

25 AUG 2025

COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: 2558/25
Number. B.S. 9292/23

Appellant: **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT, SCIENCE AND INNOVATION**

AND

Respondent: **NAGANA YARRBAYN WANGAN AND JAGALINGOU CULTURAL CUSTODIANS LTD ACN 668 011 872**

**OUTLINE OF ARGUMENT ON APPEAL
QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)**

Introduction

1. The Queensland Human Rights **Commission** intervenes in this proceeding under s 51 of the *Human Rights Act 2019* (Qld) (**HR Act**).
2. By way of overview, the Commission submits **first**, in respect of Ground 1 of the Appeal, that the Respondent's (**Nagana**) application for relief under ss 8 and/or 10 of the *Civil Proceedings Act 2011* (Qld) (**CP Act**),¹ on the grounds set out at para [3] sub-para (1) of the **Application** filed,² satisfies the 'piggyback' requirement in s 59(1) *HR Act*, sufficient to enliven jurisdiction under s 59(2) for the Court to consider unlawfulness under s 58 *HR Act*.
3. Section 59 makes clear that the independent claim need not be successful (nor, as it is contended below, actually brought), but rather, there need only be standing to seek such relief, on a genuine "non-colourable" basis.³ This is what "may seek" must mean.
4. Regardless of which approach to s 59 is taken, Nagana has available an independent claim at law for at least declaratory relief, on the grounds that the decision of the Appellant (**DESI**) was, "other than because of section 58, unlawful". Nagana contends that DESI's decision was unlawful due to non-compliance with the *Environmental Protection Act 1994* (Qld) (**EP Act**).
5. In support of those arguments, Nagana brings into aid a purposive interpretation of the *EP Act*, including by the application of s 48 *HR Act*, which mandates, subject to consistency with purpose, an interpretation that is compatible with human rights, in particular with Nagana's members' cultural rights as Aboriginal and Torres Strait Islander (**First Nations**) people, recognised in s 28 *HR Act*. Section 59 is not engaged to that end.
6. **Second**, contrary to what is asserted as Ground 2(a), the matter is justiciable, as it involves rights, expectations and interests that are recognised at common law and in statutes such as the *Native Title Act 1993* (Cth), the *EP Act*, as well as, conclusively in respect of the case for unlawfulness on the s 58 ground, under s 58 *HR Act*.
7. **Third**, it is further contended, relevant to Ground 2(a), that s 28 *HR Act*, by way of s 59 *HR Act*, and further or alternatively, by the application of s 48 *HR Act* to interpreting the *EP Act* in a rights-

¹ Ex AR01 to the affidavit of Alison Rose affirmed 4 July 2025, p6.

² Ibid, p4-6.

³ *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1 at 10-12 [35]-[38]. See also at [41]-[43], [45]; 18-19 [67]; *Kheir v Robertson* [2019] VSC 422 at [100]-[101].

compatible way, operates to recognise a positive duty not to infringe (or allow the infringement of) s 28 *HR Act* rights, in exercising the powers under the *EP Act*. The s 28 right is a protective one, that First Nations peoples “*must not be denied... their distinct cultural rights*”. This positive duty to combat interference with such rights⁴ has been assumed by the State.

8. **Fourth**, the Commission in this outline sets out its contentions with respect to interpretation under s 48 *HR Act*, in support of the constructional contentions to be made in the cross-appeal, regarding the provisions of the *EP Act* that are engaged.
9. **Fifth**, s 59(2) operates to enable the Court to fashion the appropriate remedy on the basis of a contravention of s 58 *HR Act*. Declarations have been either foreshadowed or made by other courts after a breach of human rights is complete, to ensure that such breaches are publicly denounced. In circumstances of a continued breach of the rights and interests raised, a declaration has more, not less, utility.

Background

10. The application originally brought was both an application for prerogative relief under the *Judicial Review Act 1991* (Qld) (**JR Act**) and, more relevant to this appeal, an application for orders pursuant to ss 8 and 10 *CP Act*.
11. The ‘decision’ particularised in the application for relief was that on 22 December 2023 (repeated on 19 January 2024) DESI determined *not* to take protective action to restrain breaches of the *EP Act* including by use of its powers under ss 358 or 505 *EP Act*⁵ (to issue environmental protection orders or bring proceedings to remedy or restrain an offence against the *EP Act*). This occurred in the context where DESI had issued an environmental authority (**EA**) authorising environmentally relevant activities on ML 70441, 70505 and 70506.⁶
12. The area for which protection is sought is Doongmabulla **Springs** and associated groundwaters nearby. There are anticipated impacts (or potential impacts) of open-cut mining activities undertaken by the **Carmichael** Coal Mine in Central Queensland (ML 70441, 70505 and 70506) upon the springs. Nagana has provided expert evidence supportive of its claims.⁷
13. Other provisions of the *EP Act* central to construing those obligations are ss 8 and 9, which define “environment” as including “social, economic aesthetic and *cultural* conditions” (emphasis added) that affect physical aspects of the environment,⁸ and “environmental value” as including characteristics which contribute to “*interest, amenity, harmony and sense of community*” (emphasis added).⁹
14. The primary judge found, in respect of the *JR Act* application, that the decision/s “*did not confer, alter or otherwise affect any legal right or obligation of Nagana.*”¹⁰
15. DESI contends that this finding determines that there was “*no other basis to challenge the lawfulness of the purported decision other than because of s 58*” of the *HR Act*.¹¹

⁴ Human Rights Committee, *General Comment 23: Article 27 (Rights of Minorities)*, 50th session, CCPR/C/21/Rev.1/Add.5 (8 April 1994), at [6.1], [7] and [9]. *United Nations Declaration of the Rights of Indigenous Peoples*, Articles 8(2), 25, 29(1) & 31(2); J Hohmann and M Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (2018) 412, 452-4.

⁵ As the provisions stood at the time (amendments introduced by *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Act 2024* (Qld) in June 2024).

⁶ Exhibit AR-10 pp 123-227, to first affidavit of Alison Rose affirmed 16 February 2024. Sections 194A and 195 *EP Act*.

⁷ Exhibit AR-3, pp16-77, first Rose affidavit; Exhibit AR-4, pp78-103 first Rose affidavit. Request letters, 4, 6 and 10. As summarised by Nagana in its cross-appeal submissions, as applicant (**XAS**) paragraph [5] and footnotes 9 and 10.

⁸ s 8(e), *EP Act*.

⁹ s 9(c), *EP Act*.

¹⁰ *Nagana Yarrbayn Wangan and Jagalingou Cultural Custodians Ltd v Chief Executive, Department of Environment, Science and Innovation* [2025] QSC 132 (**judgement**) [27]-[28].

¹¹ *Judgement*, [28], [31]

16. For reasons to be discussed, the Commission submits that is not so. The interest required to be demonstrated in order to avail an applicant of the prospect of declaratory relief (quite apart from what is required to be established under the *JR Act*) is sufficient to enable the same arguments as to lawfulness by reference to the *EP Act* to be raised in support of an order under s 10 *CP Act*.
17. DESI's contention is in direct contrast with the High Court's acceptance of the availability of declaratory relief vis-à-vis prerogative relief, and the nature of that power as described in *Ainsworth v Criminal Justice Commission*.¹² The primary judge's acceptance of the limits to granting orders in the nature of certiorari and mandamus is consistent with *Ainsworth*.¹³ Evidently, however, the High Court in *Ainsworth* was not required to deal with the availability of injunctive relief to protect rights, arising under s 58 *HR Act*.
18. Section 59(4) of the *HR Act* too, in the examples there provided, indicates at least a notional distinction between relief that might be sought pursuant to the *JR Act* and such relief as may be found within the Court's inherent jurisdiction.
19. In leaving open the claim for declaratory relief,¹⁴ the primary judge found that such a power would be able to be exercised by the Supreme Court to determine unlawfulness on *HR Act* grounds.¹⁵ His Honour essentially considered, in resolving against DESI on its application for orders under r 16(e) of the *Uniform Procedure Rules 1999* (Qld) (**UCPR**), that the question of whether a declaration was open on the grounds of unlawfulness was best left to trial.¹⁶

Ground 1

Jurisdiction under s 59 *HR Act*

20. Section 59 *HR Act* permits a person who "may seek any relief or remedy... on the ground that the act or decision was, other than because of section 58, unlawful" (s 59(1)) to seek the relief or remedy on the ground of a breach of s 58 (s 59(2)).
21. The Commission submits that s 59 must be construed purposively¹⁷ and in its context as an "enabling" provision for the *HR Act*, conferring "additional jurisdiction ... (which) is an important means of giving effect to, and vindicating human rights".¹⁸ Whilst it is "both conditional and supplementary,"¹⁹ neither aspect ought to be read narrowly.
22. It is unnecessary to determine the full scope of s 59 here, because of the independent grounds raised in respect of the relief sought under the *CL Act*. That has also been the experience Victorian courts considering the equivalent provision in the **Charter of Human Rights and Responsibilities Act 2006** (Vic).²⁰
23. Nevertheless, to the extent the Court sees fit to do so, the Commission submits as to abstract availability, that the better view, as explained by Nagana in their submissions (**RS**) at paragraphs [22]-[28], is that only the notional availability of an independent ground of unlawfulness (**non-s 58 ground**) to seek the same kind of remedy is required.

¹² *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582; 596-597.

¹³ Judgement [31].

¹⁴ Judgement [36].

¹⁵ Judgement [36].

¹⁶ Judgement [36].

¹⁷ Section 14A *Acts Interpretation Act 1954* (Qld).

¹⁸ *Goode v Common Equity Housing Ltd* [2014] VSC 585 at [25]; *SQH v Scott* (2022) 10 QR 215, at [102].

¹⁹ *Director of Housing v Sudi* (2011) 33 VR 559, 580 [96]; *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 at [367].

²⁰ *Bare v IBAC* (2015) 48 VR 129, 258-9 [394]-[396].

24. What s 59 requires is standing to bring “*bona fide and not spurious, hypothetical, illusory or misconceived*”²¹ or a “*non-colourable*” case²² for the relief sought on a non-s 58 ground.
25. This criterion, which draws upon the principles developed with respect to invoking federal jurisdiction, is comparatively instructive.
26. It does not impose a threshold level of arguability beyond this. It is enough that the claim be genuinely in controversy and not incapable on its face of legal argument.²³ Invoking human rights jurisdiction to obtain relief that is genuinely sought will not be improper, so long as the non-s 58 ground of unlawfulness which founds it is not unnecessary or unconnected to the real dispute.²⁴
27. Section 59(2) expressly contemplates that the ground available under non-*HR Act* existing legal avenues need not be successful. In *Victoria*, even without that statutory guidance, it has been held that the independent ground need not be successful, or even determined.²⁵ It is the “*mere exercise of any available right to seek relief or remedy*” on the non-*Charter* ground.²⁶
28. *Kheir v Robertson*²⁷ involved an admittedly ‘colourable’ ground brought with no nexus to the relief actually sought. In *Berih v State of Victoria (No. 2)*,²⁸ applying abstract availability (by agreement), the application fell in circumstances of a lack of standing to seek orders on judicial review.
29. In *Sandy v Queensland Human Rights Commissioner*,²⁹ whilst not needing to determine the point, Williams J allowed for the s 58 grounds of unlawfulness to remain, despite the *JR Act* grounds having been struck out. Where the supervisory powers were available to correct a decision in excess of jurisdiction, it was unnecessary to decide the point.
30. *Thorpe v Head, Transport for Victoria*³⁰ concerned a case far removed from the present. The applicant there lost standing in respect of the decision the subject of the relief she sought. She was ultimately not one who “*may seek*” relief on non-*Charter* grounds.³¹ The Court’s comments on the utility of a declaration in those circumstances were obiter. But in any event, the utility had been lost not because the relief pertained to future decisions, but because there was likely to be no repeat or future decision at all. In those circumstances, Forbes J still accepted the possibility that in other cases a declaration which makes clear certain conduct cannot be repeated would have utility.³²
31. Section 59 *HR Act* is more explicit than s 39 of the *Charter*. In particular, s 59(1) describes the independent ground of unlawfulness as arising “*other than because of section 58*”. It clearly leaves open the application of other provisions of the *HR Act* invoked within unlawfulness arguments available in causes of action outside of the *HR Act* (judicial review, common law or inherent jurisdiction, tort law). Evidently this would permit a constructional argument involving the application of s 48 *HR Act*. The question of whether it permits a non-*HR Act* ground protective of the human rights listed in Part 2 of the *HR Act* (e.g. failure to take into account a relevant consideration, or failure to comply with statutory requirements) remains undecided.³³
32. Ultimately, however, it is unnecessary for this Court to determine whether there is a need for an actual or even arguable claim on grounds brought extraneous to s 58 *HR Act*, for the purpose of dismissing the appeal.

²¹ *Kheir* at [101], referring to *Burgundy Royal Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, also relied upon in *Citta Hobart*.

²² *Citta Hobart* at 10-12 [35]-[38]. See also at [41]-[43], [45]; 18-19 [67].

²³ *Ibid*.

²⁴ *Tucker v McKee* [2022] FCAFC 98 at [70]; *Kheir* at [99].

²⁵ *Patricks case* (2011) 39 VR 373, 439 [297], [299]; *Goode* at [39].

²⁶ *DPP v Debono* [2013] VSC 407 at [82].

²⁷ *Kheir v Robertson* [2019] VSC 422 at [99].

²⁸ *Berih v State of Victoria (No 2)* [2024] VSC 230 at [70]-[71].

²⁹ *Sandy v Queensland Human Rights Commissioner* (2022) 12 QR 556 at [91]-[101].

³⁰ *Thorpe v Head, Transport for Victoria* (2021) 56 VR 66.

³¹ *Thorpe* *ibid* at [169], [172].

³² *Thorpe* at [112]-[114].

³³ *Austin BMI* at [368]; c.f. *Owen-Darcy v Chief Executive*, QCS (2021) 9 QR 250, 284-285 [86]-[91]. *Berih* at [69].

Ground 2(a)

Is there a justiciable controversy?

33. It may be accepted that Courts are tasked with “*determining legal controversies*” and not answering abstract or hypothetical questions.³⁴ The requirement for justiciability applies to the power in s 10 *CP Act*.³⁵
34. Justiciability requires a determination that concerns “*rights, liabilities and interests of a kind which are protected or enforced in the courts*.”³⁶ It will be met where:³⁷

‘The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.’ ...

...“real interest” in obtaining the relief has also been referred to as the requirement that the applicant have a “sufficient interest”, a “sufficient material interest”, or a “special interest”. (Footnotes omitted).
35. In *Onus v Alcoa of Australia Ltd*,³⁸ it was accepted that Aboriginal traditional custodial applicants had ‘special interest’ in the preservation of sacred relics to give them standing to enforce cultural heritage legislation.
36. The nature of the rights held by Nagana’s members include that they are a self-determined Wangan and Jagalingou group with cultural authority to give effect to their connection with, and obligations to, the Springs and the other springs located on Jagalingou Country. These areas, including the groundwaters feeding into the springs, are sacred to them and their cultural beliefs and practices. Under their own laws and customs, they have obligations to care for country, including the Springs.³⁹
37. In its cross-appeal submissions, Nagana sets out the contentions it makes with respect to the statutory powers in the *EP Act* that it contends are capable of giving rise to a statutorily imposed duty to protect the environment, including personal and cultural connections thereto, including the Springs.⁴⁰
38. The Commission submits that the right now enshrined in s 28 *HR Act* supports, via s 48 *HR Act*, Nagana’s contended construction of the *EP Act*, and the resultant duties it imposes.⁴¹ Further submissions in that regard will be made by the Commission on the cross-appeal.
39. The rights or interests that are now protected by the legislature in s 28, and as arguably provided for in the *EP Act*, are demonstrations of rights that have been accepted by the legislature as capable of protection or enforcement in the courts.
40. Nagana has ‘sufficient interest’ for the exercise of declaratory relief on grounds of unlawfulness other than under the *HR Act* as set out in the originating application [3](1). It follows then that Nagana has standing to seek declarations of infringement of s 58 of the *HR Act*, pursuant to s 59. For the reasons set out by Nagana, its application on non-s 58 grounds is justiciable and not ‘obviously untenable’ or ‘manifestly groundless’. The threshold necessary for dismissing the application under s 16(e) of the *UCPR* has not been reached.

³⁴ *Ainsworth* 582; *Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31 (AIP) at [37].

³⁵ *Nerang Subdivision Pty Ltd v Hutson* [2020] QSC 225 at [39], [41] (Bond J).

³⁶ *Egan v Willis* (1998) 195 CLR 424 at [5].

³⁷ *Hunt v Gerrard* [2025] QCA 126 at [93]-[94], referring to *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421, 437-438.

³⁸ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

³⁹ Request Letter 1, Applicant’s submissions below (ASB) [6].

⁴⁰ XAS at [11]-[15].

⁴¹ See references in footnote 4, and submissions to be made on the cross-appeal.

Section 48 HR Act

41. Subject to an override declaration,⁴² s 48(1) *HR Act* applies to all statutory provisions –whenever enacted.⁴³ Its statutory ‘command’ has two aspects:⁴⁴
 - (a) consistency of interpretation with the statutory provision’s intended meaning; and
 - (b) an interpretation which is compatible with human rights.
42. A statutory provision will be ‘compatible with human rights’ if it (s 8 *HR Act*):
 - (a) does not limit a human right; or
 - (b) limits a human right only to the extent that is reasonable and demonstrably justified in accordance with section 13. This latter aspect calls for proportionality analysis.
43. It is the Commission’s submission that the effect of s 48(1) is that human rights forms part of the context and becomes one of the implicit assumptions from which purpose is discerned and text construed. If the question is whether a limit to rights is authorised, it may apply similarly to the principle of legality, in its protection of the statutory rights. Where it is clear that limits have been placed on human rights, s 48(1) mandates, consistent with the provision’s purpose, an interpretation that permits of only justified limits to such human rights. Again, this task is to occur textually, contextually and purposively, to determine the intended meaning in light of the *HR Act*.
44. The Explanatory Note to the *Human Rights Bill 2018* says of the provision that a court may not depart from the purpose of a provision, but “*may depart from the literal or grammatical meaning of the words used in exceptional circumstances.*”⁴⁵
45. This restates the principles articulated most famously in *Project Blue Sky*,⁴⁶ endorsed in a human rights context by Gummow J (with whom Hayne J agreed) in *Momcilovic v The Queen*.⁴⁷ The prospect that human rights compatibility interpretation would require the use of such techniques also received judicial endorsement in the dissenting judgement of Edelman J in *DPP v Smith*.⁴⁸
46. In *Momcilovic*, the judgements split on the approach to be taken under the interpretation provision in s 32(1) of the *Charter*, on the question of whether or not s 7(2) (the limitation provision) applied to the task. Section 8 in the *HR Act* resolves that question for the Queensland statute. It clearly invokes the justification analysis for the purposes of interpretation under s 48(1) and (2).
47. Chief Justice French in *Momcilovic* did not apply s 7(2) to the interpretative task. His Honour expanded on what he had previously said in brief terms in *Hogan v Hinch*,⁴⁹ placing the interpretative mandate in s 32(1) alongside the principle of legality but extending to protect the statutory rights.⁵⁰ As his Honour reflected, courts in Australia interpreting under human rights statutes must stay true to the legislative purpose and not stray into legislative activity.⁵¹ His Honour considered Lord Hoffman’s description of the task in *R (Wilkinson) v Inland Revenue Commissioners* as consonant with the interpretative method in Australia.⁵²

⁴² Section 48(5) *HR Act*.

⁴³ Section 108(1) *HR Act*.

⁴⁴ *AIP*, 72 [114].

⁴⁵ Explanatory Notes, *Human Rights Bill 2018 (Qld)*, p30.

⁴⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78].

⁴⁷ *Momcilovic v The Queen* (2011) 245 CLR 1 [170] (Gummow J) .

⁴⁸ *DPP v Smith* (2024) 98 ALJR 1163, at [131]-[143].

⁴⁹ *Hogan v Hinch* (2011) 243 CLR 506 [27] (French CJ).

⁵⁰ *Momcilovic* [50]-[51] (French CJ).

⁵¹ *Momcilovic* at [20] (French CJ), at [146](ii), [151] (Gummow J, with whom Hayne J agreed) and [545]-[546] (Crennan and Kiefel JJ).

⁵² [2006] 1 All ER 529 at 535.

48. The judgement of Crennan and Kiefel JJ was consistent with this. Their Honours spoke of the *Charter* now forming part of the context in which Parliamentary intent is to be observed.⁵³ This passage in *Momcilovic* has received appellate endorsement in application to the *HR Act*, albeit in obiter, in *Athwal v State of Queensland*.⁵⁴
49. Therefore, consistent with the 'modern approach' to statutory interpretation that is well-established in the courts of this country,⁵⁵ Parliament's legislative recognition and protection of people's human rights in the *HR Act* now forms part of the context within which any statutory provision affecting those rights is to be construed, considered at the outset. A clear meaning should not be reached without reference to context. Under this standard approach, the text of a provision might be strained, read down or added to, in order to give effect to the intended purpose of the legislation.⁵⁶
50. Justice Gummow (with whom Hayne J agreed on this point⁵⁷) and Bell J⁵⁸ in *Momcilovic* incorporated justified limits into the interpretative task under the *Charter*, quoting the following part of the decision of McGrath J in *R v Hansen*:⁵⁹
- As between ss 5 and 6 it will **usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right** in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.
51. Gummow J then stated:⁶⁰
- Section 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, **where it has been engaged, s 7(2)**. This relationship between s 32(1) and s 7(2) is thus similar to that between s 5 and s 6 of the *NZ Act*. (emphasis added)
52. New Zealand courts have incorporated proportionality analysis as part of the interpretative task under the New Zealand *Bill of Rights Act 1990 (BORA)* for some years. The applicable principles have only been developed incrementally and there have been differences on the exact approach to be taken, in particular, the sequence of questions to be answered. However, a flexible approach depending upon the nature of the task at hand, can be seen.
53. In *Moonen v Film and Literature Board Review*,⁶¹ Tipping J (for the Court of Appeal of New Zealand) indicated the following in respect of the interpretative mandate in s 6 *BORA* and the justified limits set out in s 5 *BORA*:⁶²
- An enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constitutes the least possible limitation.
54. The majority of the Supreme Court in *R v Hansen*⁶³ reflected the primacy of consideration of proportionality, particularly where the natural meaning and intent coincided to impose a clear limit on human rights. As to the approach in that case, Tipping J relevantly stated:⁶⁴

⁵³ *Momcilovic* at [565]-[566] (Crennan and Kiefel JJ).

⁵⁴ *Athwal v State of Queensland* (2023) 16 QR 218 at [91] (Mullins P, Dalton JA, Mitchell AJA).

⁵⁵ *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at [19]; *The Queen v A2, The Queen v Magennis, The Queen v Vaziri* (2019) 93 ALJR 1106 at [52]-[53].

⁵⁶ *Birmingham v Corroctive Services Cmr NSW* (1988) 15 NSWLR 292, 302; *R v Young* (1999) 46 NSWLR 681, 687-688.

⁵⁷ *Momcilovic* at [280] (Hayne J).

⁵⁸ *Ibid*, at [678], [681]-[684].

⁵⁹ *R v Hansen* [2007] 3 NZLR 1 at 65 [191].

⁶⁰ *Momcilovic* at [168].

⁶¹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

⁶² *Moonen* (*ibid*) at 16 [16].

⁶³ *Hansen* at [57]-[60] (Blanchard J), [88]-[92] (Tipping J), [192] (McGrath J).

⁶⁴ *Hansen* at [88]-[89] (Tipping J).

[88] ... Section 6 [of BORA] is concerned with meanings which are inconsistent with the rights and freedoms contained in the Bill of Rights. It is only when a meaning is inconsistent, that the preference for a consistent meaning mandated by s 6 comes into play. Logically, therefore, the Court's initial task is to identify the meaning which the statutory provision bears without reference to the preference with which s 6 is concerned. The Court then tests that meaning for Bill of Rights consistency along the lines set out below.

[89] The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament. Once the resulting meaning, which I will call Parliament's intended meaning, has been identified, the next step is to determine whether there is any inconsistency between that meaning and the Bill of Rights. If there is none, the matter rests there. If there is an inconsistency, and this can conveniently be called apparent inconsistency, the question which then arises is whether the Court's next step is to examine whether a consistent or less inconsistent meaning can be given to the statutory language to accord with the s 6 preference; or rather, whether the next step is to examine the apparent inconsistency to see whether it is nevertheless reasonable and a demonstrably justified limit and thus permitted by s 5 of the Bill of Rights. I say "permitted" in the sense that by enacting a provision with that meaning Parliament is not acting inconsistently with the Bill of Rights of which s 5 forms an integral part.

55. Thus, the interpretive process is flexible to the task of construction in light of the words to be construed. Parliament's intended meaning must be construed in light of its affirmation of human rights in the *HR Act*. An intention to limit human rights must be clearly expressed; with s 48(1) providing protection akin to the principle of legality applied to the human rights in question. Subject to there being an incompatible statutory purpose, statutory protection for human rights is factored into the purpose or intended operation of the provision involving justification for the extent of the limitation authorised. As McGrath J said in *Hansen*, human rights interpretative provisions can be seen to make the State's commitment to human rights "*part of the concept of purposive interpretation*."⁶⁵
56. Victorian cases have largely followed French CJ's approach since *Momcilovic* and have not engaged in justification analysis. However, in the pre-*Momcilovic* decision *RJE v Secretary to the Department of Justice*,⁶⁶ Nettle JA applied s 7(2) in his analysis of the provisions at hand.⁶⁷ His Honour concluded that an interpretation of the word "likely", as used in s 11 of the *Serious Sex Offenders Monitoring Act 2005* (Vic), as more likely than not, was required to ensure that the limits to a person's human rights effected by the provision were capable of demonstrable justification.⁶⁸ In doing so, he found the approach of Lord Woolf CJ in *Poplar Housing and Regeneration Community Association v Donoghue*⁶⁹ of some use.⁷⁰ Proportionality analysis as part of the interpretative function had also previously been engaged in under the *Human Rights Act 2004* (ACT).⁷¹ It was applied by Applegarth J in *Australian Institute for Progress Ltd v Electoral Commission of Queensland*,⁷² and foreshadowed for the appropriate case by Bond JA in *R v Wassmuth; Ex parte Attorney-General (Qld)*.⁷³

Ground 2(b):

⁶⁵ *Hansen* at [252] (McGrath J).

⁶⁶ *RJE v Secretary to the Department of Justice* (2008) 21 VR 526.

⁶⁷ *RJE* at 554-555.

⁶⁸ *RJE* at [113], [119].

⁶⁹ *Poplar Housing and Regeneration Community Association v Donoghue* [2001] DWCA Civ 595, [2002] QB 48, 82 [75].

⁷⁰ *Poplar Housing* (ibid). *RJE* at [115].

⁷¹ *R v Fearnside* (2009) 165 ACTR22; [2009] ACTCA 3. Later overturned: *Andrews v Thomson* (2018) 340 FLR 439.

⁷² (2020) 4 QR 31 at [112]-[138].

⁷³ (2022) 11 QR 82 at [90] (Bond JA).

Rule 16(e) *Uniform Civil Procedure Rules*

57. The Appeal in Ground 2(b) turns on a similar question; whether there is any utility in the grant of bare declaratory relief (in the form of foreseeable consequences for the parties).⁷⁴

Utility under general law

58. As explicitly recognised in *Ainsworth*, and *FAI Insurances v Winneke* before it,⁷⁵ the power to make a declaration may alone have utility. See per the plurality in *Ainsworth*.⁷⁶

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which “[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.” However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have “a real interest” and relief will not be granted if the question “is purely hypothetical”, if relief is “claimed in relation to circumstances that [have] not occurred and might never happen” or if “the Court’s declaration will produce no foreseeable consequences for the parties. (citations omitted)

59. In relation to declaratory power, the Court considered a practical impact on reputation was “no mere hypothetical question” so a declaration was appropriate to “redress some of the harm done”.⁷⁷ The Court also commented on the fact the appellants could have sought an injunction had they been earlier aware of the Commission’s intention to publish the report.
60. DESI’s reliance on *Cappelleri v Cappelleri*,⁷⁸ and its reference to *Mutasa v Attorney-General*, is misplaced. In *Mutasa* the duty alleged was a political, not a legal one. In *Cappelleri*, the principles are uncontroversial.⁷⁹ Shortly after the passage relied upon by DESI, the Court also referred to *Sankey v Whitlam*,⁸⁰ where the word ‘right’ in the phrase “*declarations of right*” was described as a “very wide word” which must be construed broadly.⁸¹
61. That the exercise of a declaratory power is available to address rights and interests recognised at law or in equity⁸² provides fertile ground for the fashioning of suitable remedies, particularly where there is an independent statutory grant of power in the *CP Act*.

Utility under *HR Act*

62. Despite a breach of s 58(1) *HR Act* not amounting to jurisdictional error (given s 58(6)(a)), this does not prevent the Court from making any order available to it under the jurisdiction conditionally invoked, as it sees fit.⁸³
63. Rights recognised in the *HR Act* are private and not public rights and thus are capable of enforcement and determination through judicial remedies where s 59(1) is engaged. Vindication of such rights may also ground a sufficient interest for a public remedy such as a declaration of invalidity. A declaration can be suitably vindicative of human rights and promote the rule of law.⁸⁴

⁷⁴ *Ainsworth* at [38]; *Eastman v ACT* (2008) 2 ACRLR 180 at [20]-[21].

⁷⁵ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 per Brennan J at 407, 420.

⁷⁶ *Ainsworth* at 582-583.

⁷⁷ *Ibid*, at 583.

⁷⁸ *Cappelleri v Cappelleri* [2024] VCA 173.

⁷⁹ *Ibid*, at [62]-[64].

⁸⁰ *Sankey v Whitlam* (1978) 142 CLR 1.

⁸¹ *Cappelleri* at [65], [67].

⁸² *Asmar v Albanese (No 4)* (2021) 67 VR 202, [175].

⁸³ *Goode* at [39]; *Bare* at [329], [377], [461]-[463] and [569]; *Certain Children (No. 2)* (2017) 52 VR 441, 598 [549]; *Haigh v Ryan* [2018] VSC 474.

⁸⁴ *Johnston & Ors v Carroll & Ors* [2024] QSC 6 at [55]; *Borrowdale v Director-General of Health* [2020] 2 NZLR 864, [288].

64. In some circumstances, and consistent with the principles articulated by the High Court in *Unions NSW v New South Wales*,⁸⁵ past infringements of human rights may be sufficient to give standing for declaratory relief even without other legal consequences. The High Court affirmed that sufficiency of interest is a matter of degree and the categories of interests that may be protected by judicial orders are broad.
65. The preparedness of Ginnane J in *Loiello v Giles*⁸⁶ to make a declaration with respect to a revoked curfew direction had the plaintiff been successful, and the declarations actually made by the High Court of New Zealand in *Borrowdale v Director-General of Health*⁸⁷ and Mallon J in *Grounded Kiwis Group Inc v Minister of Health*⁸⁸ indicate that even where the rights were breached in the past, a declaration may still have a foreseeable consequence. A judicial declaration to resolve what is alleged to be a continuing breach will be noticeably more useful. As to whether it can or will be made depends upon matters of degree, depending upon the nature of the rights and interests affected and the circumstances of any unlawfulness.

Response to Attorney-General's additional submissions

66. The **Attorney-General** relies upon the decision by Williams J in *SQH v Scott*, acceding to her submission.⁸⁹ The Commission notes that the submission regarding withstanding a strike-out application was based upon the Hon Pamela Tate's early extra-judicial comments only, and her Honour William J's conclusion was merely that the non-s 58 grounds in that case were "*clearly arguable*", in circumstances where no strike out was contemplated.⁹⁰
67. The Attorney also refers to Ginnane J's decision in *McKechnie v Secretary to the Department of Justice and Community Safety*,⁹¹ as an instance of the application of arguability to non-*Charter* grounds.⁹² Justice Ginnane's decision does not set out all of its reasoning. For instance, his Honour deals with the question of *Charter* grounds without reference to s 39. Second, his Honour correctly identifies that there is an exception under s 38(2) but does not then go on to consider whether this meant "the public authority could not reasonably have acted differently".⁹³
68. *Kheir v Robertson*, also relied upon by the Attorney,⁹⁴ is referenced earlier in these submissions. It is able to be reconciled with the other Victorian cases also relied upon by the Attorney⁹⁵ that "*a person may seek*" means "*at a minimum... actual standing to seek relief on independent grounds.*"
69. Even if arguability is required, it falls within the context of a broader abuse of process doctrine, and is a low bar that is easily met in this case.
70. The Commission further notes the Attorney's submissions against Nagana's standing; and describing Nagana's application for declaratory relief as "colourable" (at [43]-[44]); which have not been contended by DESI. These matters were not in dispute as between the parties below and ought not, subject to any specific appeal ground being raised, be disturbed now.

P Morreau KC
H Edwards

Counsel for the QHRC
25 August 2025

⁸⁵ *Unions NSW v New South Wales* (2023) 277 CLR 627 at [21]-[22].

⁸⁶ *Loiello v Giles* (2020) 63 VR 1.

⁸⁷ *Borrowdale v Director General of Health* [2020] 2 NZLR 864

⁸⁸ *Grounded Kiwis Group Inc v Minister of Health* [2022] 3 NZLR 19.

⁸⁹ AGS [18].

⁹⁰ *Scott* at [96], [101].

⁹¹ [2023] VSC 542.

⁹² AGS [19].

⁹³ *McKechnie v Secretary to the Department of Justice and Community Safety* [2023] VSC 542 at [33].

⁹⁴ AGS [21].

⁹⁵ AGS [25].