6 NSWLR 1, 3 (Austl.); *ACR Trading Pty Ltd. v Fat-Sel Pty Ltd.* (1987) 11 NSWLR 67, 82-83; *Warringah Shire Council v Sedevic* (1987) 10 NSWLR 335; *Cf. Civ Aviation Auth v Repacholi* (1990) 102 FLR at 270-71; *A-G v Huber* (1971) 2 SASR 142, 181, 198-99, (refusing to exercise the discretion and granting an injunction to restrain production of the theatre performance "Oh! Calcutta" on the ground that it might involve

is unjustifiable to assume the defendant would be convicted of any offence.⁴⁹

If refusal of relief would result in irreparable damage or destruction of the very items for whose protection the statutory offence has been created, the court is more inclined to grant relief.⁵⁰ In *Onus v Alcoa of Australia Ltd*,⁵¹ an injunction was sought to restrain a threatened commission of an offence under a South Australian statute protecting aboriginal relics. The respondent company proposed to construct an aluminium smelter under a development consent on land that it owned. The construction work would have caused irreparable damage to the relics. Where it is unjustified to assume that a conviction could be secured, and injunctive relief would involve an intrusion upon personal liberty and privacy, relief will be refused.⁵² Where the only injury alleged is to the moral well-being of the public, a court is more likely to exercise its discretion to decline to grant an injunction.⁵³

E. Mandatory Injunctions

In cases of failure to perform a public duty, mandamus is ordinarily the appropriate remedy. The courts are reluctant to grant mandatory interlocutory injunctions against administrators. In this respect, declarations are more readily granted. Since a respondent administrator can be expected to

the commission of offences against decency or morality); *Potato Mktg Corp of Austl. v Galati* [2015] WASC 430; *Sec. Dep't of Educ. v Joys Child Care Ltd.* [2017] NSWSC 749.

49. *A-G (Qld) (ex rel Kerr) v T* (1983) 57 ALJR 285 (Austl.); *A-G v Huber* (1971) 2 SASR 142 (Austl.).

50. *Onus v Alcoa of Austl. Ltd.* (1981) 149 CLR 27,63 (Wilson J) (*Onus*); *Central Queensl Speleological Soc'y Inc v Central Queensl Cement Pty Ltd.* [No. 1] [1989] 2 Qd R 512 (Thomas J, dissenting).

51. *Onus* (1981) 149 CLR 27 at 35, 36, 46.

52. *A-G (Qld); Ex rel Kerr v T* (1983) 46 ALR 275 (Austl.) (where an injunction sought to restrain an abortion, would have involved an intrusion upon personal liberty and personal privacy in the pursuit of moral and religious aims).

53. *A-G v Mercantile Inv. Ltd.* (1920) 21 SR (NSW) 183,187, 189; *A-G v Huber* (1971) 2 SASR 142 at 162, 169 (Bray CJ., dissenting) (holding that the discretion to decline an injunction should be exercised where no civil or material interest of any individual and no material interest of the public is alleged to be affected); *A-G (ACT) v ACT Minister for the Envt Land and Planning* (1993) 43 FCR 329, 332-4; *Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* 1998) 194 CLR 247 (per Gaudron, Gummow and Kirby JJ).

abide by an order of the court as to the law, a declaration may suffice so that there is no necessity to issue mandamus.⁵⁴

Nonetheless, a mandatory injunction lies against a public authority which owes a private statutory duty to a plaintiff, irrespective of whether mandamus lies in the circumstances and irrespective of whether the duty is entirely private rather than public.⁵⁵ A mandatory injunction may, in an exceptional case, be granted even “where the injury sought to be restrained has been completed”, and may issue if the injury is so serious that there is interference with the liberty of the plaintiff, damages are inadequate, and restoring matters to their former condition is the only remedy that will meet the requirements of the case.⁵⁶

The availability of injunctions in public law was partially reviewed in *Smethurst v Commissioner of Police*,⁵⁷ where the focus was on mandatory injunctions. The High Court held that the Australian Federal Police acted under an invalid search warrant when its officers searched a journalist’s home and downloaded data from her mobile phone. Certiorari was issued to quash the warrant. The Court was divided as to whether a mandatory injunction should be granted. The opinion of the plurality prevailed that since the excess of power was not continuing, and the journalist had no legal right to the return of the data, no relief was available in equity’s auxiliary jurisdiction by way of mandatory injunction to require delivery up of the data, nor an injunction restraining the police from providing the data to prosecuting authorities.

The plurality’s opinion lost sight of two principles. The first is that equitable relief in public law is available to protect fundamental common law rights where the executive branch lacks statutory power to interfere with those rights.⁵⁸ In the classic case of *Entick v Carrington*,⁵⁹ equitable relief was available in respect of trespass to personal property when police

54. See generally *Quin v A-G* (NSW) (1988) 16 ALD 550 (Austl.).

55. *Bradley v Commonwealth* (1973) 128 CLR 557, 586-94; *John Fairfax & Sons Ltd. v Austl. Telecomm. Comm’n* (1977) 2 NSWLR 400 at 405-6; *Della-Vedova v State Energy Comm’n of W Austl.* (1990) 2 WAR 561, 568.

56. *Smethurst v Comm’r of Police* (2020) 272 CLR 177 at 270[238], 276-9[251]-[260] (per Edelman J)(quoting *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1875-1876.

57. (2020) 272 CLR 177.

58. *Id.* at 225[111]-[112], 230-2[123]-[130] (per Gageler J).

59. *Entick v Carrington* (1765) 19 St Tr 1029 (Austl.)(per Lord Camden).

officers entered and seized personal goods without statutory authority. According to the minority opinion in *Smethurst*, the invasion of the journalist's common law personal property rights and of her home by a trespasser should be remedied by the issue of a mandatory injunction for the delivery up of the copied data. The second principle is that in public law, equitable relief is available not only to restrain a threatened breach of a private legal right but also, and pre-eminently, to restrain a threatened breach of statutory provisions enacted for the benefit of the public.⁶⁰ Here, equity interferes not to protect a particular proprietary or legal right advanced by an individual plaintiff, but to protect the public interest, including the public interest in the due administration of law and the proper application of public funds. The evolution of the test of standing in public law, derived from a public nuisance case, later reformulated and relaxed to reflect a rationale appropriate for public law, is instructive.⁶¹ In the specific context of *Smethurst*, a statutory regime regulating police powers to search and seize is enacted for the benefit of the public, protecting liberty. Equitable relief should be available to prevent the continuation of a public wrong or, in an appropriate case, to remedy the consequences of an excess of power.

III CIVIL ENFORCEMENT PROCEEDINGS

A. Provisions in General

While commonly assumed to be the same as judicial review, civil enforcement proceedings are significantly different, involving particular statutory causes of action, with the court enjoying flexibility as to relief. Remedies are specifically provided for in statutory provisions providing for the regulator or any other person, with an open standing rule, to bring proceedings to remedy or restrain a contravention of the statute. In such civil enforcement proceedings, it is not necessary to establish that the breach of the statute constitutes jurisdictional error in order for a grant of relief to be appropriate. The court is not constrained by

60. *Cooney v Ku-ring-gai Corp* (1963) 114 CLR 582, 603-605 (Austl.); *Smethurst v Comm'r of Police* (2020) 272 CLR 177 at 249-50[176]-[179] (Gordon J), 274-5[248] (Edelman J touched upon this aspect of the equitable relief in public law).

61. *Boyce v Paddington Borough Council* [1903] 1 Ch 109,113 (Austl.); *Smethurst v Comm'r of Police* (2020) 272 CLR 177 at 225-6[113].

common law principles as to the legal effect of jurisdictional error, which form the backdrop to the issue of certiorari or prohibition. In civil enforcement proceedings, injunctions and declarations are a means for identifying and restraining actions which constitute a public wrong in the sense that a regulatory provision enacted in the public interest has been or may be about to be infringed.

Such regulatory schemes ordinarily make specific provisions as to the injunctive or declaratory orders that the relevant court is empowered to make. Some of the discretionary requirements for the availability of equitable relief may be expressed to be unnecessary. These include the need for a threat that the conduct will be repeated or that the applicant gives an undertaking as to damages to obtain an interlocutory injunction. This apart, in determining whether to grant an injunction or declaration, the court has a general discretion.⁶²

The discretionary caution as to injunctions or declarations to enforce the criminal law becomes inapplicable. The court is expressly empowered to grant injunctions and declarations in its civil jurisdiction as to contravention of a civil penalty provision where such conduct also constitutes a statutory offence. Here, absent statutory indication to the contrary, it is appropriate for the court to take into account the public interest in exercising its discretion. A declaration of contravention marks the court's disapproval of the contravening conduct.⁶³

A statutory injunction may have utility of an educative nature in reinforcing in the marketplace that the restrained

62. See generally *Warringah Shire Council v Sedevic* (1987) 10 NSWLR 335, 338-341, (summarising the relevant considerations in exercise of the discretionary power of the Land and Environment Court to make such order as it thinks fit under the *Environmental Planning and Assessment Act* 1979 (NSW) s 124); *ACR Trading Pt Ltd. v Fat-Sel Pty Ltd.* (1987) 11 NSWLR 67, 82-83; *Liverpool City Council v Roads and Traffic Auth and Interlink Roads Pty Ltd.* (1991) 74 LGRA 265, 281 (where an injunction was refused on the basis of futility); *Turnbull v Chief Exec of the Off of Env't and Heritage* (2017) 223 LGERA 81 at [46]-[48]; *Raedel v Shahin* [2019] SASCFC 141 at [138]-[145].

63. See generally *Corporations Act* 2001 (Cth) ss 1317, 1324; *Blacktown Mun Council v Friend* (1974) 29 LGRA 192,200-201; *Trade Prac. Comm'n v Mobil Oil Austl. Ltd.* (1984) 4 FCR 296,300; *F Hannan Pty Ltd. v Electricity Comm'n of NSW [No. 3]* (1985) 66 LGRA 306,313; *Austl. Sec. and Inv. Comm'n v Sweeney* [2001] NSWSC 114 at [34]-[35]; *Re McDougall*; *Austl. Sec. and Inv. Comm'n v McDougall* (2006) 229 ALR 158 at 170[57]-[58]; *Austl. Sec. and Inv. Comm'n v FUELbank Austl. Ltd.* (2007) 162 FCR 174, 184[61]; *Austl. Sec. and Inv. Comm'n v Dunjey* [2023] FCA 361 at [136]; *Cf. Austl. Sec. and Inv. Comm'n v HLP Fin Planning (Austl.) Pty Ltd.* (2007) 164 FCR 487, 504[58]; *Stirling v Dueschen* [2011] WASC 126 at [89]; *Cando Mgmt. and Maint Pty Ltd. v Cumberland Council* (2019) 237 LGERA 128.

conduct is unacceptable.⁶⁴ The fact that such an injunction may prove difficult or even impossible to enforce is a material consideration to be weighed against other circumstances relevant to the court's exercise of its discretion, but is not necessarily a bar to the grant of the injunction.⁶⁵ An injunction is not refused on the ground that it would not have a practical effect where the reason for the failure to have a practical effect is that the defendant disobeys it.⁶⁶

Some civil enforcement schemes may provide for orders that do not share all of the features of injunctions or declarations at general law. For example, under the *Land and Environment Court Act 1979* (NSW) the Land and Environment Court of NSW has power, "instead of declaring . . . that a development consent" is invalid in whole or in part, to make an order "suspending the operation of the consent," or an order specifying terms that will validate the consent.⁶⁷

An overarching procedural mandate for obtaining injunctive relief is now in place in relation to federal civil enforcement proceedings. Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ("RPSP Act") provides a framework for enforcement of duties that are expressly stated in another enactment to be "enforceable provisions" for the purposes of the RPSP Act. Pursuant to ss 121 and 122 of the RPSP Act an "authorised person" may apply for an injunction or interim injunction to restrain a person from engaging in conduct in contravention of an enforceable provision or require action to be taken by a person who has refused or failed to act, in contravention of an enforceable provision. For example, the provisions of the *Privacy Act 1988* (Cth) are enforceable provisions and the Privacy Commissioner and "any other person"

64. *Australian Competition and Consumer Comm'n v 4WD Sys Pty Ltd.* (2003) 200 ALR 491 at [217]; *Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2006) 154 FCR 425, 432[24]-[26].

65. *Austl. Competition and Consumer Comm'n v Chen* (2003) 132 FCR 309; *Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2006) 154 FCR 425, 432[25].

66. *Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2008) 165 FCR 510, 525[51]-[53] (NSW) (citing *Vincent v Peacock* (1973) 1 NSWLR 466, 468); see also *Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2015) 238 FCR 209 (NSW) (where the respondent was later found guilty of wilful contempt of court in breaching an injunction restraining it from taking Antarctic minke whales in the Australian Whale Sanctuary in contravention of the *Environmental Protection and Biodiversity Conservation Act 1991* (Cth) (Austl.)).

67. *Land and Environment Court Act 1979* (NSW) s 25B; see *GPT Re Ltd. v Belmorgan Prop Dev Pty Ltd.* (2008) 72 NSWLR 647, 669[90].

is an “authorised person” in relation to those enforceable provisions.⁶⁸

B. An Example: National Consumer Credit Regulation

A useful illustration is the regime for civil enforcement proceedings in the Federal Court of Australia with respect to contraventions of the *National Consumer Credit Protection Act 2009* (“NCCP Act”). The key proceeding is for a declaration under s 166, which need not be a precondition to, but lays the groundwork for proceedings for other relief. Additional causes of action may be brought, with the proceedings for a declaration or injunction, or subsequently. These are proceedings for compensation or a civil penalty.⁶⁹ The proceedings for civil penalties usually attract the most attention. The basis for calculating a penalty and the proper role of the court in scrutinising the adequacy of a penalty order by consent may generate public debate.

Pursuant to s 166(1) of the NCCP Act, within six years of a person contravening a civil penalty provision, the Australian Securities and Investments Commission (“ASIC”) may apply to the Federal Court for a declaration that the person contravened the provision. For example, such proceedings may be brought against a pay-day lender operating without holding an Australian Credit Licence and in breach of the prohibitions in the National Consumer Credit Protection Code that limit the maximum fees and charges that may be imposed in providing credit.⁷⁰ Section 166(2) of the Act provides that if the Court is satisfied that a person has contravened a civil penalty provision, the Court “must make” a declaration to that effect. Thus, in contrast to the usual discretionary nature of equitable relief, it is mandatory for the Court to make a declaration of contravention if the Court is satisfied that there is a contravention.⁷¹

68. *Privacy Act 1988* (Cth) s 80W (Austl.); see *Knowles v Sec’y, Dep’t of Defence* [2020] FCA 1328, [50]–[51] (Vic) (where contravention of the *Privacy Act 1988* was not established and so injunctive relief under the RPSP Act was not available).

69. *National Consumer Credit Protection Act 2009* (Cth) ss 178, 179 (compensation), 167 (civil penalty). Criminal proceedings may follow: NCCP Act s 173.

70. Section 29(1) of the NCCP Act is a civil penalty provision (s 5 of the Act defines “civil penalty provision”), which provides that a person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

71. *Austl. Sec. and Inv. Comm’n v Fin Circle Pty Ltd.* (2018) 131 ACSR 484, [153]–[159] (Vic) (O’Callaghan J) (referring to the mandatory nature of a declaration under s 166

The critical principles governing the permissible scope and content of a declaration under s 166(1) is set out in s 166(3). The declaration must be formulated in a way that specifies the conduct that constitutes the contravention with sufficient particularity to enable the declaration to stand on its own.⁷² It must be sufficiently time specific, and must accurately describe the conduct that gave rise to the contravention.⁷³ The declaration should be informative as to the basis on which the Court declares that a contravention has occurred, and contain appropriate and adequate particulars of how and why the conduct is a contravention of the Act.⁷⁴ The declaration should avoid using defined terms which are effectively meaningless to anyone who does not have access to the agreed facts for the purposes of the Court proceedings.⁷⁵

Separately, s 177(1)(a) of the NCCP Act empowers the Federal Court to grant an injunction, on such terms as it considers appropriate, if it is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute a contravention of the NCCP Act. In contrast to the declaration under s 166, relief under s 177(1)(a) is discretionary. However, s 177 contains express modifications to the generally applicable requirements affecting the exercise of the discretion to grant an injunction in judicial review.

and contrasting discretionary declarations made under other provisions, such as the *Federal Court of Australia Act 1976* (Cth) s 21 or the *Corporations Act 2001* (Cth) s 1101B(1)(a)(i)); see also *Austl. Sec. and Inv. Comm'n v Warrenmang Ltd.* (2007) 63 ACSR 623, [32] (Vic) (Gordon J) (referring to s 1317E of the *Corporations Act 2001* (Cth)); *Austl. Sec. and Inv. Comm'n v Westpac Banking Corp* [2019] FCA 2147, [239]–[240] (NSW) (referring to s 961K of the *Corporations Act 2001*).

72. See *Warrenmang Ltd.* (2007) 63 ACSR 623, [32] (Gordon J) (referring to the similarly drafted power to make a declaration of contravention under s 1317(1),(2)(a)-(d) of the *Corporations Act 2001* (Cth)).

73. *Warrenmang Ltd.* (2007) 63 ACSR 623, [48]; see, e.g., declarations under s 166 made in *Austl. Sec. and Inv. Comm'n v Thorn Austl. Pty Ltd.* [2018] FCA 704 (NSW) (Jagot J).

74. *BMW Austl. Ltd. v Austl. Competition and Consumer Comm'n* (2004) 207 ALR 452, 465[35] (Vic) (Gray, Goldberg and Weinberg JJ), (citing *Rural Press Ltd. v Austl. Competition and Consumer Comm'n* (2003) 216 CLR 53, 91[90] (Austl.)); *Austl. Sec. and Inv. Comm'n v Monarch FX Grp Pty Ltd.* (2014) 103 ACSR 453, [64] (Vic); *Westpac Banking Co* [2019] FCA 2147 at [1], [152–53] (Allsop CJ) (in proceedings seeking declarations under s 166 and civil penalties for contravention of other provisions of the Act); *Austl. Sec. and Inv. Comm'n v Austl. and NZ Banking Grp Ltd.* [2018] FCA 155 (Vic) (Middleton J).

75. *Westpac Banking Corp* [2019] FCA 2147 at [216] (Jagot J). For examples, see *Austl. Sec. and Inv. Comm'n v ACN 092 879 733 Pty Ltd.* [2012] FCA 923 (declaration 1) (NSW); *Fin Circle Pty Ltd.* (2018) 131 ACSR 484 (declaration 9).

The modifications indicate that s 177 is not limited by considerations relating to the grant of injunctive relief in equity.⁷⁶ Section 177 is remedial in that it is designed to minimise the risk of further damage to members of the public. The key principles governing its issue are as follows. First, s 177(1)(a) makes it clear that an injunction may be granted not only where the Court is satisfied that a person is proposing to engage in conduct that constitutes a contravention, but also where the Court is only satisfied that a person *has engaged* in the contravention. In the example of the pay-day lender, in order for an injunction to issue, ASIC need not prove that the lender is proposing to engage in further conduct constituting a contravention. Therefore, there is no need to establish the lender's intent to continue to engage in the credit activity under its existing business model.

This is reinforced by s 177(5)(a) of the NCCP Act, which provides that the Court has the power to grant an injunction whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind. In effect, s 177(5)(a) makes it immaterial that a respondent to the civil enforcement proceedings intends to, or can, engage in the contravening conduct in the future. The injunction may be issued regardless of whether there is a likelihood of future contravention because the underlying legislative policy is that where a contravention has occurred, an injunction will serve a purpose of deterrence.⁷⁷ Provisions such as s 177(5)(a) are “designed to ensure that once the condition precedent to the exercise of injunctive relief has been satisfied (ie contraventions or proposed contraventions . . .), the court should be given the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly.”⁷⁸

76. *Austl. Sec. and Inv. Comm'n v Cassimatis* [No. 9] [2018] FCA 385, [118] (Qld) (Dowsett J).

77. *ICI Austl. Operations Pty Ltd. v Trade Pracs Comm'n* (1992) 38 FCR 248, 256 (Lockhart J) (French J agreeing), in relation to s 80(2),(4),(5) of the former *Trade Practices Act 1974* (Cth). Followed in *Re McDougall*; *Austl. Sec. and Inv. Comm'n v McDougall* (2006) 229 ALR 158, 174–75[70]–[72] (Young J) in relation to s 1324 of the *Corporations Act 2001* (Cth).

78. *ICI Austl. Operations Pty Ltd.* (1992) 38 FCR 248 at 256, followed in *Foster v Austl. Competition and Consumer Comm'n* (2006) 149 FCR 135, 147–48[27]–[31] (Ryan, Finn and Allsop JJ), in relation to ss 80(2),(4),(5) of the former *Trade Practices Act 1974*. In relation to s 1324 of the *Corporations Act 2001*, see *McDougall* (2006) 229 ALR 158 at 174[70] (Young J) and *Cassimatis* [No. 9] [2018] FCA 385 at [117]–[119].

In a particular case, there may be evidence as to the scale of contravention beyond the declaration made, and as to the likelihood of future contraventions by the respondent. However, it is not necessary to establish that an injunction will ensure deterrence because the policy underlying s 177(5)(a) is that by granting the injunction, “deterrence is effected by attaching to the repetition of the contravention the range of sanctions available for contempt of court.”⁷⁹ The contravention, and the declaration of contravention, enliven the power to grant the injunction.⁸⁰

The power to grant an injunction under s 1324(1)(a) of the *Corporations Act 2001* is in similar terms to s 177(1). In relation to that power, it has been said that “[i]n circumstances where a contravention has been identified, it is appropriate for the Court to restrain the defendants from committing future contraventions of a similar kind.”⁸¹ The authorities that developed in relation to that civil enforcement provision apply to the exercise of the power in s 177(1)(a) of the NCCP Act. The injunction is framed in terms of the activities which gave rise to the contravention rather than being directed to all of the activities in which the respondent might engage. In *Australian Securities and Investments Commission v ACN 092 879 733 Pty Ltd*,⁸² the Court made a declaration that a company contravened s 166 of the NCCP Act and granted an injunction under s 177 restraining it from engaging in any further holding out of that kind.⁸³ The grant of the injunction followed from the declaration, with no further justification required, so that the injunction operated to restrain the contravening conduct the subject of the declaration.

79. *ICI Austl. Operations Pty Ltd.* (1992) 38 FCR 248, 268 (French J); *see also BMW Austl. Ltd.* (2004) 207 ALR 452, 466[39] (Gray, Goldberg and Weinberg JJ).

80. *Austl. Sec. and Inv. Comm’n v Secure Inv. Pty Ltd.* [No. 2] (2020) 148 ACSR 154, 172[73] (Qld) (Derrington J).

81. *Austl. Sec. and Inv. Comm’n v Marco* [No. 6] [2020] FCA 1781, [122] (WA) (McKerracher J) (where s 1324(6)(a) and (c) of the *Corporations Act 2001* are in similar terms to s 177(5)(a) and (c) of the Act respectively).

82. *Austl. Sec. and Inv. Comm’n v ACN 092 879 733 Pty Ltd.* [2012] FCA 923, [36]–[37] (NSW).

83. *Id.* This was a contravention by breach of s 30(2) of the NCCP Act, in holding out that it engaged in the business of providing home loans in circumstances where it was not authorised to do so. *Id.*; *see also Austl. Sec. and Inv. Comm’n v BHF Sols Pty Ltd.* (2022) FCR 330 (NSW) where the contraventions by pay-day lenders were established on appeal to the Full Federal Court and the matter remitted to the trial judge to make orders by way of relief. The remitted proceedings, in which declarations and injunctions were sought under ss 166 and 177, has been heard and is reserved.

Secondly, s 177(5)(c) of the NCCP Act provides that an injunction may be granted whether or not there is an imminent danger of substantial damage to another person if the person engages in conduct of that kind. In light of this provision, there is no room for a contention by a respondent to the civil enforcement proceedings that it would be futile to grant the injunction because the respondent claims to have ceased to engage in the contravening conduct. In *ACN 092 879 733 Pty Ltd*, the Court observed that “the conduct giving rise to the relevant contravention appears to have ceased,”⁸⁴ making it plain that cessation of the contravening conduct did not stand in the way of an exercise of the discretion to grant the injunction. There was no need for ASIC to prove the scale of contravention beyond the declaration made or the likelihood of future contraventions.⁸⁵

IV SOME QUESTIONS

In *Bateman’s Bay*,⁸⁶ the purpose of the grant of injunctive relief to restrain ultra vires commercial activity by a statutory authority was expressed to be vindication of “the public interest in the maintenance of due administration.” Yet, there was no suggestion that the limitations upon the availability of this equitable relief should be relaxed in the public law context. The purpose of the relaxation of the limitations in civil enforcement proceedings is the more effective pursuit of the public interest in securing relief against contravention of a regulatory scheme. Civil enforcement proceedings are proceedings in public law. Many kinds of unlawful government activity, exposed in judicial review, could be characterised as contraventions of a regulatory scheme. Here, the respondent is a public authority rather than a non-compliant private sector entity. However, the objective in

84. *ACN 092 879 733 Pty Ltd*. [2012] FCA 923 at[37].

85. See, e.g., *ACN 092 879 733 Pty Ltd*. [2012] FCA 923 (Order 3); *Austl. Sec. and Inv. Comm’n v Fin Circle Pty Ltd*. [No. 2] (2018) 353 ALR 137 (Vic) (Order 2); *Austl. Sec. and Inv. Comm’n v Rent 2 Own Cars Austl. Pty Ltd*. [2020] FCA 1312, 682[436] (Qld) (Orders 5, 6).

86. *Bateman’s Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd*. (1998) 194 CLR 247, 237[25] (NSW) (Gaudron, Gummow and Kirby JJ). Followed in *Abebe v Commonwealth* (1999) 197 CLR 510, 551–52[104] (Austl.) (Gaudron J); *Smethurst v Comm’r of Police* (2020) 272 CLR 177, [172] (Austl.) (Gordon J). *Contra Bateman’s Bay Loc Aboriginal Land Council* (1998) 194 CLR 247 at 176[81] (McHugh J) (taking the view that the function of the civil courts is to enforce rights of individuals rather than the public law of the community).

granting relief is the same— the public interest in ensuring that the unlawful conduct is identified and restrained.

The function of a court in judicial review is to grant relief that keeps the executive branch within the boundaries of power. In judicial review, equitable relief should be fashioned to meet the requirements of the case. The rules of standing to seek judicial review have, over time, been relaxed. This evolution recognised that an effective representative of the public interest who has participated in an issue has a special interest in the subject matter of the action, giving standing to bring judicial review proceedings to right a public wrong. That evolution may have been influenced by courts observing that open standing provisions for bringing civil enforcement proceedings had no untoward consequences.⁸⁷ It is surprising that the statutory reforms reflected in provisions for civil enforcement proceedings have not worked as a source of learning as to the parallel path on which equitable constraints upon the grant of injunctions in judicial review may gradually be relaxed.

87. *Truth About Motorways Pty Ltd. v Macquarie Infrastructure Inv. Mgmt Ltd.* (2000) 200 CLR 591 (Austl.).