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Incorporating the
2013 National Lecture on Administrative Law
by The Rt Hon Dame Sian Elias, GNZM
Chief Justice of New Zealand



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NATIONAL LECTURE ON ADMINISTRATIVE LAW: 2013 NATIONAL ADMINISTRATIVE LAW CONFERENCE

*Sian Elias**

I am greatly honoured by the invitation to deliver the 2013 National Lecture on Administrative Law. It was however foolish of me to be flattered into accepting. On one or two previous occasions when I have ventured to talk about administrative law on this side of the Tasman, I have usually ended up in hot water. Indeed, a much more qualified and eminent senior Australian judge, whom I like to think of as a friend, has told me quite plainly that 'You New Zealanders just don't understand Australian public law'.

The spirited defence in the last two lectures in this series, by Justices Gummow and Keane, indicates that there are stout answers to be made and strong intellectual positions to be held against charges of Australian exceptionalism. Such charges may well be exaggerated. More importantly, the sniping generates too much indignation to be constructive. So while it is not possible to avoid questions of difference, I hope to concentrate as much on what is shared in our linked traditions and I hope to get behind some of the labels that impede shared insights. I want to talk about administrative justice. It is an end we have in common, whether we prefer to position it within a constitutional framework based on separation of powers or under the rule of law – if indeed there is any difference.

Foundations

Any comparative perspective on public law runs into the fact that national constitutions and constitutional traditions set the scene. That is because 'behind every theory of administrative law there lies a theory of the state'.¹ Our theories of the state share common roots and some inherited oddities (and there is nothing as odd as the metaphor of 'the Crown' which, as Paul Craig and Adam Tomkins have commented is 'as daft, in the modern era, as constitutional law gets').² In New Zealand, as in Australia, the superior courts have general supervisory jurisdiction over inferior tribunals and administrative action and have the constitutional responsibility of interpreting primary legislation. In both jurisdictions the executive is answerable to the courts for the lawfulness of its actions and to Parliament for its policies.

The roots we share and the similarities of our institutions do not detract from the significance of the differences between a federal state established under a constitutional document which distributes the functions of government and a unitary state operating under a constitution substantially unwritten in which the limits of the authority of the different branches of government and their relationship with each other rest, uneasily, on historical accommodations and political and legal theories. But the core constitutional principles we recognise and apply in administrative law in both systems are the separation of powers and the rule of law. They shape public law in both jurisdictions.

* *The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand*

Separation of powers

Justice Gummow pointed out in his lecture last year that administrative law in Australia must start with the conferral by the Constitution on the Executive of authority to execute and maintain the Constitution and the laws of the Commonwealth. The authority of the Executive is balanced in the Constitution by the authority conferred on the other two branches of government, although the symmetry is inevitably modified from the purer United States model by the engrafted Westminster model of ministerial responsibility to Parliament.³ Although the boundaries of executive and legislative functions may be less sharp, the High Court has been vigilant to secure strict separation of the judicial function. The authority of Chapter III courts under the Constitution to interpret legislation and keep the Executive within the powers conferred upon it is secured both by observance of this separation and by the constitutional writs. This mantle now also protects the functions of the State Supreme Courts from legislative encroachment.⁴

Sir Anthony Mason has expressed the view that the separation of powers 'has had a stronger influence on Australian public and administrative law, especially judicial review, than it has on English, Canadian and New Zealand administrative law'.⁵ It is not necessary to disagree with this assessment to suggest that its principal manifestation has been in strong protection for the judicial function. Certainly the separation of legislative and executive functions is less strict, as is perhaps inevitable in a Westminster Parliamentary system. It is an interesting question whether the strong protection of judicial function from legislative erosion⁶ comes at the price of more deference to the executive function. This is a matter I will return to.

As Lord Diplock pointed out in *Duport Steel v Sirs*,⁷ separation of powers is the assumption behind the constitution of the United Kingdom (and New Zealand) too. There is, therefore, constitutional justification for judicial review of administrative action in New Zealand and the United Kingdom, as in Australia.⁸

Even so, the source of the distribution of power in a foundational instrument adds strength to the separation, a claim which cannot be made when the distribution is based on doctrine. This has implications for legal method. Ultra vires may seem a more convincing basis for judicial supervision of administrative action in a jurisdiction where separation of powers is derived from a fundamental constitutional instrument than in a system where distribution of governmental power rests on doctrine, statutes, and the residual prerogative powers. Judicial supervision under a Constitution in which the executive has direct authority may perhaps require more circumspection than under the different constitutional arrangements in New Zealand. In New Zealand, even if the executive has no clear independent constitutional source of power beyond statute other than can be found in the dwindling prerogative, the legislature has untrammelled authority to empower the executive and ease any judicially-imposed restrictions. In a system like yours, where the lines of authority seem brighter because captured in a text, it may be understandable to prefer bright lines than in a constitutional system where judicial authority rests on big ideas such as the rule of law or the principle of legality.

The sphere reserved for judicial authority is strictly patrolled in Australian constitutional law. Chief Justice Spigelman points out that it is a more strict separation than that developed in the United States jurisprudence, even though Chapter III of the Australian Constitution is based on Art III of the US Constitution.⁹ In Australia, only Chapter III courts can exercise judicial power and they can perform non-judicial functions only if incidental to the exercise of judicial authority.¹⁰ The High Court will strike down legislation which intrudes upon the judicial power. This strict demarcation of functions

prompts vigilance about distinctions between law and policy and emphasis upon distinctions between law and the merits of individual decisions.

Separation of powers necessarily sets up inter-institutional respect. There may be room for difference in national traditions about the level of respect required to be shown in the particular context. But care to ensure that institutions do not overreach is found in any jurisdiction. (In the recent exchange between Lord Sumption and Sir Stephen Sedley on judicial overreaching in judicial review, Sedley is surely in the right when he points out that the legitimacy of what they do is a matter of constant anxiety for all judges.)¹¹

Observing proper boundaries is constitutional obligation. If however, the separation of powers (whether derived from a constitutional text or from doctrine) is taken to mark out entirely distinct spheres of responsibility, it would be unacceptably tolerant of government power, as Peter Cane has pointed out.¹²

Whether the strict separation of powers in Australia raises this risk is not something upon which I am qualified to comment. Michael Taggart suggested a few years ago that there are signs that the emphasis on the constitutional protection of the judicial authority has come at a cost to administrative law and has expanded the area ceded to the executive.¹³ If so, our law may diverge. Whether it does significantly may depend in part on the second constitutional principle we share: the rule of law.

Rule of law

Although it is always a good precept to beware of fashions in legal thinking, there is substantial support for the view that the foundation of modern administrative law is the rule of law.¹⁴ Mark Elliott has suggested that it is now ‘the driving force behind – and the normative basis of – modern administrative law’.¹⁵ In similar vein, Sir John Laws has written that the rule of law is ‘a free-standing principle, which is logically prior’ to the three heads of review identified by Lord Diplock in the *CCSU* case.

There is some justification in the view that the rule of law is too often invoked as if a talisman to ward off evil. And I certainly do not intend to use it as any conversation-stopper. It is however a principle recognised as an assumption of the Australian *Constitution*¹⁶ and it is part of the New Zealand constitution, as explicit reference in the *Supreme Court Act 2003* affirms.¹⁷ Although invoked sometimes for rhetorical flourish, there has to date been little unpacking of the concept attempted in New Zealand case law at least. It is notable, however, that the White Paper which preceded enactment of the *New Zealand Bill of Rights Act* explained the omission of any reference to ‘equality’ in the proposed Bill of Rights as unnecessary because it is part of the rule of law.

The principle of the rule of law exerts a powerful pull. It is Dicey’s concept of the rule of law that underlies modern public law. Rights may not be infringed except in accordance with law, determined by the ordinary courts of the land.¹⁸ The rule of law is however also pregnant with common law values, as Lord Bingham’s writings on the topic indicate and as is suggested by the White Paper on the New Zealand Bill of Rights, with its reference to equal treatment being part of the rule of law. The rule of law in this sense is also behind disenchantment in some jurisdictions with the adequacy of ultra vires and imputed legislative intent as explanations for intervention by way of judicial review. A common law conception of the rule of law, like the common law itself, is not static. It has necessarily been affected by the removal of immunities and procedural impediments to legal action against government and officials. The values of the common law adopted in judicial review are also values which are used in interpretation of legislation. Such values develop. In New Zealand they are influenced now by the *New Zealand Bill of Rights Act*.

Administrative justice

It is easy to acknowledge that our traditions and legal method may diverge because of constitutional differences. What is not so apparent however is whether the ends of administrative justice and the role of the courts in achieving it should differ.

‘Administrative justice’, the term I have used, was looked to by Lord Denning when in 1949 he said that the ‘task of doing justice as between the subject and the administrative branches of government is just as important as the task of doing justice between man and man’.¹⁹ It may have been a startling idea at the time. Indeed, twenty years later when I first studied administrative law, many of the great administrative law cases which established the subject in its modern form were very new. Over the next decade the courts in the United Kingdom redressed the indifference and injustices to ‘living people’ which had shocked Kenneth Culp Davies, the American administrative lawyer on his visit in 1959.

Administrative justice must be adaptable to the changing circumstances of administration and the expectations and needs of modern society. Although there are fields of legal control where certainty through what Felix Frankfurter called ‘mechanical application of fixed rules’ is attainable, he was surely right to say that ‘there are other fields where law necessarily means the application of standards – a formulated measure of conduct to be applied by a tribunal to the unlimited versatility of circumstance’.²⁰ And he identified administrative law as occupying such a field, where fixed rules are less useful and abstractions can work real injustice by attempting to ‘torture[]’ individual circumstances into ‘universal molds which do not fit the infinite variety of life’.²¹

In administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalisation unnourished by the realities of ‘law in action’.

If this insight is accurate, as I think it is, it suggests that in administrative law we should be careful not to be locked into tests, formulas and prescriptions. It has implications too for preferences for bright lines and hard edges.

Constitutional underpinning, such as is provided by a doctrine of separation of powers, brings great strength and authority to administrative law. But it may bring temptations which, if taken, can impede responses to ensure administrative justice. It is, I think, a mistake to see administrative law as isolated from the general body of common law. Felix Frankfurter pointed out that ‘the problem of rule *versus* discretion is far broader than its manifestations in administrative law’.²² That is demonstrated in the great administrative law case of *Ridge v Baldwin*,²³ where Lord Reid drew on private law cases concerned with control of power. Although issues of power present in a more acute form and over a wide range of activities in the administrative state, these are but new aspects of familiar conflicts in private as well as public law between rule and discretion. The overlap of principles and values applied by the common law indicate the concern of the law with the exercise of power over others, wherever it is found.

That is not to say that the concept of the public in administrative law is irrelevant. But if the problems of power and its abuse are not confined to public law, it is less easy to discern the purpose in insistence on drawing rigid boundaries between public and private power. Indeed the exercise was deprecated by Sir William Wade.²⁴ Certainly, a clear distinction is hard to maintain in jurisdictions in which the exercise of judicial function must conform with human rights standards in private law cases as well as public law cases.²⁵ But well before introduction of such statements, Sir David Williams was urging that the principles of administrative law ‘inevitably impinge upon or draw from other areas such as tort, contract,

company law, labour law, and criminal law'.²⁶ Too close a tie to constitutional law may blunt that sense of connection. It may also obscure the fact that securing administrative justice is a whole of government responsibility, the topic I next address.

The work of administrative justice today

Administrative justice is today the work of many hands. An emphasis on judicial supervision misses the point that modern administration, which is characterised by openness and fair process, is substantially the work of the other branches of government.²⁷ De Smith in his pioneering text famously said of judicial review that it 'is inevitably sporadic and peripheral'.²⁸ And, in reality, the courts are not where administrative justice is usually obtained.

Discretion is systemised by policy statements, manuals, and other forms of 'soft' law which protect against arbitrariness and provide fair processes. Checks within government provide supervision and may be accessed for review of decisions by those affected. More or less elaborate systems of review of decisions are provided by tribunals or officers who observe principles of natural justice, an obligation now imposed on all who exercise public functions under the *New Zealand Bill of Rights Act*. Ombudsmen provide additional scrutiny and assistance for those affected by administrative decision-making in my jurisdiction as well as in yours. Effective redress for administrative error for most people does not entail access to a court possessing general supervisory jurisdiction. And, in reality, judicial review is not often the best mechanism for securing administrative justice.²⁹

Access to official information has changed the culture and method of government. It has also changed the administration of justice in the courts. Until the relatively recent legislative reforms the courts themselves had lagged in terms of freedom of information. There was even doubt as to whether courts could compel production of official information relevant to litigation or whether they were obliged to accept the decisions of the Executive at face value. As a young lawyer I once watched a dramatic exchange in the New Zealand Court of Appeal in 1981 between the Court and the Solicitor General in which the Court insisted on being provided with material relied upon by the Minister in making his decision in a controversial case. It was a close run thing. The Solicitor-General was obliged to keep going back for instructions. The relief of the judges when the Court was eventually advised that the Minister acquiesced was palpable. It was a constitutional moment.

Few judicial decisions have had the impact of the decision of the Ombudsman in New Zealand, later upheld by the Court of Appeal when challenged by judicial review on behalf of the police, that the Official Information Act required pre-trial disclosure by the police in prosecutions.³⁰ This shift was achieved by a Parliamentary Officer with a mandate to promote good government. It is not at all clear that the courts could have forced such reform by themselves without serious political strain. That the Ombudsman did was in large part because of respect for the office and because the climate of open government the office promoted was embraced by our society. It affected popular expectations of good government.

Do the modern safeguards diminish the importance of judicial review in securing administrative justice? I do not think they do. Although Australia was an early pioneer of merits review, the provision of reasons, and access to official information under the reform package of the 1970s, most common law jurisdictions have now followed suit. I am not therefore convinced that Australian preference for jurisdictional error and legality and reluctance to embrace abuse of power as a basis for judicial intervention is explained by the federal law reform package of the 1970s, as Chief Justice Gleeson has suggested.³¹ To an outsider, there seems much force in Peter Cane's assessment that the system may itself

have fragmented administrative law 'by giving the distinction between judicial review and merits review a unique and rigidifying significance'.³²

There are two main reasons why I think judicial review is critical to administrative justice despite the systems of modern government. In the first place, I think it is necessary to acknowledge how much the architecture of modern administrative justice owes to the realisation that 'the judge over the shoulder' would intervene to ensure observance of legality, rationality, and fairness in administrative decision-making. It is not necessary to attribute to judges the credit for the insight, once it was realised how much had been lost during the period of what Sir William Wade described as their 'backsliding'.³³ Wade attributed the new preparedness to correct administrative injustice as a response to the public mood. And, certainly, the legislative and administrative reforms I have already referred to suggest that there was a well-spring of political will to do better. What was cause and effect may not be profitably disentangled but I have elsewhere suggested that the climate of openness in government has had profound consequences for law and judicial method, especially in judicial review, which has itself led other public agencies to reinforce and develop administrative justice.³⁴

In the second place, judicial oversight of administrative decision-making provides independent scrutiny which is beneficial for good administration more generally. Most often, the cases provide independent vindication of official behaviour. There is public virtue in this demonstration and in the exposition of how decisions have been taken, even where correction is not necessary. It is a principal contribution of legal process to the rule of law. Judicial determinations 'illuminate' administrative justice as well as holding institutions and officials to account.³⁵ Is it romantic to think that the examination of practices in the deliberative processes of the court itself promotes good administration and helps it to adapt to changing circumstances? And in high stakes cases, those of real public anxiety, there may be real benefit in the dispassionate processes of the supervisory jurisdiction. That certainly was my experience of some highly charged cases when in legal practice.

In supervising the exercise of discretionary judgments, the courts are engaged in the same interpretative exercise as in construing the text of provisions by which powers are conferred. In such exercise, values obtained from the common law, international law, and contemporary legislation are context for both.³⁶ The exposition of such principles and their application in individual cases provide frameworks and standards for administrators and judges alike to use. New Zealand, as a small society, has always looked for help wherever it can get it: from other jurisdictions, particularly this jurisdiction, and from international sources. As in the common law method within which we work, we look for reasons that convince and standards that are explained in application. Good government according to law is the end sought by administrative justice. It must entail reasonableness, fairness, legality, consistency, and equal treatment (the best protection against arbitrariness and a value that underpins the rule of law). But these abstractions need explanation in application to be useful. So, administrative lawyers have to read cases.

In the climate of openness and justification in which administrative law is conducted today, a sharp distinction between merits review and supervision of process seems increasingly difficult to maintain. Under New Zealand's *Official Information Act 1982* people are entitled to reasons for administrative decisions. It is an aspect of human dignity that people know why official action is taken which affects them. If people are given the dignity of reasons, they want them to justify the outcome. If they do not, the decision is appropriately characterised as unreasonable and reviewable. And, as Peter Cane has pointed out, it is difficult to understand in what sense a judgment that an administrative decision is unreasonable is not a judgment about the merits of the decision.³⁷

The reach of the supervisory jurisdiction

Much academic writing has been directed at the difficulty of maintaining a boundary between what is public and private. I do not do attempt here to do more than acknowledge this issue as a challenge for the courts in supervising the legal system. I have already referred to the fact that the common law principles applied by the courts in administrative law are derived from private law sources as well as public law sources. I have referred to the opinion of Sir William Wade that a rigid distinction between public and private power is harmful.

The ‘public function’ test applied in *Datafin* for cases where the source of the power under examination is not statutory or prerogative is so far a swallow that has not ushered in a general spring – yet.³⁸ In the corporatised and pluralist modern state, it is however increasingly difficult to draw a confident line between what is public and what is private.³⁹ The New Zealand Bill of Rights Act attaches not only to the legislative, executive, and judicial branches of government but also to ‘acts done ... by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law’.⁴⁰ We can expect further development of what functions and powers are properly viewed as ‘public’ and less emphasis on the nature of the person or body exercising the function.

Lord Diplock made it clear that it is the responsibility of the courts to adapt their processes ‘to preserve the integrity of the rule of law despite changes in the social structure, *methods of government* and the extent to which the activities of private citizens are controlled by government authorities’.⁴¹ And, as he explained on another occasion, the jurisdiction of the High Court to supervise for legality extends to new bodies possessing the ‘essential characteristics’ upon which the supervisory jurisdiction of the High Court has been based.⁴²

In all jurisdictions, the courts have been cautious.⁴³ Perhaps in Australia however the approach has been even more careful. Certainly, to our eyes, cases like *Tang*⁴⁴ and *NEAT Domestic*⁴⁵ are surprising. It may be that in those cases there were other remedies. What would surely be unacceptable however is if cases of potential injustice fall into some black hole because of the classifications of power as public or private.

I am not entirely convinced that a public function approach is in any event sufficient. I wonder whether the supervisory jurisdiction of the courts which protects the legal order is properly confined to the area of law we call ‘administrative’. Administrative law is simply the field in which power is most often encountered in modern states. But power abused or rights infringed should always be the concern of the courts. I have mentioned Sir David Williams’s view that administrative justice is not an island but is connected to the mainland of the common law. More attention should, I think, be paid to consistency between the principles we apply in supervising administrative action and the principles applied in torts, contract, company law, labour law, and criminal law.⁴⁶

The characteristics of judicial review

Chief Justice Gleeson identified the characteristics of judicial review in Australia as ‘[a] search for jurisdictional error and an insistence on distinguishing between excess of power and factual or discretionary error’.⁴⁷ Chief Justice Spigelman has similarly expressed the view that Australia’s ‘constitutional jurisprudence has now installed jurisdictional error as an overriding, unifying concept’.⁴⁸ The classic statement of the distinction between excess of power and merits review is that of Brennan J in *Attorney-General (NSW) v Quin*.⁴⁹

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s

power ... the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The rather unattractive indication in this much quoted statement that the courts must be indifferent to 'administrative injustice' must be read with the important qualification Sir Gerard makes that it is only where 'merits' *can* be distinguished from 'legality' that the courts cannot intervene. As a fair reading of *Craig v South Australia*⁵⁰ demonstrates and as is now emphasised in *Kirk v Industrial Relations Commission (NSW)*,⁵¹ the grounds for vitiating error which justify judicial review are comparable to those in other common law jurisdictions and are themselves capable of movement. In *Kirk*, the High Court has affirmed that classifications of when error is jurisdictional are only examples. There is no 'rigid taxonomy'.

Such contextual assessment of when it is appropriate for courts to exercise the power of judicial review is a feature of all common law jurisdictions. In New Zealand and the United Kingdom we prefer to avoid the language of jurisdictional and non-jurisdictional error. In Canada, as in Australia, the Supreme Court finds it useful to label the cases where the courts must intervene by judicial review as ones of jurisdictional error. In both Canada and Australia, what constitutes jurisdictional error is however an intensely contextual assessment, in which usually the most important context is provided by any statute which confers the power being exercised. Behind the terms there is common acceptance that the supervisory jurisdiction requires vitiating error (a matter of degree not susceptible to rule or test) and is not warranted where the decision maker reasonably has a choice in the assessment made.

I do not mean to suggest that there are not real differences in legal culture or dress. Often these differences in tradition and culture do lead to different results in different jurisdictions. There are some decisions of your courts which seem decidedly strange to us. No doubt there are some decisions of our courts that seem unacceptably adventurous or loose to you. That is to be expected. Indeed, within jurisdictions judicial attitudes and public expectations can be expected to fluctuate over time. As Frankfurter said, administrative law is concerned with 'fluid tendencies and tentative traditions'.⁵² But the differences should not be exaggerated. In all common law jurisdictions, judicial review polices minimum standards of administration, below which the decision lacks legitimacy in law. When that happens, it the function of the courts to say so.

In 1999, the New Zealand Court of Appeal summarised the grounds upon which judicial review is available in New Zealand and compared the New Zealand position with 'the different approach taken in Australia' in *Craig v South Australia*:⁵³

The grounds upon which judicial review is available are well established. Judicial review is in general available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers, to quote Lord Templeman in *Re Preston* ...

Error of law is a ground of review in and of itself: it is not necessary to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction. The effect of the House of Lords' decision in *Anisminic v Foreign Compensation Commission* ... as interpreted in *O'Reilly v Mackman* ... and *Ex parte Page*, is in general to render redundant any distinction between jurisdictional and non-jurisdictional error of law.

The availability of error of law as a ground for review of the exercise of public power is also now well established in New Zealand as appears from the decisions of this Court in *Bulk Gas Users Group v Attorney-General* ... This may be compared with the different approach taken in Australia: *Craig v State of South Australia* ...

As I have already indicated, I doubt whether the claim that New Zealand and Australia diverge in respect of the basis on which judicial review is exercised is much more than label-deep. English abandonment of the ultra vires theory of administrative law in favour of a common-law based system of judicial review is sometimes suggested to have increased the scope for intrusion by the courts. But the same reach has come about in Australia with expansion in the grounds which now count as jurisdictional error. No longer is judicial review confined to matters the decision-maker could not embark upon. Jurisdictional error arises also where the decision-maker acts for improper purpose or unreasonably or errs in law on a point critical to the outcome or which, if uncorrected, would undermine the integrity of an integrated legal system. As Aronson and Groves have observed, 'jurisdictional error expresses a conclusion that judicial intervention is appropriate'.⁵⁴ That is 'a conclusion based not just on principles generalised from the vast mass of judicial review decisions, but also on the particular statute at hand and the administrative demands of effectiveness and efficiency'. It is a contextual assessment in which the relative gravity of the error is critical.

Intensity of review

Because context *is* everything and is everywhere, jurisdictional differences in the intensity of supervision are to be expected even if the functions performed are, behind the labels, the same. Constitutional traditions, social expectations, intellectual preferences all mean there is reason to take different paths. This can I think be seen in relation to attitudes to the interpretation of and source of discretionary powers, to variable standards of review, and to preparedness to apply proportionality analysis. I want to touch briefly on these areas as the final matter I address. I group them all under the heading 'intensity of review' because I think interpretation of the source and scope of powers and substantive evaluation of justification for their exercise both admit variable standards.

First, interpretation. The view that only the courts can declare the meaning of an enactment exerts a powerful pull on judges in our tradition. We do not feel very deferential when it comes to interpretation. But if, as Sir Stephen Sedley has recently argued, the meaning of words cannot be ascertained 'except in relation to known or supposed facts'⁵⁵ (such as 'speech' in relation to 'flag-burning'), then meaning is always evaluative. Where the evaluation may properly be influenced by expertise possessed by an independent decision-maker then there is room for the courts to accept the interpretation preferred by him, as long as it is a reasonable one. The scope for this leeway is limited.

Generally, the courts cannot defer to the views of the Executive in matters of interpretation because to do so would be to abdicate their responsibility when adjudicating between the state and the private individual. Lord Denning, who was firmly of this view, thought that if the executive was not happy with an interpretation, it should go to Parliament to have the law amended.⁵⁶ I tend to the Lord Denning end of the spectrum, but acknowledge there are here a range of responses which will inevitably be affected by jurisdictional habits and preferences and by the particular circumstances. In Canada, more respect is paid to the expertise of the primary decision-maker, including legal expertise. The *Chevron* doctrine has an appeal in North America that Australia and New Zealand have resisted to date, except perhaps in Australia in relation to errors of inferior courts. It seems unlikely in our traditions, where authoritative interpretation of law is highly valued, that the courts will cede the responsibility to say what the law is, except in very limited circumstances. Perhaps in highly technical areas, such as price-setting, where interpretation of standards set by legislation is a matter of evaluative judgment, there is room for greater respect shown to the primary decision-maker, at least where it is independent. In such cases, the proper characterisation of the exercise being undertaken may in fact be to ascertain whether the conduct in issue fits the rule, as the High Court has recently held.⁵⁷

Secondly, the *source* of executive authority may lead to differences between jurisdictions in intensity of review. This is to revert to the different constitutional contexts within which administration is carried on. The area of direct executive authority under the Constitution has greatly exercised the High Court in the last few years. While the extent of the powers is contestable, there is no doubt that there is substantial direct discretionary power, which is referable to and limited only by the functions assigned to all branches. The position in New Zealand is different. In New Zealand, as in the United Kingdom, there have been some academic efforts to develop what Stephen Sedley has described as a 'meta-doctrine of executive supremacy that marginalises both the legislature and the courts'.⁵⁸ But the orthodox view is that, lacking any other source of original power, the executive must have statutory or prerogative authority for the exercise of power, apart from the purely ancillary powers necessarily incidental to its lawful functions.⁵⁹ As Diplock LJ said of the prerogative powers, 'it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'.⁶⁰ The different authority of the executive under our constitutional arrangements has implications for the intensity of review of its actions.

Finally I deal briefly with reasonableness, proportionality, and deference.

The apparent reluctance of Australian courts to adopt variable intensity review or proportionality analysis may be modified by recent emphasis in the High Court on contextualism. In New Zealand, as in the United Kingdom, we have been more prepared to acknowledge frankly that in some contexts the supervisory jurisdiction requires something on the continuum closer to a standard of correctness. This development was underway long before adoption of statutory statements of rights.⁶¹ What is at stake and questions of institutional competence have always affected the intensity of judicial supervision. That is a matter of rationality. In addition, in decisions of great importance, judicial indifference to what happens within wide discretion is not I think the response the community expects.

So far, Lord Diplock's prediction that proportionality would emerge as a general ground of review⁶² has not come about outside the application of proportionality analysis to limitations of human rights. Although it was argued by Jowell and Lester many years ago that proportionality is imminent in the common law, that may be true only in the sense that disproportionate results (using a sledge hammer to crack a nut) inevitably bear on reasonableness.

Proportionality analysis is a more precise methodology for identifying when it is justified to interfere with rights. Rights may not be interfered with unless the interference is justified. Proportionality requires evaluation. It requires pursuit of a legitimate aim. The limitation on the right must be a proportionate means of achieving that legitimate aim. The rights of the individual then have to be balanced with the interests of the community, a balance on which European law permits a margin of appreciation to member states.

While proportionality is increasingly resorted to in human rights cases and there are advocates for its wholesale adoption in replacement of review for reasonableness,⁶³ there is some truth in the charge that it dazzles with a show of objective rationality.⁶⁴ Even in the context of human rights, it is preferable methodology only in those cases where it is necessary to decide whether a limitation is justifiable in a free and democratic society. In very many human rights cases there is no question of such justification and the outcome turns simply on whether the right is infringed, a question of statutory interpretation or assessment in which recourse to proportionality analysis may balance rights away. There is room for concern if judicial methodology jumps too readily to justification without considering the nature of the right and whether it is infringed. A recent controversial case in New Zealand concerning discrimination may provide some illustration.⁶⁵

There is nothing wrong with unreasonableness as a standard of review. It is flexible enough to accord proper respect for the primary decision-maker and separation of powers where a range of reasonable options are available. Even in Canada, with its more developed concepts of deference to a primary decision-maker, the extent of deference is highly contextual. In some cases, the courts insist on correctness. In others they are concerned only with decisions that fail a reasonableness standard, leaving choice to the administrative decision-maker.

It is the term of art 'Wednesbury' unreasonableness which proved unhelpful, because it was anachronistically shackled to a level of unreasonableness that was pitched close to bad faith. What is reasonable must be contextually assessed. But Lord Cooke was surely right to suggest in *Daly* that 'It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd'.⁶⁶ Administrative justice requires more than that. It seems to be a standard no longer adhered to by the High Court.⁶⁷

Where human rights are engaged, there has been considerable debate in the courts and among academics about whether the role of the courts is to supervise for unreasonableness in the decision of the primary decision-maker or to vindicate the right, by making its own assessment. The topic has unsurprisingly attracted a great deal of academic comment. TRS Allan has argued that a doctrine of judicial deference in relation to rights is 'either empty or pernicious'.⁶⁸ If prompted by separation of powers concerns it is 'empty' because 'that separation is independently secured by the proper application of legal principles defining the scope of individual rights or the limits of public powers'.⁶⁹ A doctrine of deference is 'pernicious' if it:⁷⁰

permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong. In its latter manifestation, judicial deference amounts to the abandonment of impartiality between citizen and state ... leaving the claimant without any independent means of redress for an arguable violation of rights.

The reasons given by the primary decision-maker for violation of rights will always be important context. But, as cases in the United Kingdom and in the Canadian Supreme Court and the Constitutional Court of South Africa make clear, it is one thing for the courts to find the reasoning of the primary decision-maker convincing, and it is quite another thing to defer to that agency unless its conclusion is irrational.

Legal purists may take the view that the courts, which are themselves bound to observe human rights,⁷¹ cannot avoid concluding objectively whether rights have been infringed. I am not unattracted to that view, but I do not think it prevents the court giving the weight it thinks appropriate in the circumstances to well-justified conclusions of the agencies primarily responsible. The reasons they give will be key to the courts having confidence in their conclusions. If they do not give convincing reasons why the human right should yield, the courts will have to undertake close scrutiny and make the determination unless there are reasons why the decision-making body should have to reconsider the matter.⁷²

What lies ahead?

In concluding, I offer a few general thoughts. I am conscious that contextual judicial review is time-consuming and at times politically fraught. There are also risks for judicial review in the new culture of justification in which administration is now conducted. Lord Sumner's metaphor of the Sphinx⁷³ was, as Lord Cooke once said, a rather vicious one because it suggested that justification is best avoided by administrators because it risks exposing error in reasoning.⁷⁴ That is no longer an option in the climate of openness our societies expect.

The emphasis on justification makes reviewable error easy to spot and hard to ignore. There is potential for overloading of the courts and delays in administration. Such strains are emerging in the United Kingdom, where the Prime Minister has complained that judicial review is 'far too slow in getting stuff done'.

In most jurisdictions, but not in New Zealand, there are filters for judicial review. In the United Kingdom senior judges have made statements in judgments and extra-judicially suggesting that proportionality in use of judicial resources requires further restraint in recourse to judicial review and individual justice. We need to be careful. There are real risks here to rule of law values and to access to justice. Such an approach could lead to retreat into a renewed search for tests and doctrine, which flies in the face of the experience that led Mark Aronson and Matthew Groves to say (drawing on TRS Allan but also echoing Felix Frankfurter) that 'the scope and grounds of judicial review have a degree of indeterminacy whose resolution in individual cases cannot be achieved by reference to doctrine alone'.⁷⁵

The risks of overuse of judicial review are not ones that have arisen to date in New Zealand. Despite long-standing relaxation of standing and greatly simplified approaches to the supervisory jurisdiction in the last 20 years, the number of judicial review cases in New Zealand is low. That may be because the wider machinery of administrative justice, administrative review of merits, checks, and better primary systems of administration, have kept judicial review in its proper supervisory place. If so, it suggests that keeping the wider system of administrative justice in good shape is highly desirable. Whether that will be possible in times of stringency in government is an open question.

In New Zealand, too, we have been spared the highly difficult cases concerning terrorism and immigration which have put the judiciary in tension with the executive in the United Kingdom. In the preface to the current edition of *De Smith* the authors refer to the 'heavy cloud looming overhead at the start of 2013', with 'frequently ill-informed, unsubstantiated and sometimes intemperate ministerial attacks on the courts'.⁷⁶ In the United Kingdom, the balancing of the needs of procedural fairness with the interests of national security has presented the courts with real challenges, especially in the use of closed material.

These may be especially difficult issues. But all of us can point to times when judicial review has raised the tensions between the executive and the courts. In jurisdictions without a formal constitutional distribution of powers, such as mine, the role of the courts is vulnerable. That is why close attention to judicial method and effort in explaining fully the reasons for judicial review in each case are best policy. It is also why fitting the decision within a comparative law and international law framework matters. It helps in terms of legitimacy.

So I value very much the things we have in common in administrative justice. I prefer to dwell on the connections rather than the exceptions. It is a comfort to be able to draw on the rich vein of jurisprudence developed in the High Court, a great court which conscientiously confronts big issues. As importantly, it is of the greatest benefit to my jurisdiction to be able to draw on the superb Australian academic tradition in administrative law. Attention to difference is important in understanding why we may take different paths, but New Zealand law draws great strength from the connections with Australian administrative justice.

Endnotes

- 1 Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 1.
- 2 Paul Craig and Adam Tomkins, *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006) 5.
- 3 Stephen Gageler has noted that this melding of a parliamentary system into a constitution based on the United States model produces a tension: Stephen Gageler 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 164.
- 4 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
- 5 Sir Anthony Mason, 'The Break with the Privy Council and the Internationalisation of the Common Law' in Peter Cane (ed), *Centenary Essays of the High Court of Australia* (LexisNexis Butterworths, 2004) 66, 77.
- 6 For example, by the enactment of privative clauses.
- 7 [1980] 1 WLR 142, 157.
- 8 See Ivan Hare, 'The Separation of Powers and Judicial Review for Error of Law' in Christopher Forsyth and Ivan Hare, *The Golden Metwand and the Crooked Cord* (Oxford University Press, 2005) 113, 129 for the view that commentators have not sufficiently emphasized the separation of powers in the public law of the United Kingdom. Hare argues that it is possible to find constitutional justification for judicial review of administrative acts in the principle of the separation of powers.
- 9 The Hon Justice J Spigelman AC, 'Public Law and the Executive' (2010) 34 *Australian Bar Review* 10.
- 10 See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
- 11 Jonathan Sumption QC, 'Judicial and Political Decision-Making: the Uncertain Boundary' (FA Mann Lecture 2011, Lincoln's Inn, London, 8 November 2011); Stephen Sedley 'Judicial Politics' (2012) 34 *London Review of Books* 15.
- 12 Peter Cane, 'Review of Executive Action' in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 57, 59–60.
- 13 Michael Taggart 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1.
- 14 Mark Elliot, *The Constitutional Foundations of Judicial Review* (Oxford University Press, 2001) 104.
- 15 Ibid.
- 16 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 per Dixon J.
- 17 *Supreme Court Act 2003 (NZ)*, s 3(2) (in conjunction with 'the sovereignty of Parliament').
- 18 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1961) 195-196.
- 19 Sir Alfred Denning, *Freedom under the Law* (Stevens, 1949) 96.
- 20 Felix Frankfurter, 'The Task of Administrative Law' (1927) 75 *University of Pennsylvania Law Review* 614, 619.
- 21 Ibid.
- 22 Ibid.
- 23 [1964] AC 40.
- 24 HWR Wade and CF Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 570-571.
- 25 See *Hosking v Runting* [2005] 1 NZLR 1 (CA) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).
- 26 DGT Williams, 'Criminal Law and Administrative Law: Problems of Procedure and Reasonableness' in P Smith (ed), *Essays in Honour of JC Smith* (Butterworths, 1987) 170, 170.
- 27 As scholars such as Carol Harlow and Richard Rawlings have stressed, arguing that a judicial review-centred conception of public law provides a partial picture only.
- 28 SA de Smith, *Judicial Review of Administrative Action* (Stevens, 1st ed, 1959) 1. This description was retained in all five editions of the text.
- 29 See the Hon PA Keane, 'Democracy, Participation and Administrative Law' (2011) 68 *AIAL Forum* 1, 14.
- 30 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).
- 31 Murray Gleeson, 'Australia's Contribution to the Common Law' (2008) 20 *Australian Law Journal* 1, 15.
- 32 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 133.

- 33 Wade described the time as one when the judges 'declined to apply the principles of natural justice, allowed Ministers unfettered discretion where blank-cheque powers were given by statute, declined to control the patent legal errors of tribunals, permitted the free abuse of Crown privilege, and so forth': HWR Wade, *Constitutional Fundamentals* (Stevens, 1980) 78.
- 34 Dame Sian Elias, 'Administrative Law for "Living People"' (2009) 68 *Cambridge Law Journal* 47.
- 35 DGT Williams, 'Police Accountability' in D Butler, V Bogdanor and R Summers (eds), *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press, 1999) 273, 294.
- 36 As TRS Allan has been at the forefront in pointing out. See, for example, TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993).
- 37 Peter Cane, 'Merits Review and Judicial Review – The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 221.
- 38 *R v Panel on Take-overs and Mergers, Ex parte Datafin plc* [1987] QB 815 (CA).
- 39 Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths, 1999).
- 40 *New Zealand Bill of Rights Act 1990*, s 3.
- 41 *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 (HL) 639-640. [Emphasis added.]
- 42 *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864 (CA) 884.
- 43 In *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC), the Privy Council corrected the New Zealand Court of Appeal and held that the decision of a State enterprise to enter into a contract could be the subject of judicial review on a limited basis (for fraud, corruption and bad faith).
- 44 *Griffith University v Tang* [2005] HCA 7, (2005) 221 CLR 99.
- 45 *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35, (2003) 216 CLR 277.
- 46 In jurisdictions like mine where providing remedies for breaches of the New Zealand Bill of Rights Act is a responsibility of the courts, there is the need to reconcile tortious and Bill of Rights Act remedies.
- 47 The Hon Murray Gleeson, 'Australia's Contribution to the Common Law' (Singapore Academy of Law, 20 September 2007).
- 48 The Hon JJ Spigelman AC, 'Public Law and the Executive' (Garran Oration, Institute of Public Administration Australia National Conference, Adelaide, 22 October 2010).
- 49 (1990) 170 CLR 1, 35-36.
- 50 (1995) 184 CLR 163.
- 51 (2010) 239 CLR 531.
- 52 Frankfurter, above n 20, 619.
- 53 *Peters v Davison* [1999] 2 NZLR 164 (CA) 180-181.
- 54 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) [1.140].
- 55 Stephen Sedley, 'Construct or Construe' [2012] 34 (16) *London Review of Books* 19, 19.
- 56 *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 (HL) 806-807.
- 57 See, for example, *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, (2009) 238 CLR 304, in relation to misleading or deceptive conduct in trade. See Christopher Walshaw, 'Interpretation is Understanding and Application: The Case for Concurrent Legal Interpretation' (2012) 34 *Statute Law Review* 101.
- 58 Sedley, 'Construct or Construe', above n 55.
- 59 Dicey defined the prerogative power as 'the residue of discretionary power left at any moment in the hands of the Crown': above n 18, 424. Sir David Williams says that '[t]he advantage of Dicey's words is that the executive is obliged to identify a statutory or prerogative basis for what it does. Where big government moves there is no such thing as 'ordinary powers,' for those powers are exercised in a context of financial dominance and control of information and access to political channels to which no natural person could aspire': DGT Williams 'Statute Law and Administrative Law' (1984) 5 *Statute Law Review* 157, 168.
- 60 *BBC v Johns* [1965] Ch 32, 79.
- 61 Paul Craig, *Administrative Law* (Sweet and Maxwell, 7th ed, 2012) 536-537.
- 62 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410.
- 63 See, for example, Paul Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265.
- 64 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) [6.520].

- 65 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
- 66 *Regina v Secretary of State for the Home Department, Ex parte Daly* [2001] UKHL 26 [32].
- 67 See *Minister for Immigration and Citizenship v Li* [2013] HCA 18, where Gageler J was the only Judge to endorse the capricious or absurd standard of review: at [108]. The majority (Hayne, Kiefel and Bell JJ) concluded that the standard of unreasonableness is not limited to 'an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it'. The majority Judges speculated that Lord Greene MR in *Wednesbury* had not meant to endorse such a stringent standard of review and that he had, instead, simply meant to suggest that 'an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified': at [68].
- 68 TRS Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65 *Cambridge Law Journal* 671, 675.
- 69 Ibid.
- 70 Ibid 675-676.
- 71 In New Zealand, this is made explicit by s 3 of the *New Zealand Bill of Rights Act*.
- 72 Such as where it is necessary to ascertain and assess facts before concluding that a limitation on rights is justifiable.
- 73 *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (PC) 159.
- 74 The Rt Hon Sir Robin Cooke, 'The Struggle for Simplicity in Administrative Law' in Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, 1986) 1, 6-7.
- 75 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 7.
- 76 The Rt Hon Lord Woolf and others, *De Smith's Judicial Review* (Sweet & Maxwell, 7th ed, 2013) vii.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Report into Freedom of Information completed

On 1 July 2013, Attorney-General Mark Dreyfus QC received a report on freedom of information laws by eminent former senior public servant and diplomat Dr Allan Hawke AC.

Dr Hawke's report reviews the operation of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010* and the extent to which those laws, and related laws, provide an effective framework for access to government information.

'I am pleased to receive Dr Hawke's report and I thank him for all the work he has undertaken during the course of his review,' Mr Dreyfus said.

'I will be giving Dr Hawke's report close consideration and will release it publicly once I have had an opportunity to consider the issues it raises.'

The review provided an opportunity to assess the impact of the Government's Freedom of Information reforms, which aimed to promote a pro-disclosure culture across the Government and build a stronger foundation for more openness in government.

The review was mandated by legislation to begin in November 2012, two years after the commencement of the FOI reforms, to allow enough time to assess the effectiveness of the reforms, including the structural changes to the FOI system.

Dr Hawke was asked to consult on aspects of Freedom of Information such as:

- the effectiveness of the Office of the Australian Information Commissioner;
- the appropriateness of existing FOI exemptions;
- the role of fees and charges; and
- minimising regulatory burdens and the cost of FOI.

Eighty-one submissions were made to the review.

The legislation establishing the review requires the report to be tabled within 15 sitting days after it has been received by the Attorney-General.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Third%20quarter/1July2013-ReportintoFreedomofInformationcompleted.aspx>

Commonwealth whistleblower laws passed

Public-sector whistleblowers will have greater protection under legislation passed by the Government.

The Minister for the Public Service and Integrity Mark Dreyfus QC said the Public Interest Disclosure Bill and the Public Interest (Consequential Amendments) Bill were a significant step in advancing integrity and accountability of the Commonwealth public sector.

‘The Public Interest Disclosure Bill strikes the right balance to achieve a comprehensive and effective framework of protection for public interest disclosures in the Commonwealth public sector. It will help build and maintain a culture of disclosure across the public sector,’ Mr Dreyfus said.

‘The Bill will encourage a pro-disclosure culture, by facilitating disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector. It provides a clear set of rules for agencies to respond to allegations of wrongdoing made by current and former public officials, and strengthens protections against victimisation and discrimination for those speaking out.’

The Public Interest Disclosure Bill implements the 2010 Government Response to the 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs report, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*, chaired by Mr Dreyfus.

The Bill will have broad coverage across the Commonwealth public sector, including application to the Australian Public Service, statutory agencies, Commonwealth authorities, the Defence Force, Parliamentary departments and contracted service providers for Commonwealth contracts.

‘I would like to thank all those who contributed to the development of this legislation, from my colleagues on the 2009 Committee Inquiry, to the Government members and senators who have had a sustained interest in the progress of this Bill, the Committees involved in the recent Parliamentary inquiries and those who made submissions to these inquiries. All have made valuable contributions to the Bill. I would particularly like to acknowledge the assistance of Dr A J Brown in the development of the legislation,’ Mr Dreyfus said.

‘A federal public interest disclosure scheme has been a long time coming. The passage of this legislation means that the Commonwealth is no longer the only Australian jurisdiction without dedicated legislation to facilitate the making of public interest disclosures or to protect those who make them.’

The Public Interest Disclosure Bill includes a statutory review of its operation two years after commencement.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/26June2013-Whistleblowerlawspassed.aspx>

Parliament passes historic Commonwealth Sex Discrimination Amendment Bill

Attorney-General Mark Dreyfus QC has welcomed the passage through Parliament of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill, which legislates long-overdue protections for gay, lesbian, bisexual, transgender and intersex people.

The legislation will establish, for the first time at the Federal level, protections against discrimination in areas such as accommodation and healthcare.

Following consultation with aged care providers and a recommendation from the Senate Legal and Constitutional Affairs Committee, the Government amended the Bill to insert a qualification on the exemption for religious organisations for the provision of Commonwealth-funded aged care services.

‘The Government is proud to have passed this historic Bill, which is an important step towards equality for all Australians, regardless of their sexuality or gender identity,’ Mr Dreyfus said.

‘This amendment has been strongly supported by UnitingCare Australia and Mission Australia, and other major aged care providers have confirmed they do not discriminate against any residents or those seeking care.’

‘The vast majority of aged care service providers give dedicated and loving care to their residents no matter who they are, but it is important to ensure such discrimination cannot ever occur. Ageing gay, lesbian, bisexual, transgender and intersex people should not have to live in fear that they may be barred from essential care services.’

‘This protection is particularly vital in regional areas where there is a limited choice of aged care providers.’

The new protections build upon the Government's reforms to eighty-five Commonwealth Acts which removed discrimination against same-sex couples and their children.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/26June2013-ParliamentpasseshistoricSexDiscriminationAmendmentBill.aspx>

Protecting privacy in the digital era

The Attorney-General Mark Dreyfus QC has asked the Australian Law Reform Commission to conduct an inquiry into the protection of privacy in the digital era.

The inquiry will address both prevention and remedies for serious invasions of privacy.

‘As I noted in March this year, further work needs to be done on whether to create a right to sue for breach of privacy,’ Mr Dreyfus said.

‘I am asking the Australian Law Reform Commission to consider this issue in light of changing conceptions of community privacy and rapid growth in information technology capabilities.’

‘The Government strongly believes in protecting the privacy of individuals, but this must be balanced against the Australian public’s right to freedom of communication and expression.’

New technologies and modes of communication that provide new opportunities to connect, collaborate and create also pose new privacy challenges.

‘Our privacy laws need to address future challenges and ensure people can take action against a person or organisation that seriously violates their privacy. Earlier consultations by the Australian Law Reform Commission in 2008, and responses to the Government’s 2011 discussion paper, showed little consensus on how a legal right to sue for breach of privacy should be created, or whether it should be created at all,’ Mr Dreyfus said.

A range of issues were raised, including whether a tort could create a more litigious culture, how it could impact on free speech and how the implied right to political communication could be balanced with an individual's right to sue.

'I have asked the Australian Law Reform Commission to ensure that the importance of freedom of expression and other rights and interests are appropriately balanced,' Mr Dreyfus said.

The Government will carefully consider the findings of the Australian Law Reform Commission before making a final decision.

<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2013/Second%20quarter/12June2013-Protectingprivacyinthedigitalera.aspx>

New law to strengthen open justice in Victoria

On 26 June 2013, the Victorian Coalition Government introduced legislation into Parliament to strengthen and promote open justice in Victoria's courts.

The legislation consolidates and reforms the general statutory powers for the courts and VCAT to make suppression orders and closed court orders.

It establishes clear presumptions in favour of allowing free reporting of court proceedings and holding hearings in public.

'This legislation is another significant step in the Coalition Government's reforms to strengthen Victoria's justice system,' Attorney-General Robert Clark said.

'Open justice demonstrates publicly that laws are being applied and enforced fairly and effectively. Unless there is good reason to the contrary, the community is entitled to know what is being said in court where there are allegations that the conduct of an individual or organisation is in breach of the law.

'Restrictions on publishing information before the courts should only be imposed where there is a very good reason and should be limited to a clear and specific purpose.'

Key features of the Bill include:

- suppression orders under courts' general statutory power can only be made in specified limited circumstances where there is a strong and valid reason for doing so;
- the court must be satisfied on the basis of sufficient credible information that the grounds for making a suppression order are established;
- the type of information to which an order relates must be specified in the order and must be no more than is necessary to achieve the purpose of the order; and
- orders must be restricted in their duration. A court may only make an order for a fixed or ascertainable period, or until the occurrence of a specified future event. If there is a possibility that the future event will not occur, the order also must contain an expiry period that cannot be longer than five years.

Generally, orders restricting the reporting of court proceedings under the Bill can only be made where it is necessary to:

- prevent prejudice to the proper administration of justice;

- prevent prejudice to national or international security;
- protect the safety of any person;
- avoid undue distress or embarrassment to a party or witness in criminal proceedings involving a sexual offence or family violence; or
- avoid undue distress or embarrassment to a child who is a witness in a criminal proceeding.

The Bill does not alter the principle that matters that might prejudice a fair trial should not be reported ahead of a court hearing.

However, the Bill sets clear rules and guidelines for the making of any orders to suppress publication of such matters, to ensure those orders are limited to what is necessary and are not in force for longer than is necessary.

The Bill is based on a model Bill endorsed in 2010 by the Standing Committee of Attorneys-General. However, the Coalition Government has deliberately excluded from the Bill the sweeping and unclear 'public interest' ground for suppression orders that was included in the model Bill.

Instead, the Bill preserves specific statutory regimes that provide for the making of suppression orders where considerations other than those in the Bill are relevant, for example orders about serious sex offenders, child protection proceedings and other Children's Court matters.

The Bill also preserves the existing grounds for VCAT and the Coroners Court to make suppression orders, reflecting the unique nature of those jurisdictions.

The Bill makes clear that news media organisations may appear and be heard by a court or tribunal on an application for a suppression order under the Bill.

Media organisations and other relevant persons are also given express statutory rights to seek review of orders that are made to ensure that interested parties can have their say on whether an order should be varied, revoked or renewed.

Where an interim order is made, the court must proceed to determine the substantive application as a matter of urgency.

<http://www.premier.vic.gov.au/media-centre/media-releases/7168-new-law-to-strengthen-open-justice.html>

\$4 million to assist unrepresented litigants in federal civil law matters

Attorney-General Mark Dreyfus QC and Parliamentary Secretary Shayne Neumann have announced new funding of \$4 million over four years to support unrepresented litigants who would not otherwise have access to legal assistance and advice.

'The service fills an important gap by providing legal assistance in federal civil law matters to those who are unable to otherwise afford legal representation,' Mr Dreyfus said.

Assistance will be available for unrepresented litigants in the areas of social security, discrimination, consumer law, judicial review, bankruptcy, immigration and employment law.

'The national rollout will be based on the successful pilot conducted by the Queensland Public Interest Law Clearing House in the former Federal Magistrates Court and Federal Court,' Mr Neumann said.

'The pilot was a good example of an effective collaboration between government-funded services and the private sector to deliver cost-effective legal services that respond to the legal needs of the Australian community.

'It was modelled on the Royal Courts of Justice Advice Bureau which has been successfully operating in London for more than 30 years.'

Mr Dreyfus said there would be a focus on early resolution and mediation of disputes.

In addition, the scheme will help divert potentially frivolous or vexatious actions away from the Federal Court and Circuit Courts, lessening the burden on those courts,' Mr Dreyfus said.

'This is an important initiative in improving access to justice across our nation, and I commend the Queensland Public Interest Law Clearing House for its pioneering work with this program.'

Further information is available at www.ag.gov.au

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Third%20quarter/25July2013-4milliontoassistUNRepresentedlitigants.aspx>

Commissioner appointed for ALRC inquiry into legal barriers for people with disabilities

A new inquiry will consider whether Commonwealth laws and legal frameworks create barriers to people with disabilities exercising their rights and legal capacity.

On 23 July 2013, Attorney-General Mark Dreyfus QC formally referred the inquiry into Legal Barriers for People with Disabilities to the Australian Law Reform Commission (ALRC), and appointed the Disability Discrimination Commissioner Mr Graeme Innes AM to the ALRC to support the inquiry.

'People with disability deserve the opportunity to make decisions affecting their lives,' Mr Dreyfus said.

In welcoming Mr Innes' appointment, Minister for Disability Reform Jenny Macklin said that as Australia's Disability Discrimination Commissioner Mr Innes has been a powerful advocate for people with disability.

'Mr Innes' work in ensuring that people with disability have access to the same rights and opportunities as Australians without disability ideally positions him to lead this important Inquiry,' Ms Macklin said.

'The inquiry follows the historic launch of DisabilityCare Australia on 1 July this year- a momentous achievement that will finally give people with disability the certainty they deserve.'

Inquiries undertaken by the Australian Law Reform Commission provide a unique opportunity for in depth consideration of issues of law.

The reference follows a three-week public consultation on draft terms of reference.

‘Overall the feedback on the draft terms of reference was very positive,’ Mr Dreyfus said.

‘We have made changes to the terms of reference based on the consultation and I’m looking forward to the ALRC’s final report on this topic, which is due in August 2014.’

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Third%20quarter/23July2013-Commissionerappointed-for-alrc-inquiry-into-LegalBarriersforPeoplewithDisabilities.aspx>

Recent Decisions

A decision of a superior court of record is valid until set aside

The State of NSW v Kable [2013] HCA 26 (5 June 2013)

- 1 From February to August 1995 Mr Kable was held in a New South Wales prison pursuant to an order made by Levine J purportedly under the *Community Protection Act 1994* (NSW) (the *CP Act*). The *CP Act* permitted a detention order to be made in respect of Mr Kable, if a Supreme Court judge was satisfied that he was likely to commit a serious act of violence and it was appropriate to hold him in custody.
- 2 Mr Kable successfully challenged the constitutional validity of the *CP Act* (*Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24) (*Kable No 1*). The High Court held that the *CP Act* was inimical to the exercise of judicial power. It was wholly invalid, as were all the steps taken under it.

In 1996 Mr Kable commenced proceedings seeking damages arising from the conduct of the State and its officers for detaining him for six months on the basis of the detention order made under the invalid *CP Act*. The primary judge dismissed Mr Kable's claims. On 1 November 2010, Mr Kable appealed to the Court of Appeal. That Court allowed the appeal in part, on the basis that an order made under the *CP Act* was not a judicial act and was void from the beginning.

By special leave, the State appealed to the High Court. The High Court unanimously allowed the appeal, holding that the detention order was a judicial order that was valid until set aside.

The High Court found that the order made by Levine J (although constitutionally invalid) was a judicial order because it was the result of an adjudication determining the rights of Mr Kable. It was made following proceedings in which witnesses were examined and cross-examined, opposing parties made submission and, subject to some exceptions, the rules of evidence applied. The High Court drew a distinction between *how* the power which the *CP Act* purported to be given to the Supreme Court was exercised and *whether* the power was given validly to the Supreme Court.

The High Court also held that it is now firmly established in Australian law that the orders of a federal court which is established as a superior court of record are valid until set aside, even if the orders are made in excess of jurisdiction (whether on constitutional grounds or for reasons of some statutory limitation on jurisdiction), and that these principles apply equally to the judicial orders of a State Supreme Court.

The High Court opined that there must come a point in any developed legal system where decisions made in the exercise of judicial power are given effect despite the particular decision later being set aside or reversed. That point may be marked in a number of ways. One way in which it is marked, in Australian law, is by treating the orders of a superior court of record as valid until set aside. Were this not so, the exercise of judicial power could yield no adjudication of rights and liabilities to which immediate effect could be given. An order made by a superior court of record would have no more than provisional effect until either the time for appeal or review had elapsed or final appeal or review had occurred. Both the individuals affected by the order would be required to decide whether to obey the order made by a court which required steps to be taken to the detriment of another. The individuals affected by the order would have to choose whether to disobey the order (and run the risk of contempt of court or some other coercive process) or incur tortious liability to the person whose rights and liabilities are affected by the order.

Therefore the order made by Levine J under the *CP Act* provided lawful authority for Mr Kable's detention until set aside, and the primary judge's orders dismissing Mr Kable's claims were reinstated.

Apprehended bias – too many statements, not enough questions

***SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 (25 July 2013)**

The appellant, a Nepalese citizen, arrived in Australia on 18 February 2009 on a student visa. On 28 September 2011 he applied to the Department of Immigration and Citizenship for a Protection (Class XA) Visa. The appellant claimed, among other things, that he (as a Hindu) had made a Muslim girl pregnant and that the girl's father and some Muslim associates had attacked his family home.

A delegate of the Immigration Minister refused that application. On 29 March 2012 the appellant applied to the Refugee Review Tribunal (the Tribunal) seeking review of the delegate's decision. The appellant attended a hearing before the Tribunal member. On 21 August 2012, the Tribunal affirmed the delegate's decision and published its reasons for decision.

The appellant then sought judicial review of the Tribunal's decision by the then Federal Magistrates Court. That Court dismissed the application on 26 March 2013.

On 16 April 2013, the appellant appealed to the Full Federal Court. The appellant contended, among other things, that the Federal Magistrate erred in not concluding that the decision of the Tribunal was vitiated by reason of a reasonable apprehension of bias on the part of the Tribunal member.

The Full Court found, after considering the entirety of the transcript of the Tribunal hearing and the surrounding circumstances, including the statutory power being exercised by the Tribunal, that the course of the hearing did give rise to a reasonable apprehension of bias. The testing by the Tribunal of the appellant's claims and evidence was too frequent and what the Tribunal said was too absolute and definite, taking the form of statements rather than questions.

The Full Court held that it is one thing to manifest scepticism and to test credibility vigorously but it is another to state, on approximately a dozen occasions in the course of a relatively short hearing of less than two hours and over fewer than 10 pages of transcript, that the Tribunal does not or cannot believe the appellant or using words to that effect such as 'Don't

be silly.’ The Tribunal is exercising a statutory power of great importance to the claimant for refugee status; the language used by the Tribunal in testing the claims must be considered in that light by the properly informed lay person.

The Full Court held that while there is no clear line between testing and arguing, the relevant part of the course of the hearing took the form of lengthy statements on the part of the Tribunal rebutting what the claimant said rather than testing the material, leading to the reasonable apprehension that the Tribunal was arguing its fixed position.

The AAT’s jurisdiction

Arifin and Decision Maker [2013] AATA 502 (15 July 2013)

In April 2012, the applicant sought review of a decision by Centrelink concerning the date from which she was entitled to be paid a disability support pension. On 4 June 2013, the Administrative Appeals Tribunal (the Tribunal) decided that the applicant was entitled to be paid from a date earlier than that originally determined by Centrelink.

During the course of the review, the applicant submitted a large bundle of documents to the Tribunal in which she referred to herself as a victim of mental health issues. She described a range of matters including unfair termination of her employment on the ground of mental health issues, vilification and physical assault. She also referred to conduct directed at her by the police, Centrelink and her private health fund, and the circumstances in which her infant son died in 1999, which she said amounted to medical negligence.

In a telephone conversation with a Tribunal officer on 23 April 2013, the applicant advised that she wished to claim compensation for the matters described in the bundle of documents. Following this conversation, the Tribunal returned the bundle to the applicant with a letter advising it did not have jurisdiction to determine claims for compensation for discrimination.

On 2 May 2013, the Tribunal received an Application for Review of Decision form from the applicant. The application referred to the bundle of documents and attached a letter headed ‘Appeal for Claiming of Compensation’. The letter outlined the same matters referred to in the bundle of documents.

The Tribunal found that it has no jurisdiction to consider the matters described in the bundle of documents or in the application for review. While the Tribunal has power to review a wide range of decisions made by Australian Government ministers, departments and agencies, it does not have a general power to review any decisions. The Tribunal only has jurisdiction to review a decision if the legislation under which the decision is made gives it that power (s 25 of the *Administrative Appeals Tribunal Act 1975*).

At the hearing, the applicant referred to the *Disability Discrimination Act 1992* (Cth) which makes it unlawful to discriminate against a person on the ground of his or her disability in areas including employment, education, accommodation and services. However, nothing in the Disability Discrimination Act or any other legislation gives the Tribunal jurisdiction to determine complaints of discrimination under that Act. Rather, a person who believes she or he has been discriminated against can complain to the Australian Human Rights Commission and, if still not satisfied, can take the complaint to the Federal Court of Australia or the Federal Circuit Court.

The applicant also referred at the hearing to the Commonwealth Disability Strategy (2000) which provides a framework for government departments and agencies to meet their

obligations under the Disability Discrimination Act, and to the Tribunal's own Disability Action Plan (2008-2011). The Tribunal held that these documents describe what the Tribunal has to do to meet its obligations under the Disability Discrimination Act. They do not give the Tribunal jurisdiction to consider whether any other body has met its obligations.

A decision of an administrative character

Von Stalheim v Anti-Discrimination Tribunal [2013] TASSC 24 (4 June 2013)

In June 2003 the applicant made a written complaint to the Tasmanian Anti-Discrimination Commissioner asserting that Deloitte had discriminated against him and/or victimised him, in contravention of the *Anti-Discrimination Act 1998* (Tas) (the *AD Act*). The Commissioner accepted the complaint and conducted an investigation. Following that investigation, the Commissioner dismissed the complaint pursuant to s 71(1)(a) of the *AD Act*. The applicant then made an application under s 71(3) of the *AD Act* to the Tasmania Anti-Discrimination Tribunal (the Tribunal) for the dismissal of his complaint to be reviewed. After conducting a hearing, the Tribunal member affirmed the Commissioner's decision and the complaint lapsed.

The applicant sought judicial review of the Tribunal's decision. The Tasmania Attorney-General, intervened, contending the decision in question was not a 'decision of an administrative character' for the purposes of the *Judicial Review Act 2000* (Tas) (the *JR Act*) and therefore, the Court had no jurisdiction to review the Tribunal's decision.

The Attorney-General argued that the fact the Tribunal could have found the complaint substantiated and made remedial orders, such as the payment of compensation which was held to be judicial in nature in *Kentish Council v Wood* [2011] TASFC 3, meant that the alternate decision to affirm the Commissioner's decision was also one of a judicial nature. The Attorney also relied on the fact that the Tribunal, in reaching its decision, had received evidence from witnesses and permitted cross-examination.

The applicant contended that the Tribunal does not have the power to take evidence during reviews, as distinct from inquiries; that the taking of evidence for the purpose of reviewing the Commissioner's decision was irregular; and that the taking of evidence should therefore be ignored for the purpose of determining whether the decision under review was one of an administrative character.

The Court found that the Tribunal's decision was one of an administrative character for the purposes of the *JR Act*. The Court held that decisions made by the Commissioner at the conclusion of an investigation, and decisions made by the Tribunal upon reviews of dismissals and rejections of complaints, all have similarities with the sorts of decisions made by magistrates as to whether to commit an accused person for trial, which are administrative in character: *Lamb v Moss* [1983] FCA 254. Such decisions, like decisions under the *AD Act* about rejections, dismissals and referrals for inquiries, about whether or not there are to be further proceedings of a non-administrative character, are decisions of an administrative character.

ADMINISTRATIVE JUSTICE IN AN INTERCONNECTED WORLD

*Dean & Professor Lorne Sossin**

‘Administrative Justice in an Interconnected World’ is a compelling and elusive topic. Is my goal to discuss the extent to which administrative justice *is* in fact in an interconnected world or what it would take for this claim to become a reality. The claim that administrative justice is interconnected in this way is the compelling part – in other words, that the many disparate statutory tribunals, boards, agencies, commissions, etc, across the common law world, which exist in a decision-making sphere apart from both courts and government departments, and operate within different legal, political and policy cultures, share enough common ground to constitute a distinct system of justice. The reality is the elusive part – while there are hints at how such interconnected developments might proceed, there are also wholly parallel discussions where administrative law appears to be developing in splendid isolation in each jurisdiction, where legal and policy problems are approached as if no one else had ever considered them, and where occasionally different countries with similar values arrive at disparate responses to the same dilemmas.

While the ambition of administrative justice in an interconnected world is daunting, there is a recurring, intuitive resonance to this proposition. One brief anecdote captures this intuition. Some years back, I was involved in a research initiative commissioned by the Canadian Judicial Council (CJC) on the subject of the models of court administration. While Canada’s judiciary has a deserved reputation for excellence, independence and integrity, Canada’s courts are managed by executive departments within ministries of justice or offices of Attorneys General. While this created the appearance of conflicts from time to time, given the frequency with which those same government departments appeared before courts, this duality of role was inevitable, so the argument went, because of the inherent constraints of ministerial democracy in a Parliamentary system. Part of our research, of course, involved looking at the state of affairs in other Parliamentary democracies and Australia in particular had a number of courts run on models of judicial autonomy. This ultimately became the recommended model of the CJC, highlighting the Australian experience as a counterpoint to the argument that judicial autonomy was incompatible with ministerial responsibility. Ironically, or perhaps revealingly, when I travelled to Australia to learn the origins of the judicial autonomy model there, many pointed to the inspiration provided by a Report commissioned by the CJC by a Quebec Judge, Jules Deschenes, entitled *Masters in Their Own House/Maitres chez eux*¹ – which had found its way to reform minded judges and politicians in Australia. This story, in microcosm, is the porousness I believe informs and enriches the story of the common law in countries like Canada and Australia. Ideas flow in, they flow out, and the sum may well be more than an agglomeration of the parts.

Adjudication in the public interest is an animating principle of administrative justice in all common law jurisdictions. The question is what is particular to a jurisdiction, or a territory, or a cultural and historical perspective? Australia and Canada, for example, both are settler societies with strong indigenous communities where reconciliation and restorative justice are

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strong themes. Canada, however, also has a strong internal divide that is linguistically and culturally based between French and English Canada which has given rise to a robust form of federalism, bilingualism, and bijuralism in law between common law and civil law traditions. Australia, by contrast, lacks this dynamic, but has been shaped by a stronger republican streak than in Canada. Each is predominantly urban and multicultural but whose cultural soul may well reside in the fortitude of a small number of rural and agricultural pioneers overcoming the odds and the elements to build a society. Both countries remain part of the Commonwealth and the Constitutional culture of each was born of an evolution toward federating British colonies, rather than revolutions to assert individual rights or nationalist fervour.

Applying the principles and doctrines of administrative law, and reconciling the intent of legislatures with the lived experience of those seeking justice from these adjudicative bodies, represent broadly shared challenges for administrative justice. This claim also speaks to the very real possibility that developments in one part of the common law world have implications for the other parts. I will attempt to identify the interconnected strands of administrative justice, which will be examined with reference to three areas:

- (1) First, I will discuss the foundational issue of the boundaries of administrative law and administrative justice;
- (2) Second, I will discuss the interconnectedness of jurisprudence, and will highlight the relationship between Australian and Canadian courts' approaches to the legal standards of fairness; and
- (3) Third, I will discuss the interconnectedness of administrative justice through the example of the form and structure of Agencies, Boards and Tribunals, particularly with respect to the wave of accountability concerns sweeping the common law world.

Interconnected questions about administrative law and justice?

What is administrative law? This should not be as vexing a question as it is. At its core, administrative law provides a framework of accountability for the exercise of executive authority. When considering the judicial review of a statutory decision-maker on grounds the decision was unreasonable or unfair, the question is indeed relatively straight-forward. However, that is where the easy part ends. Here are just a few of the absolutely fundamental questions about the scope of administrative law with which courts both in Australia and Canada have wrestled:

- (a) Are administrative tribunals and adjudicative bodies part of the executive or judicial branch of government?
- (b) Are there circumstances where a private entity (for example, a company involved in a joint venture with a government agency) is subject to administrative law?
- (c) Are any government decisions immune from review on administrative law grounds?

By considering the experience of different common law jurisdictions, it is possible to discern some universal and some particular dynamics. Perhaps surprisingly, the very foundation of the field turns out to be one of the most mutable and changeable issues.

What is administrative justice?

While the United Kingdom approaches administrative tribunals as a division of the judicial branch of government, both Australia and Canada wrestle with this question. In Canada, tribunals have been held to be part of the executive branch of government, but separated

from the 'political executive' by a number of common law and in some cases constitutional autonomy protections. In Australia, tribunals appear as neither fish nor fowl, which is what has led some of Australia's leading administrative law thinkers to suggest a fourth branch of government may be necessary to adequately capture the distinctiveness of administrative justice.² Indeed, I have advanced the same argument in the Canadian context.³

The scope of administrative justice itself used to be relatively straightforward, flowing from the inherently public nature of a decision-maker authorized to make decisions by statute. However, in the era of public/private partnerships, and public authorities turning to or delegating private providers to deliver publicly funded services (particularly in settings of health care and social benefits but extending to utilities as well as transportation and energy infrastructure). Administrative justice now clearly can extend to private settings.

By contrast, in Canada at least, purely public settings, such as employment relationships between a government agency and public servants, are becoming 'privatized' with respect to legal accountability, as contractual provisions take precedence over doctrines such as procedural fairness. These dual and related trends lead to a blurring of the boundaries of administrative law. Similarly, parties frustrated by the limited remedies and circuitous pathways of administrative justice have turned with growing creativity to the courts – in Canada, for example, bringing class actions on behalf of all taxpayers against a minister for a breach of fiduciary obligations where the minister took a step which appeared to benefit a small group of investors at the expense of the public purse.⁴

What lies beyond administrative justice?

Should any kinds of public authority lie beyond administrative justice? Justiciability represents one of those universal concepts which each jurisdiction, at least in the common law world, invents for itself. While its periphery can extend to ripeness, mootness and standing, its core relates to two related propositions – first, that some kinds of disputes because of their subject matter are not amenable to judicial determination; and second, that some kinds of disputes, even if amenable to judicial determination, have been assigned to some other form of dispute resolution (for example, disputes over conduct of Parliamentarians has been assigned to the Speaker of the House of Commons rather than the Courts).

Both Australia and Canada can trace their justiciability doctrines relating to prerogative powers as a response to the UK House of Lords 1985 decision in *Council of Civil Service Unions*.⁵ The case concerned whether consultation was required in relation to the then British PM's decision to prevent unionization of a branch of the security services. The majority of the House of Lords disagreed with the proposition that prerogative powers should remain beyond review. In Canada, while allowing for review of executive authority sourced to prerogative powers generally, a number of areas of such powers have been held non-justiciable on the grounds they are not amenable for judicial determination, including disputes about the conferral of honours in *Black*⁶ (deciding whether a Canadian citizen should be made a Lord in the UK) and the exercise of foreign relations in *Turp*⁷ (deciding whether to send troops to Iraq). Australia adopted a similar response in *Peko*,⁸ where the Australian Federal Court rejected automatic immunity but found a decision relating to declaring part of a park as a heritage site to lie beyond the province of justiciability.

On the other hand, questions around the core of fairness, bias and independence appear universal. Every common law jurisdiction has struck a remarkably similar balance in this regard but the balance may look quite different, as discussed below.

Interconnected jurisprudence

Why have Australian Courts embraced the doctrine of legitimate expectations while Canadian Courts have rejected it and instead focused on the interstices of reasonableness and the obligation to provide reasons? Why does rulemaking dominate the administrative law conversation in the US and Europe but not in Australia or Canada, where arguably constraints on executive discretion and standards of review have loomed larger? Asking such questions, in my view, is precisely why approaching administrative justice as interconnectedness is worthwhile. While the discussion below might relate to Canada and Australia, it is a conversation to which every legal jurisdiction will have an important voice to add.

In 1995, the Australian High Court issued its well-known decision in *Minister of State for Immigration and Ethnic Affairs v Teoh*.⁹ The case concerned Ah Hin Teoh, a Malaysian citizen, who was ordered to be deported after a drug conviction notwithstanding that he and his wife had Australian born children. The majority of the High Court (Mason CJ, Deane, Toohey and Gaudron JJ) agreed with the Federal Court decision that there had been a breach of natural justice as the Immigration department had failed to invite Mr Teoh to make a submission on whether a deportation order should be made, contrary to the Convention on the Rights of the Child, which provided that in any administrative decision concerning a child, the child's best interests must be a primary consideration. The majority of the Court held that the ratification of an international convention can be a basis for the existence of a legitimate expectation and that, in this instance, there had been a want of procedural fairness.

In 1999, the Supreme Court of Canada synthesized and extended a number of administrative law doctrines in *Baker v Canada (Minister of Citizenship and Immigration)*,¹⁰ a case dealing with many of the same themes and issues as *Teoh*. Again, the case arose out of a request to stave off deportation of Mavis Baker, a Jamaican born woman in Canada illegally where she had Canadian born children. The Supreme Court of Canada recognized a duty to provide reasons for the first time in *Baker*, although the case was decided in Baker's favour because of a breach of fairness based on a reasonable apprehension of bias. The decision of the immigration authorities denying Ms Baker an exemption from the then Immigration Act on humanitarian and compassionate grounds was also quashed on the grounds it was an unreasonable exercise of discretion.

Both *Teoh* and *Baker*, decided within a few years of each other, reflected moments of renewed judicial activism in the constraint of executive discretion, and each built on earlier English jurisprudence exploring the principle of legitimate expectations in administrative law. Each has given rise to ripples which washed up on the other jurisdiction's shores, as a number of Australian cases have considered *Baker* just as a number of Canadian courts have explored the implications of *Teoh*. Indeed, it is not too far a stretch to conclude through consideration of these cases, that the Australian and Canadian courts together have worked out the dominant common law approach to legitimate expectations.

Baker reached the Federal Court within months of *Teoh* being released. Justice Strayer who wrote the judgment in *Baker* on behalf of the Federal Court of Appeal, discussed *Teoh* at length. He concluded:

I therefore respectfully reject the reasoning of the majority in the *Teoh* case and, as did the Motions Judge, adopt the reasoning of McHugh J. The majority judgments in *Teoh* have been criticized by at least one author. Furthermore, the finding by the Court that Australia's ratification of the Convention amounted to a public undertaking by the government that the Convention would be applied in Australia, thus giving rise to legitimate expectations, was specifically repudiated by that government.¹¹

When *Baker* reached the Supreme Court in Canada, Madam Justice L'Heureux-Dubé, without mentioning *Teoh* by name, addressed the issue in the following terms:

I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms Baker that when the decision on her H & C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H & C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.¹²

When the issue next reached the Australian High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,¹³ the Court specifically considered the approach to the issue which the Supreme Court of Canada had taken in *Baker*. The case concerned a father with temporary status in Australia once again being separated from his children due to a criminal conviction. The Court addressed *Baker* in the context of whether legitimate expectations could give rise to substantive as well as procedural remedies:

79. Moreover, the Supreme Court of Canada has stopped short of giving the doctrine of legitimate expectation a substantive operation. Indeed, in *Baker v Minister of Citizenship and Immigration*, in a judgment with which four other members of the Supreme Court agreed, L'Heureux-Dubé J said: '[T]he doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.'

80. The subject was further considered by McLachlin CJ and Binnie J in their judgment in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*. Binnie J (who delivered the judgment) discussed Coughlan and continued: 'It thus appears that the English doctrine of legitimate expectation has developed into a comprehensive code that embraces the full gamut of administrative relief from procedural fairness at the low end through "enhanced" procedural fairness based on conduct, thence onwards to estoppel (though it is not to be called that) including substantive relief at the high end, ie the end representing the greatest intrusion by the courts into public administration. The intrusion is said to be justified by the multiplicity of conflicting decisions by a public authority on the same point directed to the same individual(s)'. With the reasoning then developed by Binnie J in the succeeding passages, we would respectfully agree. He writes: 'In ranging over such a vast territory under the banner of "fairness", it is inevitable that sub-classifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not. Many of the English cases on legitimate expectations relied on by the respondents, at the low end, would fit comfortably within our principles of procedural fairness. At the high end they represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the Canadian Charter of Rights and Freedoms. There is, on the one hand, a concern that treating procedural fairness as a subset of legitimate expectations may unnecessarily complicate and indeed inhibit rather than encourage the development of the highly flexible rules of procedural fairness. On the other hand, there is a countervailing concern that using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister.'

Legitimate expectation continues to serve both as a norm of natural justice and as an instantiation of the separation of powers. The result of this interconnected jurisprudence is that the executive branch should be held by the courts to take its promises seriously, but

only to the extent that the remedy is fairness. International commitments by the executive matter under this approach, but cannot usurp the role of the legislature in incorporating such commitments into domestic law. Canadian and Australian courts may well have come to this conclusion without reference to the other's judgments, but arguably the analysis of each was enriched by its engagement with the other.

Interconnected structures and standards of administrative justice

The interconnectedness of administrative law both leads to and is reinforced by the interconnectedness of administrative justice. How are these concepts distinct? Administrative law typically relates to the doctrines which govern administrative decision-making, such as legitimate expectations, discussed above. Administrative justice, by contrast, typically relates to the decision-making structures, whether regulators, tribunals, boards, agencies or ministry departments, and to the lived experience of those who appear before them.

Unlike some of the universal questions addressed above such as 'what is administrative justice?' or 'what is fairness?', the structures of administrative justice are guided by more shifting and particular considerations, such as policy, budgets, patronage and politics. Here too, though, there are interconnecting developments worthy of note. Both Australia and Canada have been witnessing an unprecedented period of experimentation, innovation and change in administrative justice. As in the administrative law context, developments in administrative justice in each jurisdiction have had an interesting and important impact on one another.

The goal of modernizing administrative tribunal systems is ultimately to improve the effectiveness, efficiency, and accessibility of administrative justice – a goal shared across most common law systems. As the costs associated with traditional court-centred legal processes have grown, so has the popularity and variety of administrative tribunals in the view of both policy makers and various user communities. Individuals are looking to these tribunals as simpler and more economical avenues to review administrative decision making and to resolve their disputes, free from the many formal trappings of the law courts – a trend which is likely to continue as the cost of access grows as a concern, not only for socially and economically disadvantaged individuals but also for the politically significant middle class. Similarly, as social and economic disputes become more complex, specialty courts staffed with expert adjudicators often will be more effective than generalist judges.

Unfortunately, even while individual administrative tribunals are promoted as simpler, more efficient and more expert in particular subject matters than courts, fragmentation within tribunal systems continues to thwart these basic dimensions of access for users in several ways. Consider the low-income individual in Ontario who faces a challenge in obtaining social benefits and is in a dispute with her landlord. That individual needs to navigate both the Social Benefits Tribunal and the Landlord Tenant Board's procedures and rules. These two tribunals may operate in separate buildings and use different forms. They may employ different styles of adjudication and they may have divergent or even clashing organizational cultures. As a result, the user is forced to navigate a set of institutional silos which impose high financial and informational costs and are likely to impede the overall quality of justice services that the tribunals can offer.

The New Zealand Law Commission has reported a 'lack of overall coherence' in many tribunal systems, making individual tribunals increasingly difficult for users to understand and navigate as interrelated institutions, and vulnerable to claims that they fail to deliver administrative justice in cost-effective ways.¹⁴ That conclusion echoes earlier comments by Sir Andrew Leggatt in his review of the UK's tribunals:

[m]ost tribunals [in the UK] are entirely self-contained, and operate separately from each other, using different practices and standards. It is obvious that the term 'tribunal system' is a misnomer... each tribunal has evolved as a solution to a particular problem, adapted to one particular area.¹⁵

One obvious outcome of this fragmented landscape is that the sheer number of administrative tribunals – each with their own physical and logistical infrastructure – represents a considerable duplication of resources and prevents smaller tribunals from achieving economies of scale. In a survey preceding its report on tribunal reform, the New Zealand Law Commission counted over 100 specialist tribunals and courts in that country alone, while Leggatt considered 70 different tribunal bodies within the scope of his review. Despite opportunities for some tribunals to share their resources many remain operating in isolation, probably in part because each tribunal is or perceives itself to be limited by its enabling legislation and by the associated mandates of a particular government ministry. Likewise, individual tribunals are each responsible for designing and implementing their own practices and procedures, making it difficult for users of more than one tribunal to access knowledge and to operate between them. This can be particularly frustrating for users when a single dispute concerns more than one tribunal – for example, where land use, planning and environmental regulatory issues coincide.

Fragmentation arguably hinders first-instance decision-makers from learning more effectively from the decisions of review tribunals. A more coherent system would improve the quality of first-instance decisions by facilitating better feedback processes from tribunal adjudication, allowing judgments from all related tribunals to inform administrative decision making in the future. Certainly, some authors have questioned whether appeal decisions issued by tribunals have traditionally had much effect on the quality of first-instance decision making. Addressing the problems associated with fragmentation in the tribunal system may be one response to this disconnect. Over time, a system that fosters better first-instance decisions will tend to rely less on appeals or judicial review, enhancing access to justice by lowering costs and the time required to achieve a just outcome. Moreover, fragmentation in determining legal rights is likely to make it more difficult for tribunals to maintain decision-making independence from their respective ministries. A system of atomized tribunal bodies operating in relative isolation likely creates more opportunities for departmental capture and makes it difficult to impose and regulate the shared principles of transparency and openness that can flow from greater independence.

System-wide reform efforts in these countries have attempted to address the various aspects of fragmentation that plague modern administrative states. The earliest of these initiatives was to establish the federal Administrative Appeals Tribunal (AAT) in Australia in 1976, following a report by the Commonwealth Administrative Review Committee chaired by Sir John Kerr. At that time, the Kerr Committee sketched a picture of an administrative justice system that was uncoordinated, contained many gaps, and was not easily understood by its constituents. The ultimate product of the Committee's report, the *Administrative Tribunals Act*, created a generalist tribunal to review administrative decisions, which today has jurisdiction to conduct merits review under a wide variety of more than 400 Acts of the federal Parliament.

While a small number of specialist federal tribunals still exist in Australia, the outcome of the AAT model has been to centralize merits review of first-instance decisions within a single organization that includes a membership of appointed judges, lawyers, and experts in various fields such as medical practitioners, engineers and planners. This 'super tribunal' model has been replicated at the State level in Australia, although these tribunals have taken on a variety of different forms in practice. The jurisdiction of the Victoria Civil and Administrative Tribunal (VCAT), for example, extends beyond merits review into human rights and some civil claims. Western Australia's State Administrative Tribunal was not established until 2004 but loosely tracks the structure of the VCAT. Jurisdiction over merits

review and dispute settlement in New South Wales remains more fragmented compared to Victoria and Western Australia, although the State's Administrative Decisions Tribunal (ADT), established in 1997, was designed to act in part as an amalgamated generalist review body.

In practice, Peter Cane observes that the new organization of tribunal adjudication in the UK most closely reflects the two-tiered model proposed by Australia's Administrative Research Council in the mid-1990s but later abandoned by the Australian government.¹⁶ The outcome for the UK, Crane argues, is a system not unlike that of conventional law courts. Australia – at least at the federal level – has so far resisted this trajectory in favour of a model that sees amalgamated tribunal agencies as a 'distinct genus of adjudicatory institution' that seek to maintain their pragmatic advantages in terms of speed, affordability and informality.

At root, each of these responses can be understood as attempts to re-imagine individual tribunals as part of a coherent and continuous system of administrative justice. That perspective took longer to catch hold in Canada. According to Heather McNaughton, '[i]t was not until recently that governments and Canadian courts have started to conceptualize administrative tribunals dealing with such disparate interests as the protection of fundamental human rights, the issuance and transfer of quota for production of agricultural products, and property tax assessment, as being part of a *system* of justice.'¹⁷ Michael Adler has labeled this an 'administrative justice approach' which recognizes the important role of courts, tribunals, ombudsmen and other external redress mechanisms but also emphasizes internal means of enhancing administrative decisions such as recruitment, training and appraisal processes, as well as standard setting and quality assurance systems.¹⁸

A countervailing consideration to whole system reform is that administrative tribunals must retain a degree of flexibility in order to accommodate and support their particular mandates and areas of expertise. McNaughton cautions that '[t]he temptation to one size fits all reforms fails to take into account the fact that the specialist areas delegated to administrative tribunals form the very basis for their existence in the first place.' The main challenge of tribunal reform might thus be seen as an attempt to modernize and rationalize administrative tribunal systems while respecting, maintaining and promoting core principles of accessibility, pragmatism, and expediency. In other words, the key is to make the system coherent while keeping it 'nimble'.

In 2009, Ontario adopted the *Adjudicative Tribunals Accountability, Governance and Appointments Act* (ATAAGA) which established a mechanism for creating Tribunal clusters.¹⁹ Clusters bring together distinct tribunals which share a subject area theme, and allow those tribunals to harness shared services, standards and locales as well as cross-appointments and joint training. Using that legislation, the Ontario Government has created two clusters thus far – the Environmental & Land Tribunal of Ontario (ELTO), which is made up of four separate tribunals, and the Social Justice Tribunal of Ontario (SJTO), which has seven distinct tribunals. The clustering concept drew express inspiration from the Australian context, just as the proposed New South Wales Civil and Administrative Tribunal (NCAT), which seeks to consolidate a wide range of tribunals but preserve their distinct areas of expertise seems to be a potential alternative to clustering (the NCAT is set to launch in 2014 with five specialty divisions - Consumer, Administrative and Equal Opportunity, Occupational and Regulatory, Guardianship, and Victims).

Just as clusters and super-tribunals have arisen as a structure for administrative justice, new legislation in Ontario and elsewhere in Canada has focused on the accountability of administrative justice. ATAAGA has for the first time required all tribunals to have codes of conduct addressing conflicts of interest and publicly available business plans, and memoranda of understanding with the government outlining roles and responsibilities of the

Government and quasi-independent adjudicative bodies. More so than the specific changes to which this legislation may lead, the creation of coherent templates for this accountability contributes to the reality of an administrative justice system rather than a disparate and uncoordinated set of agencies, boards and tribunals.

Accountability also has been a driver of administrative justice in Australia. For example, COAT's 2012 'Framework of Excellence' seeks to provide an evidence based approach to the evaluation of tribunal performance (which builds on a 2008 Framework of Excellence applicable to courts).²⁰ The Framework focuses on the core values of tribunals, the areas of excellence and the criteria for measuring excellence. Last summer, I received an email from the Chair of the SJTO cluster asking if I had come across the Framework and how it might speak to the Canadian experience with administrative justice. In the case of administrative justice, it is not just judges who have been creating the interconnectedness of administrative law jurisprudence, but tribunal members themselves. While the optimal structure of a tribunal may not be a universal question, how to measure the success of an administrative or adjudicative decision is. Should success be determined based on the satisfaction of the parties, the degree of public confidence which a decision-making body enjoys or other quantitative measures (volume of caseload, cost, delay, etc)?

The Framework of Excellence may not be a universally applicable standard, but it has sparked meaningful debate in many jurisdictions about the goals of administrative justice and the appropriate forms of accountability to which administrative decision-makers should be subject. Interconnectedness, in this sense, is not about one development in a jurisdiction affecting other jurisdictions but rather about a shared conversation.

Conclusion

This brings me to the conclusion of this brief analysis. I hope I have illustrated both the ways in which the interconnectedness of administrative justice is a claim and a reality. I would suggest, in light of the above discussion, that interconnectedness in administrative law flows from three key conditions:

- (1) first, the presence of a question that is widely applicable to diverse jurisdictions, such as the scope of fairness, or the separation of powers between executive, legislative and judicial action;
- (2) second, the presence of particular answers in distinct jurisdictions which differ sufficiently to require an explanation, such as the legitimate expectations/reasonableness divergence arising out of *Teoh* and *Baker*; and
- (3) third, a venue or venues for shared conversations about administrative justice, such as the connections, blog posts and conference chats that led to the 'Framework of Excellence' migrating from Australia to Canada last summer.

Where these three conditions are present, as in the areas explored above, administrative justice operates on two levels simultaneously – both as a body of doctrines and principles within a particular jurisdiction and as a body of doctrines and principles developing across jurisdictions. The nature, scope and dynamics of this latter sense of administrative justice remain embryonic. I hope this broader lens on administrative justice continues to come into focus, and that the conversation about the interconnectedness of administrative justice continues to spark critique and innovation by allowing us to see our own adjudicative bodies and political/legal cultures in a new light.

Endnotes

- 1 *Maitres chez eux/Masters in their own House*, was a study prepared by Mr Justice Jules Deschênes and sponsored by the Canadian Judicial Council, dated September 1981.
- 2 See Robin Creyke, 'Administrative Justice: Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705.
- 3 L Sossin, 'The Ambivalence of Administrative Justice in Canada: Does Canada Need a Fourth Branch?' in Lamer: *The Sacred Fire*, D Jutras and A Dodek (eds) (2009) 46 *Supreme Court Law Review* 51.
- 4 L Sossin, 'Revisiting Class Actions Against the Crown: Balancing Public and Private Legal Accountability for Government Action' in J Kalajdzic (ed), *Accessing Justice* (LexisNexis, 2011), pp 31-48.
- 5 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
- 6 *Black v Chrétien* (2001), 54 OR (3d) 215 (CA).
- 7 *Turp et al. v Chrétien, McCallum, Graham and Cauchon*, 2003 FCT 301.
- 8 *Peko-Wallsend* (1987) 15 FCR 274.
- 9 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.
- 10 [1999] 2 SCR 819.
- 11 [1997] 2 FC 127.
- 12 Supra [29].
- 13 [2003] HCA 6.
- 14 New Zealand Law Commission, *Tribunal Reform* (New Zealand Law Commission SP 20, 2008) http://www.lawcom.govt.nz/sites/default/files/publications/2008/12/Publication_131_424_Web%20Tribunal-Reform-Study-Paper-20.pdf.
- 15 Andrew Leggatt, *Tribunals for Users: One System, One Service* (Stationery Office, 2001) at <http://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>.
- 16 Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009). See also Peter Cane, 'Judicial Review in the Age of Tribunals' (2009) *Public Law* 479.
- 17 Heather MacNaughton, 'Future Directions for Administrative Tribunals: Canadian Administrative Justice – Where do we go from Here?' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008).
- 18 Michael Adler, 'Understanding and Analyzing Administrative Justice' in Michael Adler (ed), *Administrative Justice in Context* (Hart, 2010) 145.
- 19 For a discussion of Ontario's tribunal clusters, see L Sossin and J Baxter, 'Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice' (2012) 12 *Oxford Commonwealth Law Journal* 157.
- 20 At: http://www.coat.gov.au/sites/default/files/docs/international_framework_for_tribunal_excellence_november_2012.pdf.

ADMINISTRATIVE LAW IN AN INTERCONNECTED WORLD: WHERE TO FROM HERE?

*Justice Duncan Kerr**

Despite drawing upon fundamentally different constitutional underpinnings the functional outcome of administrative review in democratic free market societies is often remarkably similar. There has been a growing international exchange of knowledge and ideas between their administrative bodies.

The Commonwealth and the States have also evolved from different constitutional underpinnings but developed functional similarities. Moreover there has been a recent drift towards greater uniformity of principle in administrative law: a trend that has been reinforced by the decision of the High Court of Australia in *Kirk*.

However, both as between nations and within the Australian federation it is easy to identify instances where history and constitutional structures have generated gaps or anomalies. Some of these gaps and anomalies are examined and consideration given to whether there may be yet further evolution towards greater commonality.

In a recent speech to public sector lawyers Justice Nye Perram drew a delightful biological analogy between animal evolution and comparative administrative law.¹

Fish, he noted, swim by moving their tails sideways: dolphins by moving their tails up and down. The reason Justice Perram explained, was that at an earlier stage of their evolutionary history dolphins had left the sea and had become land animals – air breathing mammals. When dolphins later returned to the sea their vestigial legs had, over the millennia, fused to become tails but continued to hinge up and down rather than sideways. Yet despite their fundamentally different evolutionary biology the tails of dolphins and fish perform a functionally equivalent role.

The task of swimming and the environment in which swimming took place, not the original biomechanical differences inherent in their constitutions, had led both to evolve a slightly different but functionally equivalent means of propelling themselves in the oceans.

Justice Perram then noted similar environmental factors, including the desirability of constraining arbitrary power, had led similar functional equivalences to evolve in international administrative law notwithstanding the existence of constitutional differences between nations equally as profound as the biological differences between fish and dolphins.

Thus, the Conseil d'Etat, re-established after the French Revolution by Napoleon exclusively to be a creature of the Executive and constitutionally separate from the French court system (French judges are prohibited, on pain of criminal sanction, from imposing limits on

* *The Honourable Justice Duncan Kerr, Federal Court of Australia, is President, Administrative Appeals Tribunal. He gave this address at the 2013 AIAL National Administrative Law Conference, Canberra, 19 July 2013.*

administrative power), acts as an independent body and grants functionally equivalent relief against misuse of administrative power in all of the circumstances in which an Australian Ch III court can grant judicial review.

The position is as was explained by M Patrick Frydman, President, Administrative Court of Appeal of Versailles:

The administrative courts have jurisdiction over all disputes related to decisions or actions of public authorities, from tiny decisions made by any local authority to decrees issued by the President of the Republic, whether the complainant seeks the annulment of an act or financial compensation for damage, and this applies in all fields of public administration. The most common kinds of administrative cases include, for example, those related to the application of economic or social regulations, taxation, town-planning, building permits, public works, public service procurement, environmental projects, hospital liability, immigration permits, civil servants' careers and pensions, European and local government elections, and so on.

The possible conflicts of jurisdiction between civil and administrative courts, which, in practice, are quite exceptional, are arbitrated by a special court, called the 'Tribunal des conflits', whose members are chosen, on an equal representation basis, from among judges of the Council of State and of the 'Cour de cassation'.

The order of administrative jurisdictions has, as well as the civil order, three levels of courts: the administrative tribunals, the administrative courts of appeal and, naturally, the Council of State, at the top, that normally acts as a 'juge de cassation' (i.e. as a court reviewing only legal and procedural aspects of the judgements, but not the assessment of the merits of the case).

The order of administrative jurisdictions also includes many specialized administrative courts, such as, for example, the 'Cour des comptes' (or Court of Auditors, that audits public expenditure), the National Court of Political Asylum (that decides about granting the political refugee status) and many social or disciplinary tribunals of different kinds. All these specialized courts - which, by the way, are probably closer to the notion of 'administrative tribunals' as it is understood in many common law countries - also come under the jurisdiction of the Council of State, acting as 'juge de cassation'.²

The text of Justice Perram's paper discusses not only civil law systems based on French jurisprudence, but also the comparative administrative law of the United States, the United Kingdom and the European Union. At considerable risk of trivialising its content it confirms that there has come to be far greater similarity in practice between the administrative law practices of modern democratic nation states than their history and constitutional differences suggest would be the case. Despite their drawing upon fundamentally different constitutional underpinnings the functional outcome of administrative review in democratic free market societies is often remarkably similar.³

However, history and constitutional differences are not without their consequences and, Justice Perram suggests, those evolutionary differences may have left Australian jurisprudence unable to respond, at least in one specific regard, with remedies for unfair administrative conduct which other comparable legal systems now routinely provide.

That is the consequence of Ch III of the Australian Constitution having been held to mandate a strict separation of powers.

I will return to that difference later in this paper. However, first I should focus upon what has emerged out of the growing awareness of our great commonalities.

International Institutions

Awareness of those commonalities has prompted a growing international exchange of knowledge and ideas between their highest administrative bodies.

Founded in 1983, the Association Internationale des Hautes Juridictions Administratives (AIHJA) known in the English language as the International Association of Supreme Administrative Jurisdictions (IASAJ), represents many national bodies that exercise judicial/administrative review. The membership of the AIHJA now extends over 100 countries spread over six continents. Reflecting the wide diversity of juristic forms that functionally similar review can take, its membership is open to the most senior of the courts and tribunals of all States and international organizations that have capacity to resolve disputes arising from the activities of government. Australian membership of the AIHJA is joint: Australia's national membership is shared by the Federal Court of Australia and the Administrative Appeals Tribunal.

To meet its objective, the AIHJA creates, promotes and conducts legal research, helps to diffuse and disseminate to members and, where applicable, to any interested person, useful information on the organization, operation and the jurisprudence of member jurisdictions. It also promotes contacts between the judges of these courts and tribunals.

The Association holds triennial congresses, the most recent being held in Cartagena in 2013. It focussed on the theme *The administrative law judge and the environment*. That congress followed on the heels of the 2010 Tenth Congress in Sydney - *The review of administrative decisions by the courts and administrative tribunals*. A book including a number of the papers produced for the Sydney congress was recently published by the AIHJA.⁴ In so doing, the AIHJA helps to open an international perspective on administrative law.

The former President of the AAT, Justice Garry Downes, became an early advocate of greater Australian engagement with the AIHJA and a member of the AIHJA's Board. He co-hosted the AIHJA's Sydney congress. Former Federal Court judge, the Hon Brian Tamberlin QC, now a Deputy President of the AAT, presented the Association's General Report to that congress.

My then commencing role as President of the AAT required focused attention at home and precluded my attending the AIHJA's Cartagena congress but the growing interconnectedness of our legal world requires our eyes to lift occasionally to engage with developments in international administrative law. I plan to attend the 2016 Congress.

In the meantime the AAT's routine engagement with other administrative law bodies will continue. In the past 12 months the AAT has hosted delegations from counterpart institutions from Thailand and Russia. The AAT has also been constructively engaged in the Federal Court's international outreach programs in our near neighbourhood. The AAT's Manager, Learning and Development, Athena Ingall, travelled to Kosrae, Federated States of Micronesia, to participate in the Federal Court's assistance program to the Pacific region. Budget pressures are far too tight for unfocused action. If the AAT is to spend public money on international cooperation it needs to be within a coherent and publicly defensible framework. I am keen to see our work with our closer regional counterparts in the Pacific, if possible with the assistance of AusAid, become a priority for the AAT.

Evolution towards common functional outcomes and residual differences

Returning to Justice Perram's biological theme, the same evolution towards commonality despite deep constitutional differences we can observe at the international level has been equally evident within the Australian federation. The Commonwealth and the States evolved from what were substantially different constitutional genetics but have since developed close functional similarities.

Nothing, at least in so far as the Australian Constitution was understood in the first half century and more of its coming into force, required that to be so. The States were not bound to the strict doctrine of separation of powers as was the Commonwealth. State Parliaments were free to constitute courts and administrative structures however they wanted—and to confer, or withdraw, power from them as they saw fit. Judicial tenure was a convention, not a constitutional imperative.

It was possible for a State to confer judicial power on administrative bodies and vice versa. Not so many years ago, High Court Justice Michael McHugh observed in obiter remarks that it was open to a State to give to an administrative body power to try offences and impose punishments for infringements of the criminal law.⁵ It certainly would have been thought possible in the early years of Australia's constitutional development for the State Supreme Courts to be conferred with power to undertake merits review of administrative decisions directly rather than being confined to supervising its exercise.

However none of the more adventurous pathways then open to the States were followed. Since the decisions of the High Court in *Kable v Director of Public Prosecutions (NSW)*⁶ and the more recent *Kirk v Industrial Court of New South Wales*⁷ some of the most radical of those options have been foreclosed.

But the relatively recent constitutional closing of those pathways does not explain why earlier parallel policy choices were made by the States, for example with respect to the development of merits review. Under both historic and modern State and Commonwealth constitutional doctrine, merits review is exclusively a creature of statute. Nothing compelled the States to follow in the Commonwealth's footsteps when, after the reports of the Kerr and Ellicott Committees,⁸ the Australian Parliament enacted the *Administrative Decisions (Judicial Review) Act 1977* and the *Administrative Appeals Tribunal Act 1975*.

However, in large measure they did so.

That was, perhaps, in part because State policies were shaped by the same considerations that had motivated Commonwealth reform. That is, State legislators recognised that the complexity of modern administration had increased such that review of government decisions through the Parliament and the courts by the prerogative writs had become inadequate as to its content and inaccessible to most persons affected, such that the same kind of remedies were needed at the State level.

While the process was far from uniform, over time each of the States adopted mechanisms to facilitate administrative review that borrow heavily from the Commonwealth model.

All of the States now have streamlined processes, based in the main on the criteria adopted under the *Administrative Decisions (Judicial Review) Act 1977*, allowing simplified access to judicial review.⁹

Most have also passed legislation conferring a right of merits review over broad areas of administrative conduct.

Much was copied from Commonwealth merits review precedents, including the widespread adoption of the principles that merits review tribunals should pursue the objectives of providing a mechanism that is fair, just, economical, informal and quick and free of the obligation to be bound by rules of evidence.

But once established the States discovered that they had some particular advantages which allowed them to make adaptations unavailable to the Commonwealth. In *Brandy v Human*

*Rights and Equal Opportunity Commission*¹⁰ the High Court had held that a Commonwealth administrative body could not make enforceable orders against non-government parties as if it was a court. No such restraint applies to the States. They were therefore free to establish institutions such as the Queensland Civil and Administrative Tribunal which exercises both administrative and judicial power and as a result can make orders which are enforceable.¹¹ This is an inestimable convenience.

Moreover, as the later adopters, the States were able to move more quickly than the Commonwealth to consolidate the administrative machinery for merits review. Most of the States have moved or are moving towards establishing 'one-stop shops' bringing together under a single roof the multiplicity of former tribunals which had earlier been established with subject matter jurisdiction.

By contrast the Commonwealth is yet to implement the recommendations of the Administrative Review Council's *Better Decisions* report¹² which recommended an integrated system of review to integrate the AAT with the other stand-alone national merits review tribunals. Public pressure led to the rejection of a compromised version of that proposal by the Howard government. It is an interesting speculation as to whether evolutionary pressures to achieve similar efficiencies and maximisation of tribunal expertise will now operate so that the States' initiatives in that regard will ultimately lead to the Commonwealth re-visiting the ARC's recommendations.

Gaps

Despite the parallel developments that have occurred in Commonwealth and State administrative law, one or two odd gaps remain or have opened up. One such gap that has emerged more recently is in respect of the administration of national 'model laws'. Since *Plaintiff S157/2002 v Commonwealth*¹³ and *Kirk* it is clear that the supervisory jurisdiction of the High Court in respect of conduct of 'officers of the Commonwealth' and the like jurisdiction of state Supreme Courts in respect of state public officials is constitutionally entrenched. However, some national schemes do not fit that binary conception. For constitutional and political reasons (the desire to establish national regulation without conferring the power to directly legislate upon the Commonwealth) a number of national schemes have been devised and implemented which rely on interlocking State laws rather than Commonwealth legislation.

The way such schemes have been enacted is for a particular state law to be selected as a model and every other state then to legislate to apply mirror legislation in identical substantive terms within its jurisdiction. Each State thus confers its own jurisdiction to administer the scheme on the same body which, in the result, in practical terms acts as a national regulator. But in strict legal terms it remains the regulator of six separate state and two separate territory schemes.

In *Pardo v Australian Health Practitioners Regulation Authority* [2013] FCA 91, I followed Greenwood J in *Broadbent v Medical Board of Queensland* [2011] FCA 980 to conclude that the Federal Court of Australia lacked jurisdiction to consider complaints under the national scheme relating to Australian health practitioners. That was despite Dr Pardo's complaint having involved not only the refusal of the Psychology Board of Australia to register Dr Pardo as a psychologist in Tasmania but also its prior (and, in her case, related) conduct when it had failed to register her in West Australia and, in that context, had allegedly defamed her.

Thus despite the conduct Dr Pardo complained of arising under an interlocking national scheme of mirror legislation the Federal Court was held to lack jurisdiction. The Tasmanian and West Australian State Parliaments had both enacted legislation giving the power to

register psychologists in their respective states to the Psychology Board of Australia but any exercise of that power could involve only the application of State law.

I do not resile from my conclusion in *Pardo* but it may be thought unfortunate that judicial review of such national 'model law' schemes can be sought only in state courts which would appear to lack jurisdiction to consider the conduct of the national regulator coherently as a whole.

That registration scheme, of course, is simply one example of where jurisdictional blind alleys have been generated because Australian federal administrative law has yet to fully mesh between state and federal systems. In a recent submission to the Review of the *Safety, Rehabilitation and Compensation Act 1988* (the *SRC Act*) the AAT suggested that consideration might be given to cross-vesting of jurisdiction in cases where an employee's condition may have been contributed to by two or more employers, one of which is bound by the *SRC Act* and the other by state or Territory workers compensation legislation.¹⁴ The Tribunal suggested that the jurisdictional difficulties involved could be overcome if the Commonwealth, State and Territories passed legislation providing for concurrent appointments allowing a member of a corresponding tribunal, with the consent of relevant Ministers, to be appointed to simultaneously exercise power derived from multiple appointments. The submission pointed out that reciprocal legislation having that effect has been in place for many years to overcome similar problems under industrial legislation.¹⁵

That such gaps still exist should be hardly surprising. Despite the Australian Constitution's autochthonous expedient of permitting State courts to exercise Federal jurisdiction from the earliest days of our Federation, it took over a century for our robust system of cross-vesting of judicial power to evolve. Given the development of comprehensive systems of merits review in the Commonwealth and the various States and Territories, it remains an ongoing project to ensure similar coherence emerges across those newer institutions.

More profound differences: administrative estoppel

Thus far this paper has focused upon the similarities that have evolved in both national and international administrative law notwithstanding their profoundly different constitutional structures.

However, those constitutional differences still sometimes generate substantively different outcomes.

One key difference which Justice Perram identified is the absence in Australia of any doctrine allowing for the application of what he termed 'administrative estoppel' – 'the proposition that an official might be bound to exercise a power in a particular way because of antecedent conduct which has led the person affected to act to their detriment'.¹⁶ Conventional legal theory posits that Australian courts cannot grant relief to a citizen who has been disappointed in his/her reliance upon an undertaking by government if the law authorises, even retrospectively, the government to take action in breach of that undertaking.

That is because in Australian legal theory judicial review exists exclusively to police the boundaries of power and to correct legal errors.¹⁷ In *Attorney General (NSW) v Quin*¹⁸ Brennan J stated:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.

It would breach the strict separation of powers in Ch III for an Australian court to both hold an enactment to be within power and limit its enforcement. It is not open to an Australian court, even if it were shown that a citizen had suffered detriment by incurring expenditure in reliance of undertakings that the law would not be altered, to make orders, premised on a doctrine akin to estoppel, on the basis that it would be unfair to the citizen for the state to enforce the new law without compensation.

Yet, as Perram J points out, the administrative law systems of many comparable free market economies routinely provide relief to citizens adversely affected in such circumstances.

Is it possible that despite our constitutional differences, Australian law may find some mechanism to permit evolution towards the recognition of a similar entitlement?

This paper has referred earlier to the response of the States following the passage of Commonwealth legislation to streamline administrative review. It suggested State legislators had recognised that the complexity of modern administration had increased such that review of government decisions through the Parliament and the courts by the prerogative writs had become inadequate as to its content and inaccessible to most persons affected.

But abstract commitment to good administration may not have been their only motive. It is likely that those legislators also had to respond to pressures from their business communities and electorates to make available to them the same kind of avenues for the vindication of their rights as they knew had been made available to them by the Commonwealth.

Justice Perram observes that the protection afforded by the *droit administratif* to those who act on the basis of a regulatory regime that is then changed to their detriment, as well as being far stronger protection than that available under Australian administrative law, is ‘much closer to our private law concept of estoppel than to the concept of legitimate expectation as it had been developed in this country before its demise in the High Court’s decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1’.¹⁹

In our ever increasingly interconnected world Australian travellers, academics and business men and women are likely to have significant dealings in jurisdictions where such rights as ‘administrative estoppel’ have evolved. That process may generate pressure for legislative reform to match—although nothing of that kind appears in immediate prospect.

Australian law some years ago rejected the notion of substantive legitimate expectations, in contrast to developments in the UK.²⁰ In *Kaur v Minister for Immigration and Citizenship* [2012] HCA 31, Gummow, Hayne, Crennan and Bell JJ observed that ‘the phrase ‘legitimate expectation’ when used in the field of public law either adds nothing or poses more questions than it answers and is an unfortunate expression which should be disregarded’.²¹

Substantive ‘legitimate expectation’ therefore would seem an improbable candidate as a foundation for doctrinal developments.

However, while there are some similar issues raised by the concept of estoppel and legitimate expectation, the two are distinct. Lord Hoffman in *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58 at 66 [34] observed:

There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation...But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to

promote...It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.

To date Australian public law, with its heavy focus on jurisdictional error and ultra vires appears to have absorbed little or nothing of the values that underpin private law estoppel. Matthew Groves has observed that 'estoppel is very much directed to a relatively narrow consideration of the issues raised between two parties within which it is often difficult to raise the wider issues of public interest that are present in many public law proceedings'.²² Australian academic thinking has been very much alive to the problem that estoppel, as a concept ordinarily applied to bipolar legal relationships, may be difficult to adapt to the kinds of polycentric problems often found in the administrative law context.²³

But the problem is more than pragmatic: such complexities arguably could be addressed through recourse to the normal discretionary considerations that apply to all equitable remedies.

In Australian law the option appears foreclosed for the more fundamental reasons Gummow J stated in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 210:

in a case of discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding.

Justice Perram observed of *Kurtovic* that 'it is difficult to see how, in light of the ultra vires theory which underpins our administrative law, any different result could possibly have been arrived at. It is in effect a corollary of Parliamentary supremacy'.²⁴

He concluded:

that doctrine requires condonation of governmental behaviour which if done by private persons would be actionable. Although one may admire the impeccable logic that brings about that situation as a deduction from the ultra vires theory, it is to be doubted, in my opinion, whether it is conducive to wholesome administration.

But are things that black and white? Is it possible that the doctrine of ultra vires need not require such an 'unwholesome' outcome at least in egregious and non-polycentric cases?²⁵

Or, returning again to Perram J's analogy and putting the question in those terms, are the constitutional bio-mechanical differences between European civilian legal fish and Australian jurisprudential dolphins so pronounced as to prohibit absolutely any further parallel administrative law evolution or might it be possible to revive interest in the place of estoppel in Australian public law?

Possible pathways to parallel evolution?

Finn and Smith have commented that:

if government in its rights and liabilities is to be treated more leniently or more stringently than an ordinary individual, a principled justification should be given for that different treatment. In particular it should only be for compelling reasons that the government, as servant of the community, should be given privileges which 'no private individual in the community possesses'... the government above all other bodies in our community should lead by example; it should act, and be seen to act, fairly and in good faith with all members of the community with whom it deals in individual cases.²⁶

In *Quin*, while acknowledging the criticisms that Gummow J had directed to the reasoning of Lord Denning in *Laker Airways v Department of Trade*²⁷ Mason CJ declined to rule out the possibility of:

the availability of estoppel against the Executive arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation'.²⁸

Since his retirement from the High Court Sir Anthony has observed that 'the recognition and development of the role of legitimate expectations in public law [has] obscured the place of estoppel in public law'.²⁹

Justice French (as his Honour then was) writing extra-curially in 2003, and after reviewing the authorities including *Quin* and *Kurtovic*, concluded that 'the possibility that estoppels may apply in public law is not foreclosed by the current state of authority in Australia'.³⁰

As Perram J tactfully remarked in his paper, 'some might think' it unjust that the law allows an administrative decision-maker to say one thing and do another even if that administrator's earlier pronouncement had induced a citizen to change his or her position to their detriment.³¹ As he noted such conduct would not be permitted in the private sphere because everyone recognises how unfair it is. In France or the European Union similar public action would almost certainly be invalid or require compensation.

Yet the prospect that Australian law will evolve to accept, as civil law systems do, that the existence of a new administrative regime is insufficient to justify a departure from the expectations engendered by, and relied upon in consequence of, an earlier one, is still only a theoretical possibility. As Weeks has remarked,

...for the last 20 years, Australian courts have...warmly embraced the limitations on raising an estoppel against a public authority expressed in *Kurtovic* and *Quin* rather than attempting to make their way through the door to an equitable remedy. It is difficult to enunciate a definitive reason for this trend. In part, it is possible that an appropriate set of facts comes along but rarely.³²

However, if such a set of facts did come along it might present an interesting test of Perram J's observation that, notwithstanding deep differences in history and constitutional taxonomy, different liberal western democracies, responding to shared problems, can, and often do, reach a similar substantive outcome.

The extra-judicial writings of Sir Anthony Mason and (now) Chief Justice French could, perhaps, be drawn on to forge the jurisprudential sword to cut the Gordian knot 'between strict fidelity to the ultra vires principle, unpalatable particularly where injured people are concerned, and coherence between private and public law'.³³

Given that estoppel is an equitable remedy, such a case might perhaps also become the vehicle for the High Court to draw on whatever is the extent of its constitutionally entrenched original jurisdiction pursuant to section 75(v) in matters where an injunction is sought against an officer of the Commonwealth. The High Court has yet to authoritatively determine the breadth of the power so conferred. It has left that question open, while indicating that injunctive relief, as an equitable remedy, may be available on grounds that are wider than those which would entitle an applicant to relief under the constitutional writs.³⁴

Perhaps too, this need not be seen as a violation of the separation of powers or the overthrow of the doctrine of *ultra vires*.

Perram J's paper usefully reminds us that that more than a century and half ago in *Royal British Bank v Turquand*³⁵ the Chancery Courts put a stop to companies being allowed to avail of the *ultra vires* doctrine to deny the constitutional authority of their officers notwithstanding that the ultimate source of a company's power to act under its memorandum and articles of association was entirely statutory in origin. It may not be fanciful to imagine that this kind of issue could arise in the Australian constitutional setting given the outcome in *Williams v Commonwealth of Australia* [2012] HCA 23 were the Commonwealth ever to deny its own constitutional authority. It seems unthinkable that such a defence would be permitted. It is but a short step from that premise to the wider public law notion of administrative estoppel.

The jurisprudential difficulties standing in the way of Australian courts reaching a similar functional conclusion as their civilian counterparts are, of course, formidable. They may ultimately be shown to forever preclude that course being taken but I am sceptical of the more pessimistic view that that possibility has already been ruled out.³⁶ As Justice Frankfurter of the Supreme Court of the United States of America observed, in a remark equally apposite to all highest courts obliged to respond to the challenges of the growth and increasing complexity of government systems: 'in administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions'.³⁷

Endnotes

- 1 'General Principles of Law in Civilian Legal Systems: What Lessons for Australian Administrative Law?', AGS Administrative Law Symposium, Excellence in Government Decision-Making, Canberra, 21-22 June 2013, available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-perram/perram-j-2013>.
- 2 Keynote address, 11th AIJA Tribunals Conference, Surfers Paradise, Australia, 5-6 June 2008, available at <http://www.aat.gov.au/Publications/SpeechesAndPapers/Frydman/AdministrativeJusticeInFrance2008.htm>
- 3 It seems plausible to suggest that, in the aftermath of *Minister for Immigration v SZMDS* (2010) 240 CLR 61, and despite considerable differences in underpinning jurisprudence, Australian law may be currently in the process of edging closer to adopting review standards which may functionally be not greatly different from the standard in many other countries which apply the notion of proportionality. As in Canada (see *Baker v Canada* [1999] 2 SCR 817; 174 DLR (4th) 193—where similar jurisprudence, albeit influenced by notions of rights and deference foreign to Australian law, has been considerably developed) that outcome would be arrived at not by the overthrow of prior doctrine but through the mundane and orthodox route of statutory interpretation in the light of presumptions of legality. In *Minister for Immigration and Citizenship v Li* [2013] HCA 18 the plurality, Hayne, Keifel and Bell JJ stated at [63] 'The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably'. This appears to be conceptually more flexible than *Wednesbury* unreasonableness and allow a bridge to permit review if a court cannot be satisfied that the decision was properly open, see at [68] 'The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified'. Such a standard opens the prospect of Australian courts achieving substantially the same end as the English courts have achieved by applying a doctrine of proportionality. See also Gageler J at [88]-[92] under the heading 'Reasonableness as a statutory implication' and, similarly, but perhaps more cautiously and limited to reasonableness in its *Wednesbury* form, French CJ at [23]-[24].
- 4 International Association of Supreme Administrative Jurisdictions, *The Review of the Administrative Decision by Administrative Courts and Tribunals*: Association Internationale des Hautes Jurisdictions Administratives, *Le controle des decisions administratives par les cours et les tribunaux administratifs* (La documentation Française 2013).
- 5 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 600.
- 6 (1996) 189 CLR 51.
- 7 (2010) 239 CLR 531.

- 8 The Commonwealth Administrative Review Committee, chaired by Sir John Kerr, and the Committee of Review of Prerogative Writ Procedures, chaired by RJ Ellicott QC.
- 9 *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); *Administrative Decisions (Judicial Review) Act 1989* (ACT). The now little-used *Administrative Law Act 1978* (Vic) differs substantially from the *Administrative Decisions (Judicial Review) Act*. Those states in which judicial review remains governed wholly or partly by the common law have simplified their procedures: see, eg Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic); and in New South Wales, Practice Note No. SC CL 3, Supreme Court Common Law Division – Administrative Law List, 16 July 2007.
- 10 (1995) 183 CLR 245.
- 11 Although the Queensland Civil and Administrative Tribunal primarily exercises administrative power it has been held to be a ‘court of a State’ for the purposes of the *Constitution*: *Owen v Menzies* [2012] QCA 170; (2012) 265 FLR 392, 396-400 (de Jersey CJ), 405-409 (McMurdo P). The Tribunal’s orders can be enforced by filing them with an affidavit in an appropriate court: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 131 and 132. Its status as a ‘court of a State’ also permits it, subject to inconsistency with federal law, conveniently to exercise jurisdiction in matters in which the Commonwealth is a party. Otherwise the limits whereby the Commonwealth is subject to State administrative decisions, have proved prone to give rise to disputes—notwithstanding what was said by the High Court in *Re Residential Tenancies Tribunal (NSW); Ex parte the Defence Housing Authority* (1997) 190 CLR 410 (‘Henderson’s Case’)—which affirmed in that particular instance that the Commonwealth was bound.
- 12 Report No 39 (1995).
- 13 (2003) 211 CLR 476.
- 14 A similar issue might arise where an employee’s condition has been contributed to by injuries arising out of employment with the same employer, but occurring at different times, initially when the employer was bound by State or Territory legislation and later when the employer was licenced under the *SRC Act*. For the full terms of the submission see *AAT Submission to the Review of the Safety, Rehabilitation and Compensation Act 1988* [2.4].
- 15 See for example ss 631 and 632 of the *Fair Work Act 2009* and ss 37 and 38 of the *Fair Work Act 1994* (SA).
- 16 Justice Perram, ‘General Principles of Law in Civilian Legal Systems’ p 12.
- 17 Even conceding that in practice the distinction between correcting legal error and examining the merits of a decision may sometimes be blurred ‘there is in Australian legal theory a bright line between judicial review and merits review,’ see Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21 *Australian Bar Review* 279, 279.
- 18 (1990) 170 CLR 1, at 35-36.
- 19 Justice Perram, ‘General Principles of Law in Civilian Legal Systems’ p 8.
- 20 *Ibid*; *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
- 21 [2012] HCA 31 at [61].
- 22 Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470, 490.
- 23 See Enid Campbell and Matthew Groves, ‘Polycentricity in Administrative Decision-Making’, in Matthew Groves (ed), *Law and Government in Australia* (2005) 213.
- 24 Justice Perram, ‘General Principles of Law in Civilian Legal Systems’ p 15.
- 25 Nicholas Seddon, citing *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 58 FCR 167, suggests there may be a basis to distinguish particular from general reliance: ‘It is generally not sensible or reasonable to make large investment decisions or other commitments on the basis of a government announcement or other policy statements. On the other hand, an operational statement or assurance (that is, one about day-to-day matters as opposed to policy) may generate a legitimate claim, either through a negligence claim, through estoppel or by invoking an Ombudsman’s ability to make a recommendation for an ex gratia or act-of-grace payment’. Nicholas Seddon, *Government Contracts: Federal, State and Local* (5th ed, 2013) 287.
- 26 Paul Finn and Kathryn Jane Smith, ‘The Citizen, the Government and Reasonable Expectations’ (1992) 66 *Australian Law Journal* 139, 146.
- 27 [1977] Q.B. 643 at p 707.
- 28 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 18.
- 29 Sir Anthony Mason, ‘The Place of Estoppel in Public Law’ in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 160, 175.
- 30 RS French, ‘The Equitable Geist in the Machinery of Administrative Justice’ (2003) 39 *AIAL Forum* 1, 11; see also Alexandra O’Mara, ‘Estoppel against Public Authorities: is Australian Public Law Ready to Stand upon its own Two Feet?’ 42 *AIAL Forum* 1.
- 31 Justice Perram, ‘General Principles of Law in Civilian Legal Systems’, 16.
- 32 Greg Weeks, ‘Estoppel and Public Authorities: Examining the Case for an Equitable Remedy’ (2010) 4 *Journal of Equity* 247, 254.
- 33 Justice Perram, ‘General Principles of Law in Civilian Legal Systems’, 18.
- 34 See for example *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ [82].
- 35 (1856) 6 E & B 327.
- 36 Australia is not the only nation with a common-law inheritance and constitutional structure that have led to hesitancy twinned with a reluctance to rule out the prospect of change. In the United States, the Supreme

Court 'has come close to saying that the government can never be equitably estopped based on a false or misleading statement of one of its agents no matter how much an individual has relied on that statement to her detriment or how reasonable her reliance. Each time it seems tempted to take this step, however, the Court stops just short of saying "never." see Pierce, *Administrative Law Treatise* (Aspen, 4th ed, 2002) quoted in *Lam* (2003) 214 CLR 1, 22 (McHugh and Gummow JJ).

- 37 Felix Frankfurter, 'The Task of Administrative Law (1926) 75 *University of Pennsylvania Law Review* 614, 619, quoted in Dame Sian Elias, 'Administrative Law for "Living People"' (2009) 68 *Cambridge Law Journal* 47, 47.

THE CONCEPT OF 'DEFERENCE' IN JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS IN AUSTRALIA – PART 2

*Alan Freckelton**

This article is in two parts. The first part¹ considered the rejection of the deference approach in *Corporation of the City of Enfield v Development Assessment Commission*², and a consideration of some of the reasons for this rejection, including an examination of the concept of the 'judicial power of the Commonwealth'. The second part will examine the judicial treatment of privative clauses in Australia, and examine academic arguments for and against a concept of deference in Australian administrative law. I will argue that Australia should move to a Canadian and UK type of substantive review of administrative decisions, rather than relying on an artificial and unsustainable distinction between errors of law and errors of fact, or, even worse, 'jurisdictional' and 'non-jurisdictional' errors of law.

Privative clauses in the High Court

Deference on questions of law generally

While Canadian courts may give deference to an administrative decision-maker in at least some matters of law, most particularly when interpreting a 'home statute', Australian courts do not. Sackville J, writing extrajudicially, has stated:³

But ... two principles have been accepted, generally without challenge, as fundamental in determining the proper scope of judicial review. The first is that courts exercising powers of judicial review must not intrude into the 'merits' of administrative decision-making or of executive policy making. The second is that it is for the courts and not the executive to interpret and apply the law, including the statutes governing the power of the executive. These can be regarded as the twin pillars of judicial review of administrative action in Australia.

Even more bluntly, Hayne J, also writing extrajudicially, stated that '[t]he whole system of Government in Australia is constructed upon the recognition that the ultimate responsibility for the final definition, maintenance and enforcement of the boundaries within which governmental power may be exercised rests upon the judicature'.⁴ In *Enfield* Gaudron J stated that 'that there is very limited scope for the notion of "judicial deference" with respect to findings by an administrative body of jurisdictional facts',⁵ which is a question of law, not fact-finding.

There is, of course, real difficulty in determining the difference between an error of law and an error of fact in the first place. Sir Anthony Mason, the former Chief Justice of the High Court, has written extrajudicially as follows:⁶

The difficulty of distinguishing between questions of law, on the one hand, and questions of fact, not to mention questions of policy, is notorious. This difficulty unquestionably creates complications for a system of administrative law such as ours which requires questions of law and questions of fact to be treated differently. In the United States and Canada, the assumption that there is a distinction has

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been challenged. So far that is not the position in Australia, where the High Court has noted that the distinction 'is a vital distinction in many fields of law', while acknowledging that 'no satisfactory test of universal application has yet been formulated'.⁷

The situation changes, however, when a privative clause is inserted into the relevant legislation. The clash between the insertion of a privative clause into legislation and the constitutional guarantee of judicial review in s 75 of the *Constitution* has been considered on several occasions by the High Court.

Privative clause cases from Federation to Hickman

Until 1945, the High Court's approach was to find that privative clauses were unconstitutional because they offended s 75 of the *Constitution*. In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow*⁸ the Court simply noted that s 31 of the *Conciliation and Arbitration Act 1904 (Cth)* which provided that '[n]o award of the Court shall be challenged, appealed against, reviewed, quashed or called into question in any other Court on any account whatsoever', did not mention prohibition or mandamus, and made an order of prohibition against the Court of Conciliation and Arbitration. However, in *R v Commonwealth Court of Conciliation and Arbitration (the Tramways Case)*⁹, in the face of a better drafted privative clause, the court made itself unambiguously clear, with a unanimous finding that such clauses conflicted with s 75 of the *Constitution* and were invalid. Powers J stated that '[t]he power directly conferred on the High Court by the Court as original jurisdiction cannot be taken away by the Commonwealth Parliament'.¹⁰ The *Tramways Case* was upheld as late as 1942, in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd*.¹¹

However, from 1945 the court attempted to reconcile privative clauses and s 75 by finding that a privative clause could not oust judicial review, but it expanded the situations in which an administrative decision would be found to be valid by a court. This line of authority, known as the *Hickman* approach for the leading case, *R v Hickman; Ex parte Fox and Clinton*,¹² was basically the approach taken by the High Court from 1945 to 2003. The key part of the *Hickman* judgment can be found in the judgment of Dixon CJ as follows:¹³

[U]nder Commonwealth law ... the interpretation of provisions of the general nature of reg 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

Later cases added that the administrative decision in question must also conform to mandatory (or 'inviolable') requirements within the Act itself.¹⁴ For example, if the Act itself required that certain procedural rights be given to an applicant, failure to follow those procedures would have the result that the privative clause would not protect the decision. However, the principles basically remained unchanged until 2003.

The jurisdictional error qualification: the evisceration of Hickman in S157

*Plaintiff S157/2002 v Commonwealth of Australia*¹⁵ involved a constitutional challenge to the validity of s 474 of the *Migration Act 1958* and administrative challenges to a number of decisions that were defended on the basis of this section. At the time of the judgment, subsections 474(1) and (2) relevantly provided as follows:

- (1) A privative clause decision:
 - (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
- (2) In this section, **privative clause decision** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not) ...

Subsection 474(3) made it clear that a decision to grant or refuse a visa was a 'privative clause decision'.

The applicants argued that s 474 conflicted with s 75 of the *Constitution* and was therefore invalid, or alternatively that s 474 did not protect 'jurisdictional errors', a term that will be explained shortly. The High Court rejected the first argument but accepted the second, which left s 474 'on the books', but rendered it of almost no effect. The leading judgment was given by Gaudron, McHugh, Gummow, Kirby and Hayne JJ. At paragraph 73, their Honours stated that:

A privative clause cannot operate so as to oust the jurisdiction which other paragraphs of s 75 confer on this Court, including that conferred by s 75(iii) in matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'. Further, a privative clause cannot operate so as to allow a non-judicial tribunal or other non-judicial decision-making authority to exercise the judicial power of the Commonwealth¹⁶. Thus, it cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction.

Their Honours stated at paragraph 76 that an administrative decision affected by jurisdictional error is a legal nullity, referring to *Minister for Immigration and Multicultural Affairs v Bhardwaj*.¹⁷ Therefore, a 'decision' affected by a privative clause is only a putative decision and cannot be a 'privative clause decision' for the purposes of s 474. When read in this way, there was no conflict between s 474 and s 75 of the *Constitution*, and the provision was therefore constitutionally valid. Indeed, s 75(v) was reaffirmed to amount to 'an entrenched minimum provision of judicial review',¹⁸ 'assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them',¹⁹ in a passage remarkably similar to the Canadian case of *Crevier*.²⁰

The remaining issue was the definition of 'jurisdictional error'. Curiously, none of the judgments referred to the High Court's decision of just two years previously, *Minister for Immigration and Multicultural Affairs v Yusuf*.²¹ In that case, McHugh, Gummow and Hayne JJ defined the term as follows at paragraph 82:

It is necessary, however, to understand what is meant by 'jurisdictional error' under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*,²² if an administrative tribunal (like the Tribunal):

'falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive²³ ... if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.

The kinds of 'jurisdictional error' identified by *Craig* and *Yusuf* are very wide, and endorse the *Anisminic*²⁴ approach as far as possible without expressly abolishing the distinction between jurisdictional and non-jurisdictional errors.

The judgment of Gleeson CJ is of interest primarily for his Honour's attempt to distinguish between jurisdictional and non-jurisdictional errors.²⁵

The concept of 'manifest' defect in jurisdiction, or 'manifest' fraud, has entered into the taxonomy of error in this field of discourse. The idea that there are degrees of error, or that obviousness should make a difference between one kind of fraud and another, is not always easy to grasp. But it plays a significant part in other forms of judicial review. For example, the principles according to which a court of appeal may interfere with a primary judge's findings of fact, or exercise of discretion, are expressed in terms such as 'palpably misused [an] advantage', 'glaringly improbable', 'inconsistent with facts incontrovertibly established', and 'plainly unjust'. Unless adjectives such as 'palpable', 'incontrovertible', 'plain', or 'manifest' are used only for rhetorical effect, then in the context of review of decision-making, whether judicial or administrative, they convey an idea that there are degrees of strictness of scrutiny to which decisions may be subjected.

The majority judges in *S157* came to the conclusion that a failure of procedural fairness was a 'jurisdictional error' and therefore s 474 did not protect the Tribunal decision from such a claim.²⁶ The *Hickman* principle has therefore been overturned. The result is that when a decision is protected by a privative clause, deference will be shown to the decision-maker on a point of law to the extent that no jurisdictional error is involved. Otherwise, the decision will be set aside.

No privative clauses have been enacted in Commonwealth legislation since *S157* was decided. This may be an admission by governments that such clauses are simply not worthwhile. All in all, it now appears that *Hickman* was a post-WWII aberration in Australian law.

Why the change?

It is almost impossible to overstate the hostility towards privative clauses by Australian academics. Duncan Kerr, the former Commonwealth Minister for Justice, is the author of an article entitled 'Privative Clauses and the Courts: Why and How Australian Courts have Resisted Attempts to Remove the Citizen's Right to Judicial Review of Unlawful Executive Action';²⁷ two chapters in that article are entitled 'Attempts to Thwart Judicial Review of Executive Action' and 'A Detour to Deference: The *Hickman* Myth'. The latter clearly elucidates the abhorrence of 'deference' of Australian commentators.

In one sense, it could be argued that the High Court decision in *S157* simply returns the High Court to a pre-*Hickman* position. This is not entirely accurate, however – the *Tramways* approach was to strike down the privative clause altogether as constitutionally invalid. The High Court's approach in *S157* was to 'gut' s 474 of the *Migration Act* rather than to invalidate it; the Court effectively found that non-jurisdictional errors will be protected while jurisdictional errors will not, which gives the courts the power to determine what a jurisdictional error is and what it is not. This gives the courts extraordinary control over the executive, giving them the ability to pick and choose which decisions to strike down. Since *S157* was decided, the High Court has found in *Minister for Immigration and Citizenship v SZJSS*²⁸ that apprehended bias also amounts to jurisdictional error, although no such bias was found to exist in that case. More controversially, the High Court and Full Federal Court

have found that even a refusal to permit an adjournment can amount to a jurisdictional error in certain circumstances.²⁹ It appears that Australia is headed for a much more interventionist approach from its courts than has been the case for some time and, unlike Canada, its academics are likely to applaud this approach.

A variable standard of reasonableness review in Australia?

As noted earlier, Australian courts are quite prepared to review an administrative decision on the ground of *Wednesbury* unreasonableness, despite the fact that this is clearly a review of the merits of the decision. Is there any move in Australia to create a variable standard of reasonableness review, such as expressly exists in the UK and appears to exist (despite denials from the Supreme Court) in Canada?

The view that there may be a variable standard of proof appears to predate *Wednesbury* in Australia. In *Briginshaw v Briginshaw*, Dixon J (as he then was) noted as follows in the context of a petition for divorce:³⁰

[A]t common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

The *Briginshaw* principle has been restated many times, but by itself has never developed into a principle of 'variegated reasonableness review'. Instead, it has been used, for example, to emphasise that an allegation of actual bias against a decision-maker will only be upheld if 'accusations are distinctly made and clearly proved',³¹ and that a decision-maker will only have 'serious reasons to consider'³² that an applicant has committed acts which exclude him or her from protection under the *Convention Relating to the Status of Refugees* if there is clear evidence before him or her to that effect.³³ That is, the *Briginshaw* principle has been applied more as a requirement of procedural fairness than going to the substance of a decision.

More recently in Australia, there has been a move towards review on the grounds of irrationality. This ground was most clearly considered by the High Court in *Minister for Immigration and Citizenship v SZMDS*,³⁴ in which the High Court split three ways. Crennan and Bell JJ allowed the Minister's appeal, finding that irrationality or illogicality is a ground of judicial review in Australian law, but that the RRT's decision was not irrational or illogical. Gummow ACJ and Kiefel J also found that irrationality is a ground of review, and found that the decision in question was illogical. Heydon J found that the decision was not irrational, but declined to make a ruling on whether irrationality or illogicality is a separate ground of review. This means that four of five judges accepted the existence of irrationality as a ground of review.

Crennan and Bell JJ seemed to take quite a narrow interpretation of irrationality. Their Honours noted that mere disagreement, even 'emphatic disagreement',³⁵ is not sufficient to find a decision to be 'irrational'. The key passage of the judgment can be found at paragraph 131:

What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made

on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

That is, a decision will not be 'irrational' in the sense that it can be the basis to set aside an administrative decision if it is a matter on which 'reasonable minds might differ'. Crennan and Bell JJ are concerned primarily with the evidence before the decision-maker and whether a 'reasonable mind' could reach the conclusion on the basis of the evidence presented, not on the basis of the decision-maker's reasons (noting that there is no common law duty to give reasons for an administrative decision in Australia). Their Honours' references to 'possible conclusions' might be seen as similar to the 'possible, acceptable outcomes' of *Dunsmuir v New Brunswick*,³⁶ but the terms 'illogical' and 'irrational' suggest something stronger than mere 'unreasonable-ness'. It may be that the judgment of Crennan and Bell JJ has simply renamed *Wednesbury* unreasonableness as 'irrationality'.

Gummow ACJ and Kiefel J took a wider view of the term. Their Honours first make it clear that a statutory requirement that a decision maker form an opinion or reach a state of satisfaction in order to make a particular decision constitutes a jurisdictional fact.³⁷ They also note that while a court is not to engage in 'merits review', 'apprehensions respecting merits review assume that there was jurisdiction to embark upon determination of the merits',³⁸ and that 'the same degree of caution as to the scope of judicial review does not apply when the issue is whether or not the jurisdictional threshold has been crossed'.³⁹ Their Honours also equated *Wednesbury* unreasonableness with 'abuse of discretion',⁴⁰ therefore more clearly distinguishing irrationality from *Wednesbury* unreasonableness than did Crennan and Bell JJ.

The interpretation of irrationality favoured by Gummow ACJ and Kiefel J is based on the reasons for the decision as well as the evidence before the decision-maker.⁴¹ Their Honours stated that the 'absence of the logical connection between the evidence and the reasons of the RRT's decision became apparent when the RRT assumed that a homosexual would be fearful of returning to Pakistan without there being any basis in the material to found this assumption or to counter the possibility that the sexuality of such a person could be concealed from others in the short period of return to the country'. Their Honours then added (at [53] and [54]):

To decide by reasoning from the circumstances of the visits to the United Kingdom and Pakistan that the first respondent was not to be believed in his account of the life he had led while residing in the UAE was to make a critical finding by inference not supported on logical grounds. The finding was critical because from it the RRT concluded that the first respondent was not a member of the social group in question and could not have the necessary well-founded fear of persecution.

The Federal Court was correct to quash the decision and to order a redetermination by the RRT.

Any crucial finding of fact that is not based on 'logical grounds' can be the basis for a finding of irrationality. In *SZOOR v Minister for Immigration and Citizenship*, Rares J of the full Federal Court, concurring in the result, described the irrationality ground as follows:⁴²

The approach to irrationality or illogicality dictated by the authorities in the High Court appears to be that even if the decision-maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside. It is only if no decision-maker could have followed that path, and despite the reasons given by the actual decision-maker, that the decision will be found to have been made by reason of a jurisdictional error.

Earlier,⁴³ Rares J had noted that this principle is similar to the law in Canada, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,⁴⁴ in which Abella J, writing for the court, stated that the adequacy of reasons is not, in itself, a ground for review of an administrative decision. Instead 'the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes'.⁴⁵

Peter MacLIVER of the AGS has explained the difference between the two joint judgments in *SZMDS* as follows:⁴⁶

The joint judgment of Gummow A-CJ and Keifel J appears to suggest that if there is illogicality or irrationality in the making of a finding critical to the decision as to a jurisdictional fact, then that is sufficient to establish this ground of review. On the other hand, Crennan and Bell JJ stipulated that the test for illogicality or irrationality must be to ask whether logical, rational or reasonable minds might adopt a different reasoning or might differ in any decision or finding to be made on the evidence upon which the decision is based (see above). Thus, even if the conclusion reached by a decision-maker as to a fact or matter involves illogicality or irrationality, if two conclusions as to that fact or matter are reasonably open upon the evidence and material before the decision maker, on the approach of Crennan and Bell JJ such illogicality or irrationality will not be sufficient to establish this ground of review.

In conclusion, while *SZMDS* may give Australian courts an opening to create a variable standard of reasonableness review in the future, it does not appear to have done so yet. There is simply not enough clarity in the judgments to clearly differentiate irrationality from *Wednesbury* unreasonableness at present and, even if a clear distinction can be drawn, it may be that *Wednesbury* will simply be restricted to 'abuse of discretion' cases, while irrationality will be the term used to describe all other cases that could have been previously regarded as falling within the *Wednesbury* principle.

SZMDS is also notable for the statement by Gummow ACJ and Kiefel JJ that '[s]till less is this the occasion to consider the development in Canada of a doctrine of "substantive review" applied to determinations of law, of fact, and of mixed law and fact made by administrative tribunals'.⁴⁷ Their Honours, after referring to *Dunsmuir*, distinguished that case from *SZMDS* and noted that *SZMDS* dealt with a statutory appeal (under s 476 of the *Migration Act 1958*), while *Dunsmuir* was a case exercising the inherent jurisdiction of the Supreme Court. Could this leave the door open in Australia for 'substantive review' of administrative decisions, at least in a case brought by way of the original jurisdiction of the High Court in s 75 of the *Constitution*?

Australian academic commentary on deference

The Australian approach of arguing for a strict separation between the 'merits' of an administrative decision and review for an error of law is both unsustainable and hypocritical. It is unsustainable because it is simply impossible to clearly delineate the two principles. It is also hypocritical because Australian courts *do* review the merits of administrative decisions – a 'patent unreasonableness' standard of review is provided on matters of fact (other than jurisdictional facts) and discretion, and a correctness standard is imposed on questions of law, at least in relation to 'jurisdictional errors' (which are very widely interpreted).

Decisions such as *M70/2011 and M106/2011 v Minister for Immigration and Citizenship*⁴⁸ and the High Court's decision in *Minister for Immigration and Citizenship v Li*⁴⁹ suggest that Australia is headed for a period of significant intervention in administrative decision-making in its courts. Unlike Canada, however, Australian commentators are unlikely to disapprove of this approach. Instead, it is notable that Australian commentators have not only rejected any move to import a standard of deference into Australian administrative law, but have done so with exceptional vehemence.⁵⁰

Deference as a failure to exercise judicial power

Hayne J, writing extrajudicially, has described deference as a word of ‘obfuscation’,⁵¹ which conceals an ‘abdication of a constitutionally conferred judicial function’.⁵² His Honour’s ultimate conclusion is that courts use the language of deference when they are too lazy to make all the appropriate findings of fact themselves,⁵³ which results in failure to comply with the constitutional role of the judiciary.

Hayne J makes a number of specific criticisms of the concept of deference. Firstly, deference is only ever expressed in comparative or relative terms. The basis for comparison between different levels of deference is rarely, if ever, articulated in the case law.⁵⁴ Secondly, identification of what responsibilities lie solely with the courts or the legislature and executive is not easy, and no basis for determining where responsibilities lie is discussed by the courts.⁵⁵ Thirdly, terms such as deference, ‘margin of appreciation’ and ‘relative institutional competence’ (also known as ‘expertise’) are rarely if ever given any clear context.⁵⁶ Fourthly, deference on the basis that a decision-maker obtains powers by means of legislation passed by a democratically elected Parliament makes no sense, because once the courts are given a task, they must perform it.⁵⁷ Finally, the *Constitution* requires a court to apply valid legislation, not simply ‘rewrite it according to judicial whim’, but the principle of the separation of powers cannot require a court to defer to the ‘legislature’s views as to how any particular laws should be interpreted or applied in any given case’.⁵⁸

Hayne’s ultimate conclusion is that any application of deference to administrative decision-makers in Australia would be a ‘fraud’ on judicial power and should not be countenanced.⁵⁹ In my view, the methodology employed by Hayne J in his article is unnecessarily narrow – his Honour focuses solely on UK cases considering the *Human Rights Act 1998*, which has existed for only 14 years and was not examined by a court until 1999. Hayne J did not consider the post-CUPE Canadian cases, or *Chevron*, the approach rejected by the High Court in *Enfield*. However, there is a more fundamental objection to the approach taken by Hayne J.

Deference as obsequiousness to governments

In 1999, Dr Mary Crock stated that ‘the present Minister [for immigration] clearly believes that the courts are not showing enough deference to government policy’,⁶⁰ and that ‘the High Court has endorsed the notion of judicial deference to government policy in a number of key migration cases’.⁶¹ Crock’s main target is privative clauses, especially the (then) proposed privative clause for the *Migration Act 1958*. She notes as follows:⁶²

The effectiveness of the proposed privative clause is predicated on a deference doctrine first enunciated by the High Court in 1945. The comments of Dixon J (as he then was) in *R v Hickman; Ex parte Fox and Clinton* have come to enshrine the notion that Parliament can direct the judiciary to adopt a deferential or noninterventionist role in the review of administrative action.

Crock defends the orthodox approach of deference on matters of fact and no deference on matters of law, but seems to argue that the High Court has been pushing for ‘deference’ to determinations of law in the immigration context.⁶³

As the courts themselves have readily acknowledged, there may be very real cause for judicial deference in instances where the protected adjudicator is using special knowledge to make an assessment of a factual situation. The more difficult cases are those where the specialist body is enlisted to make determinations that involve both the assessment of facts and the interpretation of the law, for example by determining whether facts exist to meet criteria established by law. It is in this context that the High Court’s call for deference towards the migration tribunals becomes problematic.

While Crock did not have the benefit of the *Enfield*⁶⁴ decision in writing her article, I do not think that cases such as *Wu Shan Liang* can be regarded as calling for 'deference' to administrative decision-makers in determinations of law. The High Court in *Wu* is more concerned with lower courts reading into decisions of tribunals things that are simply not there – in that case, the Federal Court decided that the decision-maker had decided a claim for refugee status on the balance of probabilities rather than on the 'real chance' test, despite many express statements to the contrary in the decision. At no stage did the High Court state that courts should defer to findings of law made by administrators, something which has been made clear by more recent cases such as *Enfield* and *SZMDS*.

Finally, Crock makes the claim that the existence of constitutional powers for the Parliament to make laws with respect to 'aliens and naturalisation'⁶⁵ has created a sense of 'entitlement' in politicians.⁶⁶

[A] battle royal has raged between the courts and the government over who should have the final say in immigration decision-making. The constitutional power given to the federal Parliament to make laws in this area has both created a sense of entitlement in the politicians and placed pressure on the courts to be deferential and non-interventionist in their review of government action.

This is an odd argument, as the *Constitution* does indeed create an entitlement on the Parliament to make laws relating to aliens and naturalisation. Should the High Court ignore the very wide wording of the *Constitution* and read in restrictions that do not exist? One would think that the express power in the *Constitution* to govern the passage of non-citizens into Australia is a fairly clear indication that Parliament *was* to be given the 'final say in immigration decision-making'. The courts' role is to *review* decisions, not have the final say in the decision-making process, unless of course constitutional questions are at issue.

Deference as an affront to the rule of law

Duncan Kerr's implacable opposition to any form of privative clause has already been discussed.⁶⁷ Denise Myerson also puts the point particularly bluntly.⁶⁸

Government officials must also obey the rules which Parliament has enacted and this can only be ensured if the courts have the jurisdiction to enforce the legal limits which govern the exercise of executive power. It follows that privative clauses – provisions which attempt to limit or exclude the ability of individuals to challenge the abuse of power by government officials in independent courts – are an assault on the rule of law.

In a 2004 article,⁶⁹ Crock also considered privative clauses, at least so far as they protect determinations of law made by administrative decision-makers, to be an affront to the entire concept of the rule of law:⁷⁰

The clashes between the executive and judicial arms of government in Australia in refugee cases may have brought little international credit to the country. On occasion, they have also threatened the very fabric of the rule of law in Australia, embodied as this is in the principle that the judiciary alone is vested with the power to make final determinations on questions of law.

Crock concludes her article even more emphatically:⁷¹

The importance of the Courts maintaining their role as interpreters and defenders of the law in the area of refugee protection cannot be overestimated. The Courts may not be able to prevent the political posturing and even manipulation that has characterised the political discourse surrounding refugees and asylum seekers in Australia. However, they are in a unique position to at least moderate the impact of the politicisation process on the refugees themselves. In the area of refugee law, the Australian judiciary can, quite patently, be the last bastion against executive tyranny for the dispossessed and reviled. At risk is life, liberty and the rule of law – not just for the refugee, but for all of us.

If a privative clause was to be interpreted literally by a court, it *would* be an affront to the rule of law. Canada has read privative clauses simply as a clear legislative statement that deference should be provided to the decision-maker, given the *Crevier*⁷² ruling that judicial review of administrative decisions can never be completely removed. A privative clause is not even determinative of the standard of review, as can be seen from *Dunsmuir*. In Australia, s 75 of the *Constitution* clearly prevents the Commonwealth Parliament from precluding judicial review altogether, but the High Court in *S157*⁷³ also found that privative clauses are of virtually no effect, a position that goes further than Canada.

One wonders what the Australian authors would think of Canadian commentators such as Audrey Macklin and Wade MacLauchlan who have defended the role of privative clauses in a modern system of administrative law! Macklin has written that ‘the motive behind privative clauses is not always the desire to keep a meddling court at bay; they may also be inserted to encourage prompt and final resolution of disputes, or as a means of allocating scarce judicial resources by restricting access to the courts’,⁷⁴ while MacLauchlan is critical of the Supreme Court of Canada’s decision in *Metropolitan Life*⁷⁵ because its ‘main point was to find a path around privative clauses’.⁷⁶ Canadian commentators, perhaps fortified by the decision in *Crevier*, regard privative clauses overall as a genuine and legitimate expression of legislative intent, while Australians regard them as something to be resisted at all costs.

Judicial review that affirms a tribunal decision is mere ‘deference’

Crock has also praised the High Court for making decisions that circumvent government policy, seemingly *because* they circumvent government policy. For example, writing with Daniel Ghezelbash in 2011, Crock lauded the decision in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth*,⁷⁷ which applied common law procedural fairness requirements to decisions on applications for refugee status made by offshore entry persons. The authors referred to the ‘sting in the High Court’s ruling’⁷⁸ for the government, and seemed to positively rejoice in the fact that unlawful entrants to Australia may, as a result of the judgment, have greater procedural fairness rights than immigrants who entered Australia lawfully.⁷⁹ The subtext is that a court is only doing its job if it finds against the government in administrative law matters – a decision in favour of the administrator is mere ‘deference’ to government and represents an abdication of judicial power.

There even seems to be a certain mistrust of democracy in some of Crock’s writing. For example, she has stated as follows:⁸⁰

[R]efugee cases in the High Court have been at the centre of gargantuan struggles between the government and the judiciary. On the one side is a government intent on stifling the judicial review of refugee decisions on the ground that the determination of protection matters should lie with the executive and with elected politicians, rather than with the unelected judiciary. On the other side are judges imbued with the notion that the courts stand between the individual and administrative tyranny; and that refugee decisions must be made in accordance with the rule of law. In 2003, the battle ceased to be a fight over ‘Protection’ — be it protection of borders or protection of human rights. The fight was all about control, and about the balance of power between Parliament, the Executive and the Judiciary within the compact that is the Australian *Constitution*.

The argument here appears to be that only judges are concerned with the rule of law, while elected governments are simply determined to ‘stifle’ the courts’ role. It reads like an argument that judges can be trusted *because* they are unelected, while ‘politicians’ are only interested in what is popular.

The idea that courts only do their job correctly if they say ‘no’ to a government can be seen in other writing by Australian commentators. Catherine Dauvergne, now with the University of British Columbia, has stated that ‘while refugee litigation has had a high profile in Australia

over the past decade, until February 2003 the story that executives receive a high degree of judicial deference in the migration law realm has been unchallenged'.⁸¹ Referring to *S157*,⁸² she then adds that this case may signify:⁸³

[A] new willingness of the courts to restrain the executive in matters of migration, whether the courts are separating refugee matters from migration matters, or whether a new version of the rule of law⁸⁴ might emerge internationally from these beginnings. Each of these possibilities would be welcome.

In my opinion judicial review is pointless if a court is not prepared to set an administrative decision aside in the right case. *Sun v Minister for Immigration and Ethnic Affairs*⁸⁵ is an excellent example of a case where judicial intervention was called for, as Ms Smidt of the RRT had, amongst other errors, simply refused to examine an 88-page printout of arrivals and departures through Port Moresby airport on certain dates, information which could have been crucial to Mr Sun proving the truth of at least some of his claims. Another example is *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs*,⁸⁶ in which the applicants claimed to fear persecution in China on the basis of their Catholic faith. The RRT member subjected the applicants to a 'pop quiz' on Catholic dogma, and despite getting about 18 of the 20 or so questions correct, found they were not Catholic. The member also refused to consider a letter from the applicants' Australian church, which stated that they attended Mass weekly, because it did not expressly state that the applicants were Catholic! The decision was set aside on the basis of apprehended bias, but it is also an unreasonable decision by any measure.

However, whether a court of judicial review has made a 'good' decision does not depend solely on who 'wins' or 'loses' in the case. A considered and well-reasoned decision in favour of the administrative decision-maker is of much more value than a decision such as that of the Full Federal Court in *Guo*.⁸⁷ Indeed, a high rate of decisions in favour of the government can result from good decision-making, or from applicants for judicial review pursuing their cases regardless of the merits (particularly in immigration cases, in which applicants will commonly pursue any means to avoid their removal from the country in question).

Australian pro-deference writers

There are few, if any, Australian writers who support the introduction of a form of substantive review into Australia law, and few who support any kind of deference to administrative decision-makers. Almost all of these are or were associated with the Commonwealth government. David Bennett's defence of the orthodox line between judicial and merits review has already been noted in Part 1 of this Article.⁸⁸ Stephen Gageler, now Gageler J of the High Court, has written of the 'political accountability' of government as follows.⁸⁹

Why shouldn't the underlying purpose of the *Constitution* continue to be seen, in the terms declared in 1897, as being to enlarge the powers of self-government of the people of Australia? Why shouldn't its establishment of institutions politically accountable to the people of Australia be seen as the primary mechanism by which the *Constitution* achieves that purpose? ... Should not the exercise of judicial power take the essentially political nature of those institutions as its starting point and tailor itself to the strengths and weaknesses of the institutional structures which give them political accountability? Why should there not openly be judicial deference where, by virtue of those institutional structures, political accountability is inherently strong? And why should there not openly be judicial vigilance where, by virtue of those institutional structures, political accountability is inherently weak or endangered?

Gageler does not specify which 'institutional structures' have which levels of political accountability, but he does state that 'political accountability provides the ordinary constitutional means of constraining governmental power'.⁹⁰ That is, setting aside of a government decision by a court should be an exceptional move, to be undertaken only where the decision-maker would be otherwise unaccountable to Australians. Does this mean that decisions made by elected officials should be scrutinised to a lower degree than those

made by unelected ones? What about decisions made by administrative decision-makers on *behalf* of elected officials, such as those made under the *Migration Act 1958*, where the Minister is the ultimate decision-maker⁹¹ but the Minister's power is widely delegated? What about decisions of review tribunals that are expressly stated to be independent of a Minister, such as the MRT and RRT?

Heydon J of the High Court also believes that judges must decide cases before them on a strictly legalistic basis. In a speech to the annual *Quadrant* dinner in 2002, Heydon J, then a judge of the NSW Supreme Court, stated that '[a] key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge'.⁹² His Honour went on to state as follows:⁹³

Rightly or wrongly, many modern judges think that they can not only right every social wrong, but achieve some form of immortality in doing so. The common law is freely questioned and changed. Legislation is not uncommonly rewritten to conform to the judicial world-view ... They appear designed to attract academic attention and the stimulation of debate about supposed doctrines associated with the name of the judicial author. Here the delusion of judicial immortality takes its most pathetic form, blind to vanity and vexation of spirit.

His Honour also noted as follows:⁹⁴

It is legislatures which create new laws. Judges are appointed to administer the law, not elected to change it or undermine it. Judges are given substantial security of tenure in order to protect them from shifts in the popular will and from the consequences of arousing the displeasure of either the public or the government. The tenure of politicians, on the other hand, is insecure precisely in order to expose them to shifts in the popular will and to enable those shifts to be reflected in parliamentary legislation.

It is noteworthy that no Australian law journal published this speech, even after its author was appointed to the High Court. It was published in New Zealand's *Otago Law Journal*, despite the fact that one would think New Zealanders would have only a peripheral interest in what an Australian judge might have to say. Indeed, Heydon's speech was widely derided by Australian commentators as a 'job application' for the place on the High Court recently vacated by Gaudron J.⁹⁵

Heydon carried this approach with him to the High Court. In an increasingly activist and interventionist High Court, he is now the primary dissenting judge, and as at 17 February 2012 had dissented in just under 50 per cent of the High Court judgments in which he took part.⁹⁶

Finally, Margaret Allars appears to be the only Australian academic in the pro-deference camp, although less solidly so than Gageler or Heydon. Allars has pointed out that Australian law *has* developed a doctrine of deference to administrative decision-makers, at least in matters of fact-finding and discretion, although Australian judges refuse to apply that label. In particular, there is a clear deference to expert decision-makers in Australian law, although this deference has been somewhat unevenly applied.⁹⁷ I would go further and add that the *Wu Shan Liang*⁹⁸ approach to interpretation of reasons is not simply a form of deference to expertise (although this is *part* of the reasoning) but a recognition that the Parliament has decided that certain decisions are to be made by administrators and not the courts. Otherwise, the courts *would* expect 'perfection' in administrative reasons.

Allars also points out that, in refusing to adopt the Canadian (and American) substantive review doctrine on the basis that it would open the way for merits review, there is a clear invitation presented by the jurisdictional fact doctrine to courts to trespass on the merits of a decision in any event.⁹⁹ While she does not clearly endorse the North American approach,

by pointing out the inconsistencies in the Australian rejection of that approach she could be said subtly to be supporting a deference-based approach to Australian administrative law.

Elsewhere, in a Canadian journal, Allars has argued that some critics of the deference approach are 'too extreme in their conception of deference as a complete submission by courts to the judgment of tribunals'.¹⁰⁰

Why the vitriol?

In my view, the violent reaction against any kind of deference in Australian administrative law by Australian commentators stems from a misunderstanding of the concept. Taken by itself, deference may have little meaning or could be regarded as a form of mere subservience. Certainly, when one takes the view that only 'errors of law' can form the basis for setting aside a decision, and that the courts function as a sort of angel with a flaming sword outside the Garden of Merits of Administrative Decisions, further 'deference' to administrative decision-makers could be unwarranted.

However, it must be remembered that deference is just one part of a package, known as substantive review in Canada and 'variable reasonableness' or proportionality in the UK. One must consider the whole package, not just the deference principle by itself, to make sense of the concept. Understood in this way, an Australian doctrine of substantive review would simultaneously give the courts *greater* scope to intervene in unreasonable decisions, without needless worrying about trespassing on 'merits review', while at the same time recognising the democratic credentials and expertise (including expertise in at least some determinations of law) of administrative decision-makers.

Let us take the extrajudicial musings of Hayne J as an example.¹⁰¹ I have already listed the principal objections given by Hayne J to any introduction of a concept of deference into Australian administrative law. If we take into account the fact that we should be looking at the whole concept of substantive review, of which deference is merely one part, his objections can be answered as follows:

Deference is only expressed in comparative or relative terms. The basis for comparison between different levels of deference is rarely, if ever, articulated in the case law.

This statement is correct insofar as it goes, but does not address the real issue. Deference can *only* ever be a relative term. A fully variable reasonableness standard, such as exists in the UK and as was proposed by Binnie J in *Dunsmuir*¹⁰² and by Binnie and Deschamps JJ in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,¹⁰³ would require the court to lay down some principles as to the 'intensity' of review. However, I do not think this is beyond the capacity of the courts. In any event, while the factors listed by *Dunsmuir* as determining whether a correctness or reasonableness standard of review¹⁰⁴ may not be exhaustive and could see reasonable minds come to different conclusions, it is as good an exercise as can reasonably be expected in clarifying a difficult area of law.

Identification of what responsibilities lie solely with the courts or the legislature and executive is not easy, and no basis for determining where responsibilities lie is discussed by the courts.

It is the role of the executive to make the decision required by the enabling legislation. It is the role of the courts to *review* that decision, including the merits or substance of the decision, and if necessary identify why the decision taken was unreasonable. The matter should then be remitted to the administrative decision-maker for redetermination.

Courts have held that 'legislative intent' is a crucial element in the interpretation of legislation, and that in a parliamentary system, when a majority government exists, the legislature is effectively controlled by the executive (this being the political party with control of the Lower House), unless checked by an effective opposition. The opposition and, indeed, the courts provide the main checks on political power exercised by the executive and legislature in a majority government. However, this does not mean that the courts must act in the role of *opposition* to the government. Deference is not subservience and giving an appropriate amount of 'weight' to the findings of an administrative decision-maker does not equate to obeying the dictates of the executive.

Terms such as deference, 'margin of appreciation' and 'relative institutional competence' (also known as 'expertise') are rarely if ever given any clear context.

This objection is very similar to the first raised by Hayne J. It is true that it is not always easy to identify a decision-maker's particular area of expertise. However, it is difficult to see why the decisions of people who work frequently with terms that are open to interpretation, such as 'genuine and continuing relationship'¹⁰⁵ or 'substantially lessening competition',¹⁰⁶ or the extraordinarily complex formulae for assessing child support¹⁰⁷ or family tax benefit¹⁰⁸, it is difficult to see why deference should *not* be given to determinations, including determinations of law, made by those decision-makers who make such decisions every day. This is especially the case when one considers that the High Court in *Hepples v Federal Commissioner of Taxation*¹⁰⁹ helpfully split three ways, depriving lower courts of even a majority opinion, in attempting to determine the meaning of ss 160M(5), 160M(6) and 160M(7) of the *Income Tax Assessment Act 1936*. If the High Court had simply determined whether the Commissioner's interpretation of these admittedly appallingly drafted provisions had been reasonable, a lot of difficulty could have been prevented.

Deference on the basis that a decision-maker obtains his or her (or its) powers by means of legislation passed by a democratically elected Parliament makes no sense, because once the courts are given a task, they must perform it.

It is indisputable that courts must perform a task they are given. Again, however, the 'democratic credential' is simply one reason for giving deference to an administrative decision, and is simply recognition that Parliament intended a particular decision to be made by a particular person or body. It does not dictate the result of the case.

The *Constitution* may require a court to apply valid legislation, and not simply 'rewrite it according to judicial whim', but the principle of the separation of powers cannot require a court to defer to the 'legislature's views as to how any particular laws should be interpreted or applied in any given case'.

Again, deference is not subservience. Deference is simply recognition of the fact that a decision-maker's interpretation of their 'home statute', or their fact finding processes, should be given appropriate weight in the circumstances. The interpretation of terms in the *Competition and Consumer Act 2010* (Cth) by the Australian Competition and Consumer Commission should be given significant (but by no means determinative) weight, as they are experts in the field. On the other hand, interpretations of (say) international taxation conventions made by the Child Support Agency (CSA) probably should not. This does not mean that any CSA determination on such matters will be *wrong*, simply that they have no more expertise than the court, and the court should make the decision for itself. It cannot be said that there is any abdication of judicial responsibility in showing deference to an administrative decision-maker, when one takes the *Dunsmuir* approach that deference is respect and not subservience.¹¹⁰

In my view, Crock's objections to concepts of deference could also be assuaged if she were to accept that deference is but one part of the 'package' of substantive review. She seems to

equate the term ‘deference’ with obsequiousness to government, or perhaps an unwillingness to make decisions contrary to government interests. The fact that Crock regards the High Court decision in *Lim*¹¹¹ as an exercise in excessive deference to government¹¹² shows, in my view, a misunderstanding of the term – *Lim* was a constitutional case and there was no administrative decision-maker to whom deference could be shown. Again, if it is remembered that deference is simply one part of an overall package of substantive review, it might be thought that Crock would have rather more time for it. Deference is simply an acknowledgement of the expertise of decision-makers, and the fact that reasonable minds may differ over the outcome of many administrative determinations. While the court must act where a decision is truly unreasonable, it should respect the credentials of the decision-maker at the same time. Crock has admitted that deference generally *should* be shown to administrative decision-makers on matters of fact,¹¹³ but why should it not be shown on questions of law with which the decision-maker has particular familiarity?

Crock’s violent reaction to any kind of privative clause in legislation may also be mollified when it is made clear that under the Canadian substantive review approach, a privative clause is never the be-all-and-end-all. Leaving aside s 75 of the Australian *Constitution*, a privative clause is simply one more indication that deference should be shown to the administrator. In Canadian law, a privative clause is viewed not so much as a command to the courts to leave an administrative decision alone, but a statement that the Parliament has decided that a particular decision-maker should have responsibility for making a particular decision. Courts will still intervene to set aside a truly unreasonable decision, but they must take the privative clause into account when determining the standard of review. This kind of approach could render obsolete the excruciating arguments as to whether an error of law is jurisdictional or non-jurisdictional in nature, and possibly end the argument about what is a jurisdictional fact and what is not, and it would certainly not offend s 75 of the *Constitution*. It would be a tremendous simplification of Australian administrative law.

The way forward for Australian administrative law

Australia now stands almost alone in the common law world in insisting that it does not undertake review of the merits of administrative decisions, and in refusing to countenance any kind of ‘variable unreasonableness’ approach. Canada, seemingly, has never concerned itself with the largely illusory distinction between the ‘legality’ and ‘merits’ of an administrative decision. Australia’s approach is unsustainable, even in theory, because as soon as one admits ‘reasonableness’ as a ground of review, the merits of the decision are in question, and the only issue is the degree of deference to be given to the decision-maker. In practice, the ‘merits / legality’ distinction has been all but abandoned, and we have seen that the High Court simply provides a high degree of deference to decision-makers on matters of fact (other than jurisdictional facts) and discretion, and little or no deference on questions of law. Australia would be better off recognising this fact, acknowledging the impossibility of distinguishing between ‘review of the merits’ and ‘review for error of law’, and moving to a system of variable intensity of reasonableness review.

It should not be thought that adoption of a Canadian doctrine of substantive review in Australia would somehow create a perfect system of administrative law. However, when an Australian court is faced with an application for judicial review of an administrative decision, it first has to determine whether the applicant’s complaint is about an error of law or fact.

Substantive review in Australia?

I believe that, contrary to the statement of Gummow ACJ and Kiefel J in *SZMDS*,¹¹⁴ now is the time for Australian administrative law to adopt a Canadian-type doctrine of substantive

review. Australian courts and commentators seem to have rejected this development because they see it as both contrary to the Australian *Constitution*, particularly s 75, and as generally undesirable.

Substantive review and section 75 of the Constitution

I have already argued that while ‘merits review’, in the sense of making a de novo decision on the basis of all available (including new) evidence is not an exercise of judicial power, ‘review of the merits’ is. As long as a court sticks to its constitutional role of *reviewing* an administrative decision, including on the basis of reasonableness, and not simply substituting its own decision, *Guo*-style,¹¹⁵ it is exercising judicial power and not executive power. There is no breach of s 75 of the *Constitution*. In any event, by applying the grounds of *Wednesbury* unreasonableness and irrationality, the courts already review the merits of administrative decisions, albeit with a high degree of deference on matters of fact or discretion. It is simply hypocritical to argue otherwise.

The main reason, however, for moving to a system of substantive review, including appropriate deference to the decision-maker, is that it is fairer and simpler for both applicants and decision-makers. It is fairer because the courts can examine the actual impact of the decision on the individual in question and the justification for that impact, without asking obtuse questions about whether a particular line in a decision constitutes an error of law or merely an incorrect finding of fact. It is fairer to the decision-makers because their democratic credentials and expertise are acknowledged and respected, without these qualities *binding* the court. It is simpler because courts and the parties before them do not have to worry endlessly about the meaning of terms like ‘error of law’ and ‘jurisdictional error’.

The lack of an Australian bill of rights

Another possible objection to the introduction of some form of substantive review in Australia is that Australia, at the Federal level, lacks any Bill of Rights, whether constitutional (such as the Canadian Charter) or legislative (such as the *Human Rights Act* in the UK). The argument is that if Australia has no Bill of Rights, how can courts determine which rights are ‘fundamental’ to an applicant for judicial review and which are not?

In my opinion this objection can be overcome. Firstly, as a matter of common law, the High Court has found that rights such as the right to life,¹¹⁶ freedom from arbitrary imprisonment¹¹⁷ and freedom from arbitrary search and interception of communications¹¹⁸ are of the top tier of individual rights. Secondly, the High Court has been prepared on occasion to imply the existence of rights from the *Constitution*. A discussion of the ‘implied rights’ cases is beyond the scope of this paper, but the High Court has made it clear in cases such as *Australian Capital Television Pty Ltd v Commonwealth*¹¹⁹ and *Langer v Commonwealth*¹²⁰ that because the *Constitution* sets up a system of representative democracy, legislative restrictions on ‘political speech’ will be very difficult to justify.

Finally, Australia is a party to most, if not all, of the major multilateral human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CROC) and UN conventions against racism and discrimination against women. In *Minister for Immigration and Ethnic Affairs v Teoh*, Mason CJ and Deane J stated that ‘ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights’,¹²¹ and while the overall status of the *Teoh* judgment is uncertain,¹²² this statement seems unexceptionable. If Australia has gone to the trouble to

sign and ratify an international instrument dealing with individual rights, those rights should be regarded as important for the sake of an ‘anxious scrutiny’ or proportionality approach to judicial review of administrative action.

While some complexities in a substantive review approach to judicial review cannot be avoided, such as the determination of the appropriate standard of review where different factors seem to point in different directions, the entire process could be much faster and, perhaps more importantly, applicants would feel more as if they have been *heard* on the merits of their case. Compare this to a decision under the current model of Australian judicial review, where applicants are regularly confused by judgments attempting to explain why the matters in question did not relate, for example, to a jurisdictional fact and cannot be reviewed. The adoption of a Canadian or UK ‘substantive review’ approach, avoiding the flaws in those systems as identified above, and including an appropriate degree of deference to the decision-maker, is simply a better way of ensuring administrative justice, which, despite the protestations in *Attorney-General (New South Wales) v Quin*,¹²³ should be the goal of a reviewing court.

Endnotes

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- 8 (1910) 11 CLR 1.
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- 11 (1942) 66 CLR 161.
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- 13 *Ibid* 614-5.
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- 18 *Supra* n15, [104].
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- 21 (2001) 206 CLR 323.
- 22 (1995) 184 CLR 163, 179.
- 23 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 [163].
- 24 *Anisminic Pty Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
- 25 *Supra* n15, [13].
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- 33 *Singh*, *supra* n123, [170].
- 34 [2010] HCA 16.
- 35 *Ibid* [124].
- 36 [2008] 1 SCR 190, [47].
- 37 *Supra* n34, [23] and [24].

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- 39 Ibid.
- 40 Ibid [43].
- 41 Ibid [36].
- 42 [2012] FCAFC 58, [15].
- 43 Ibid [8].
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- 45 Ibid [47].
- 46 Peter MacIver, 'The State of Play in Administrative Law – Logic and Reason: Too Much to Ask For?', Australian Government Solicitor *Administrative Law Forum*, 14 October 2010, [61].
- 47 Supra n34, [28].
- 48 [2011] HCA 32.
- 49 Supra n29.
- 50 For example, Stephen Rebikoff seems to equate the concept of deference with judicial cowardice in the face of a critical Minister. See Rebikoff, 'Comment: *Minister for Immigration and Multicultural Affairs v Yusuf* – One Door Closed, Another Opened?' (2001) 29 *Federal Law Review* 453, 474.
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- 113 Mary Crock, 'Privative Clauses and the Rule of Law', supra n 60, 73.
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MAKING SENSE OF *MOMCILOVIC*: THE COURT OF APPEAL, STATUTORY INTERPRETATION AND THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006*

Bruce Chen*

Since the High Court's landmark decision on the *Charter of Human Rights and Responsibilities Act 2006* in *Momcilovic v The Queen*, the Victorian Court of Appeal has had the opportunity to apply the High Court's findings on several occasions. This paper examines four key cases to shed light on the current state of play regarding the *Charter* and statutory interpretation.

On 8 September 2011, the High Court of Australia handed down its decision in *Momcilovic v The Queen (Momcilovic)*,¹ the first to deal extensively with the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter*). The High Court made significant findings in respect of the interpretive provision under the *Charter* - section 32. Section 32(1) provides that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. The High Court held that section 32(1) did not replicate the extensive effects of section 3 of the United Kingdom *Human Rights Act 1998*, which permits legislation to be interpreted in a way that may depart from parliament's original intention.

However, as the High Court's decision was delivered by way of six separate reasons for judgment, it has been difficult to determine the *ratio* in respect of certain matters. In particular, while section 32(1) was considered to amount to an ordinary principle of statutory interpretation, its precise effect was left unclear. So too the role of s 7(2) of the *Charter*, if any, in respect of section 32(1). Section 7(2) of the *Charter* provides that '[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors', including those set out under that subsection.

This paper examines four cases in which the Victorian Court of Appeal (the Court) has sought to apply *Momcilovic* with respect to the *Charter* and statutory interpretation.

Slaveski v Smith

In *Slaveski v Smith*,² the Court was predominantly concerned with the correct interpretation of section 24 of the *Legal Aid Act 1979* (Vic), which provides that Victoria Legal Aid 'may' provide legal assistance to a person in certain circumstances. More specifically, the Court was asked to determine whether certain rights to legal assistance in criminal proceedings protected by sections 25(2)(d) and (f) of the *Charter* operated to transform this discretionary power into an entitlement, such that an eligible person must be given legal aid.

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In considering whether the provisions of the *Legal Aid Act*, interpreted in light of the *Charter*, provided for an entitlement to legal aid, the Court (per Warren CJ, and Nettle and Redlich JJA) noted that the High Court in *Momcilovic* by way of a 6:1 majority held that section 32(1) 'does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision'.³ Rather, section 32(1) required that the purpose of a provision be discerned 'in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*'.⁴ The Court called upon the judgment of French CJ in *Momcilovic* as being representative of the High Court's position on this issue, observing that it 'emerges from *Momcilovic* that the effect of s 32(1) is limited'.⁵

The Court set out a passage of French CJ's judgment, that section 32(1) requires:

statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application...⁶

The principle of legality encompasses a well-recognised presumption at common law that parliament does not intend to interfere with fundamental common law rights and freedoms except by clear expression of an unmistakable and unambiguous intention.⁷ Such rights and freedoms include, for example, private property rights,⁸ the privilege against self-incrimination,⁹ access to the courts,¹⁰ and open justice.¹¹ The significance of this principle has recently been reaffirmed by the High Court.¹² Pursuant to section 32(1) of the *Charter*, such a presumption is now also applied to a broader range of rights, some of which are lesser protected or unprotected by the common law, such as the right to privacy (section 13(a) of the *Charter*) and the right to freedom of expression (section 15(2) of the *Charter*). That is the 'wider field of application' to which French CJ refers.

In *Slaveski*, the Court went on to lay down the following principles as to the precise effect of section 32(1) of the *Charter*:

Consequently, if the words of a statute [sic] are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an usual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.¹³

Thus, it can be seen that section 32(1) has been interpreted as operating in a truly orthodox fashion. It should be noted that *Slaveski* is now the leading authority on the operation of section 32(1), such that it is arguably no longer necessary to refer back to the High Court's decision in *Momcilovic*. The above passage has been applied by the Trial Division of the Supreme Court as the definitive statement on what is permitted by section 32(1) in interpreting legislation.¹⁴

Applying those considerations to the relevant provisions of the *Legal Aid Act*, the Court noted that, according to ordinary principles of statutory interpretation, the word 'may' could be read as 'shall' or 'must' 'where the particular context of words and circumstances make it apparent that Parliament intended a statutory power to be exercised in a particular way in certain events'.¹⁵ Nonetheless, the Court found that section 32(1) did not transform the discretionary power to grant legal aid under the *Legal Aid Act* into a mandatory one.

The Court outlined a number of factors relevant to this determination, but most significantly in the author's view, it held that the human rights protected by sections 25(2)(d) and (f) of the *Charter* were 'expressly conditioned upon the existence of an entitlement to legal assistance under the Legal Aid Act'. Those rights by their own terms were not 'absolute and unqualified', and as such, were 'not intended to alter' the pre-*Charter* interpretation that the power was discretionary.¹⁶

Due to the qualified scope of the human rights concerned, the Court had no need to consider the limitation of human rights and whether section 7(2) of the *Charter* had any role to play in section 32(1). However, this issue was given consideration in *Noone v Operation Smile (Australia) Inc.*

Noone v Operation Smile (Australia) Inc

In this case,¹⁷ proceedings had been brought by the Director of Consumer Affairs Victoria against a former dentist and his associated companies, in respect of claims that certain alternative therapy treatments offered by a clinic they operated were effective in treating cancer and had scientific support. The Director alleged that these claims amounted to misleading and deceptive conduct in trade or commerce contrary to section 9(1) of the *Fair Trading Act 1999* (Vic). Amicus curiae had appeared in the proceedings below, and submitted that section 9(1) should be construed in light of the right to freedom of expression under section 15(2) of the *Charter* as including a *mens rea* element.

On appeal to the Court, Warren CJ and Cavanough AJA looked to the purpose of the prohibition on misleading and deceptive conduct in trade or commerce under the *Fair Trading Act*. Their Honours discerned that its 'clear purpose' was to reproduce in Victorian law the consumer protection regime under the Commonwealth *Trade Practices Act 1974* (and thus unifying the two). They rejected the argument that the statutory prohibition under Victorian law, interpreted pursuant to the *Charter*, required the incorporation of a *mens rea* element. Such an interpretation, it was held, would make the provision 'radically different from its federal counterpart', and thus would not be consistent with the purpose of the provision.¹⁸ As provided by section 32(1), statutory provisions are to be interpreted compatibly with human rights so far as it is possible to do so *consistently with their purpose*.

In a separate judgment, Nettle JA expressed a similar view.¹⁹ However, his Honour gave further consideration to, and appeared to place greater emphasis on, the scope of the right to freedom of expression. Based on comparative jurisprudence, Nettle JA found that the right to freedom of expression under the *Charter* did not confer a right to engage in misleading and deceptive conduct, and that even if it did, the absence of a *mens rea* requirement would not offend the *Charter*.²⁰

These findings of the Court were sufficient to dispose of the appeal.

However, it is the further discussion by the Court in respect of section 7(2) which bears greater significance to the *Charter* jurisprudence. As alluded to above, what amounts to an interpretation of a statutory provision *compatible* with human rights pursuant to section 32(1) was unclear prior to *Momcilovic*, and remains so. The *Charter* harbours no definition of the word, 'compatible'. This has given rise to conflicting arguments. On the one hand, it has been argued that considerations relating to justification of human rights limitations must be taken into account pursuant to section 7(2) before any incompatibility may be found. On the other hand, it has been argued that section 7(2) is relevant only after incompatibility has been found, and upon the Supreme Court giving consideration to making a 'declaration of inconsistent interpretation' pursuant to section 36 of the *Charter*.

The Court of Appeal in *The Queen v Momcilovic*²¹ had determined that the latter approach was correct. The practical effect of this determination was to narrow the range of meanings which could potentially be given to a statutory provision, so as to be 'compatible' with human rights. As such, there was a greater likelihood that a statutory provision could be found incompatible with human rights. However, although the Court was unanimous in its findings on section 7(2), the High Court was deeply divided by this issue on appeal.

In *Noone*, Warren CJ and Cavanough AJA dissected the various judgments of the members of the High Court. Based on this analysis, their Honours observed that there seemed to be a 4:3 majority in favour of the proposition that section 7(2) *did* inform the interpretation process under section 32(1), but that two of the four members in the majority on that point were in dissent as to the final orders (Hayne and Heydon JJ). Chief Justice Warren and Cavanough AJA therefore concluded that no *ratio* could be drawn from *Momcilovic* on this issue. Their Honours considered that there was 'at least some doubt as to whether the Court of Appeal is bound to follow its previous decision in *Momcilovic*', but otherwise left the question open.²²

Justice Nettle agreed that there was no binding majority view in *Momcilovic*. However, his Honour took a different tack, considering that it was appropriate to adhere to the Court's previous finding on this point 'until and unless the High Court determines that it is incorrect'.²³

Accordingly, while the Court's reasons on this point in *Noone* are both *obiter* and non-conclusive, the joint judgment of Warren CJ and Cavanough AJA suggests that the Court may, where appropriate, be amenable to reconsidering its position that section 7(2) has no part to play in the interpretation of legislation. Nevertheless, until then, the Trial Division of the Supreme Court has, when confronted with this choice, shown preference for the approach of Nettle JA.²⁴ The current authority is that of the Court in *Momcilovic* prior to its appeal.

However, it should be noted that the position taken by the Attorney-General²⁵ and the Victorian Equal Opportunity and Human Rights Commission²⁶ (both of whom have rights of intervention under the *Charter*) is that section 7(2) *does* inform the interpretation process under section 7(2).

WBM v Chief Commissioner of Police

In *WBM v Chief Commissioner of Police*,²⁷ the appellant had pleaded guilty and received an aggregate sentence of imprisonment for knowingly possessing child pornography, making/producing child pornography, as well as other non-sexual offences. Subsequently, the *Sex Offenders Registration Act 2004* (Vic) was enacted. It provided for a sex offender registration scheme for certain offenders who had committed 'registrable offences'.

The issue before the Court was whether the appellant was subject to the scheme. This turned upon the proper construction of the definition of an 'existing controlled registrable offender' under the *Sex Offenders Registration Act*. It required that a person be 'serving' a sentence for a 'registrable offence' immediately before the date of enactment of the Act. The appellant argued that he did not meet the definition. His primary argument was that on the natural, grammatical meaning of the definition, he was not 'serving' the sentence because it was an aggregate sentence for numerous offences, and only the offences related to child pornography were registrable. It was therefore not possible to show that he would have fallen within the definition had he only been sentenced for the two registrable offences. In respect of the *Charter*, the appellant relied in support on the right under section 13(a) 'not to have his ... privacy unlawfully or arbitrarily interfered with'.

Aside from issues as to retrospectivity of the *Charter's* operation, the Court (per Warren CJ, Hansen JA and Bell AJA) was unanimous in finding that the *Sex Offenders Registration Act* did not limit the appellant's right to privacy, since it did not give rise to an 'arbitrary' interference (nor was it unlawful).

Chief Justice Warren (Hansen JA agreeing) found that the aims of the legislation were to reduce the likelihood of re-offending, facilitate the investigation and prosecution of future offences, prevent registered sex offenders working in child-related employment, and empower the monitoring of compliance with the legislative requirements. Her Honour considered that these aims were 'legitimate' and 'important' and could within reason 'provide a basis for abrogating certain fundamental rights'. It was also considered 'in the best interests' of society (and sex offenders) that sex offenders be deterred from re-offending, and that those who re-offend or attempt to be capable of being located swiftly. The legislation was 'directly linked to achieving these goals' and there was 'no practical, more minimal, alternative'.²⁸

Consistently with *Slaveski*, Warren CJ asserted that:

The interpretative exercise in s 32 (1) of the Charter merely demands that the Court select the interpretation which is compatible (or the least incompatible) with human rights. The constructions urged by the parties are compatible with the Charter right. As any construction is compatible, the Charter can provide no further guidance.²⁹

Justice Bell agreed that sex offender registration schemes of this kind were not incompatible with human rights, because their purpose was to ensure that children were protected from harm.³⁰ Moreover, the inclusion of offenders sentenced in the past was not of itself arbitrary. His Honour examined in detail the confined scope of application of the definition for 'existing controlled registrable offender' in reaching this finding. Justice Bell also expressed that he 'gave weight to the method chosen by the legislature for selecting which past offenders are to be subject of the child-protecting scheme'.³¹

As is evident from the discussion above, the Court unanimously found that the *Charter* arguments offered no assistance to the appellant.

The Court also made a number of significant observations on the common law principle of legality (the appellant having argued there had been an abrogation of the common law right or freedom to carry on one's own business or trade). The Court unanimously agreed that the principle of legality did not involve justification considerations. As Warren CJ stated:

When applying the principle of legality one takes the right at its highest. It is not appropriate to consider whether any abrogation of a common law fundamental right or freedom is justified. It must be kept in mind the fact that the principle of legality does not require one to look at whether the intended end justifies the proposed means. In other words, the principle of legality is engaged when fundamental rights and freedoms are threatened even where the Parliament had a good reason to abrogate them such as to promote an overall increase in rights and freedoms for all.³²

The strength of the common law principle of legality, where it is applicable, can thus be contrasted with that of the *Charter* due to the principle's absence of justification considerations (should section 7(2) of the *Charter* indeed be found to have a role to play in interpretation). Nevertheless, Warren CJ noted that the strength of the principle may vary according to the significance of the right, the context in which it is raised, and depending on whether the right has been weakened or qualified over time (including by legislation).³³

Taha and Brookes

The last of this quartet of cases is *Victorian Toll v Taha; Victoria v Brookes*,³⁴ a case handed down in March this year.

That case dealt with the interpretation of section 160 of the *Infringements Act 2006* (Vic), which pursuant to subsection (1) conferred on the Magistrates' Court the power to order that an 'infringement offender' be imprisoned for a specified period for non-payment of fines. Subsections (2) and (3) contemplated the making of less severe orders for certain infringement offenders, such as those with a mental or intellectual impairment, disorder, disease or illness. Two appellants were involved in these proceedings. One possessed an intellectual disability, and the other suffered from a mental illness.

The question before the Court was whether the proper construction of section 160 of the *Infringements Act* required the Magistrates' Court to take into account the options available under subsections (2) and (3), before making an order for imprisonment under subsection (1).

The Court answered this question in the affirmative. Justice Nettle reached his conclusion on the basis of ordinary principles of statutory interpretation, and considered that his construction was supported by the *Charter*. Justice Nettle equated section 32(1) with the common law principle of legality, consistently with the approach previously adopted in *Slaveski* (his Honour having been one of the judges of the Court in that case). Justice Tate also reached her findings on the basis of ordinary principles of statutory interpretation (although her Honour's judgment went further on *Charter* grounds, as discussed below). Justice Osborn agreed with the findings of Nettle and Tate JJA on non-Charter grounds.

Although the operation of section 32(1) of the *Charter* was not central to the determination of the appeal, the judgment of Tate JA is interesting to note because it revisits the effect of section 32(1), as well as the role of section 7(2), in light of the High Court's reasoning in *Momcilovic*.

In relation to section 32(1), Tate JA considered that the High Court's findings in *Momcilovic* 'should not be read as implying that s 32 is no more than a "codification" of the principle of legality'.³⁵ In her Honour's view, not all six members of the High Court had shared this position. Justice Tate reproduced and relied upon this passage of Gummow J's judgment (Hayne J agreeing):

[T]he reference to 'purpose' in such a provision as s 32(1) is to the legislative 'intention' revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation. There falls within the constitutional limits of that curial process the activity which was identified in the joint reasons in *Project Blue Sky* ... [where] McHugh, Gummow, Kirby and Hayne JJ, before setting out a lengthy passage from Bennion's work *Statutory Interpretation*, said:

'The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

That reasoning applies a fortiori where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).³⁶

Thus, Tate JA went on to say that in *Momcilovic*:

there was recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, *might more stringently require* that words be read in a manner 'that does not correspond with literal or grammatical meaning' than would be demanded, or countenanced, by the common law principle of legality.³⁷

It can therefore be seen that the position adopted by Tate JA arguably goes beyond that previously stated by the Court, in that her Honour appears to consider that the effect of section 32 extends beyond the principle of legality. While it is too early to remark on what effect her Honour's reasons for judgment have had on this discrete point, a number of preliminary observations can be made.

Firstly, Tate JA's views on section 32(1) are in *obiter*. Her Honour ultimately considered that the question of interaction between section 32(1) and the principle of legality 'does not arise here', and it was sufficient to treat section 32(1) as 'at least reflecting the common law principle of legality'. Secondly, Tate JA's view appears to be drawn from the findings of only two judges of the High Court in *Momcilovic*. Thirdly, Tate JA's view does not appear to be shared by other judges of the Court in this case or in *Slaveski*. Fourthly, it could be said that Tate JA's view, in any event, provides section 32(1) with only a slightly strengthened effect, to 'more stringently require' that legislation be interpreted compatibly with human rights via methods which fall within ordinary principles of statutory interpretation. How this would operate differently in practice remains to be seen.

On a final and brief note as to the role of section 7(2), Tate JA adopted the same tentative approach as Warren CJ and Cavanough AJA. That is, her Honour declined to follow the approach of Nettle JA in adhering to the Court's pre-*Momcilovic* findings (ie section 7(2) does not form part of the interpretation process under section 32(1)).

Summary of discussion

Based on the above discussion, the following points can be drawn from the Court's jurisprudence on interpreting legislation compatibly with *Charter* rights:

- Following *Momcilovic*, the Court has equated section 32(1) - the interpretive provision - with the principle of legality (or in Tate JA's view, at least as broad as the principle of legality).
- As section 32(1) amounts to an ordinary principle of statutory interpretation, its effects are fairly orthodox. *Slaveski v Smith* is the leading authority on what is permitted under section 32(1) when interpreting legislation.
- Whether section 7(2) has any role to play under section 32(1) remains unresolved. The views of Warren CJ, Tate JA and Cavanough AJA indicate that the Court might ultimately reconsider its position, and find that a statutory provision which limits a human right will only be incompatible where the limit is not justifiable under section 7(2). However, the current position is that section 7(2) does not inform the interpretation process.
- There is likely to be a renewed focus on the operation of the common law principle of legality and the common law rights which fall within its protection. *WBM* provides a good example. In that case, the Court considered common law rights under the principle of legality and human rights protected by the *Charter* side by side.

Steps for statutory interpretation

Pulling these threads together, the steps to interpreting legislation in light of the *Charter* can be summarised succinctly. The steps proposed below adopt the position taken by the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission in respect of section 7(2).

- Firstly, determine the meaning of the statutory provision applying ordinary principles of statutory construction.
- Secondly, determine whether the statutory provision on its ordinary construction limits a human right protected by the *Charter*.
- Thirdly, if the human right is limited, determine whether the limit is reasonable and demonstrably justified pursuant to s 7(2) of the *Charter*.
- Fourthly, if the limit is not reasonable and demonstrably justified, seek to give the statutory provision a meaning that is compatible with human rights (unless the words of the statutory provision are clear and not capable of another meaning). This meaning must be consistent with the purpose of the statutory provision.

Conclusion

The Court has in a relatively short period of time provided greater clarity to the lengthy and disparate findings of the High Court in *Momcilovic*. However, as this paper has demonstrated, there are a number of aspects to be finally determined or further developed in the near future. Nevertheless, the jurisprudence in its present state provides for a solid framework in interpreting statutes compatibly with human rights protected by the *Charter*.

Postscript

In August 2013, the Court handed down a further decision in relation to the *Charter* and the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). In *Nigro & Ors v Secretary to the Department of Justice*,³⁸ the Court (per Redlich, Osborn and Priest JJA) reiterated the observations made in *Slaveski v Smith* equating section 32(1) of the *Charter* with the principle of legality. The issue of whether section 7(2) has any role to play under section 32(1) was again left unresolved by the Court. Furthermore, the Court in *obiter* cast doubt on an issue which had not previously been fully considered by the Court, namely, whether section 32(1) could be applied so as to confine broadly-conferred statutory discretions, such that they can only be exercised compatibly with human rights.

Endnotes

- 1 (2011) 245 CLR 1.
- 2 [2012] VSCA 25.
- 3 *Ibid* [20].
- 4 (1998) 194 CLR 355.
- 5 [2012] VSCA 25, [23].
- 6 (2011) 245 CLR 1, 50.
- 7 See *Coco v The Queen* (1994) 179 CLR 427, 437-8 per Mason CJ, and Brennan, Gaudron and McHugh JJ.
- 8 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 per French CJ.
- 9 *Hammond v Commonwealth of Australia* (1982) 152 CLR 188, 199-200 per Murphy J (Gibbs CJ, Mason, Brennan and Deane JJ agreeing).
- 10 *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 160 per Dawson and Gaudron JJ.
- 11 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520-1 per French CJ.
- 12 See *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, [42]-[46] per French CJ, [145]-[152] and [159]-[160] per Heydon J; *Monis v The Queen* [2013] HCA 4, [60] per French CJ and [331] per Crennan, Kiefel and Bell JJ; and *X7 v Australian Crime Commission* [2013] HCA 29, [86]-[87] per Hayne and Bell JJ, [158] per Kiefel J.

- 13 [2012] VSCA 25, [24].
14 See *A & B v Children's Court of Victoria & Ors* [2012] VSC 589, [102]-[110] per Garde J; *Magee v Delaney*
[2012] VSC 407 [168]-[173] per Kyrrou J.
15 [2012] VSCA 25, [26].
16 *Ibid* [27]-[29].
17 *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91.
18 *Ibid* [16]-[20].
19 *Ibid* [144], [166].
20 *Ibid* [147] ff.
21 (2010) 25 VR 436.
22 [2012] VSCA 91, [28]-[31].
23 *Ibid* [142].
24 *Magee v Delaney* [2012] VSC 407, [163].
25 See *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91;
and *Magee v Delaney* [2012] VSC 407.
26 See *Aitken & Ors v The State of Victoria - Department of Education & Early Childhood Development* [2012]
VCAT 1547; and *Bare v Small* [2013] VSC 129.
27 [2012] VSCA 159.
28 *Ibid* [115], [117] per Warren CJ, [133] per Hansen JA.
29 *Ibid* [123]; see also [97].
30 *Ibid* [204].
31 *Ibid* [205].
32 *Ibid* [80] per Warren CJ (footnotes omitted); see also [159] per Bell AJA.
33 *Ibid* [84]-[86].
34 *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37.
35 *Ibid* [189].
36 (2011) 245 CLR 1, 92 per Gummow J (her Honour's emphasis) (footnotes omitted); see also 123 per Hayne
J.
37 [2013] VSCA 37, [190] (footnote omitted) (emphasis added).
38 [2013] VSCA 213.

THE CONSTITUTIONALISATION OF ADMINISTRATIVE LAW: NAVIGATING THE CUL-DE-SAC

*Daniel Reynolds**

The constitutionalisation of administrative law is a topic that is difficult to get wildly excited about,¹ yet perhaps the time has come to at least begin politely feigning interest in it. No other trend can be said to so comprehensively account for the impasse at which Australian administrative law now finds itself, with one scholar describing the *Constitution* as ‘the dominant influence upon judicial review of administrative action in Australia’,² and another going further to claim that ‘our administrative law is now firmly a creature of constitutional legality’.³ This paper follows the approach used elsewhere⁴ of treating administrative law as simply the judicial review of administrative action, albeit a simplistic approach that has been cogently critiqued by some as idolising courts at the expense of equally valid alternative forums for administrative review⁵ (namely tribunals, ombudsmen and other dispute resolution options).⁶ Indeed, it has been argued – though far from universally accepted – that the growth of these other mechanisms has pushed judicial review to the periphery of administrative law,⁷ a trend that has only been quickened by the constitutionalisation of judicial review. In using the term ‘constitutionalisation’, I do not mean the entrenchment *in the Constitution* of modern principles through referenda⁸ but rather the judicial ‘freezing’ of common law doctrines by according them constitutional status so as to render them immune from alteration by parliaments and non-constitutional courts.⁹

This paper explores the topic of constitutionalisation in three main parts. Part I gives a brief history of the constitutionalisation of administrative law, retracing especially the developments made in a series of cases beginning in the 1990s and culminating (so far) in the 2010 case of *Kirk*.¹⁰ Part II highlights the major issues emerging from this new constitutionalised administrative law, exploring amongst other things the centrality of jurisdictional error, the limits on qualitative judicial review, and the pervasive influence of the separation of powers doctrine. Finally, in Part III I attempt to provide a solution to this stalemate – or at least suggest a paradigmatic shift that might move others to solve it – the crux of which is a multidisciplinary approach employing the various modes of constitutional interpretation to achieve more desirable, or at least more flexible, doctrinal outcomes.

I A brief history of modern administrative law

Pre-1970s: a common law genesis

For the better part of a century before the statutory reforms of the 1970s, the *Constitution* was fully operational, including section 75(v) and the appearance of a structural separation of powers. Why, then, is the *Constitution* seen to have a central influence on administrative law today when in this early period it simply informed the development of the common law in a general sense? The best answer is that, though the *Constitution* informed administrative law jurisprudence even in its formative years, the courts’ focus during this time was on

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adopting and elaborating core doctrinal concepts, such as jurisdictional and non-jurisdictional error, natural justice,¹¹ principles governing the exercise of discretion, and so on.¹² These principles were firmly embedded in the common law¹³ rather than in any constitutional analysis and, indeed, ‘little progress’¹⁴ was made in the first period of the High Court’s life in resolving technical questions about remedies¹⁵ or the precise effect of section 75(v) on administrative law.

1970s and 1980s: the statutory era

Prompted by the recommendations of the Kerr Committee,¹⁶ which argued that a more clearly delineated list of substantive grounds of review should be enacted in legislation,¹⁷ Federal Parliament spent much of the 1970s and 1980s rewriting Australia’s administrative law. With the advent of the *Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR)*, judicial review was re-oriented from remedies to grounds of review and the availability of judicial review was redefined by reference to ‘decisions of an administrative nature made under an enactment’. The High Court appeared to be ‘in sympathy and in tune with the spirit of 1970s reforms’,¹⁸ abandoning in large part its technicality-centred reasoning for a more substantive, socially alert jurisprudence. This can be seen, for instance, in its keen interest in natural justice, or the battle lines drawn through the controversial new doctrine of legitimate expectations¹⁹ and, more generally, the court’s activity during this time has been described (often pejoratively) as ‘judicial activism’.²⁰

In 1983, an amendment was made to the *Judiciary Act 1903 (Cth)* granting the Federal Court a statutory jurisdiction that mirrored the original jurisdiction conferred on the High Court for judicial review of administrative decisions.²¹ The system worked more or less harmoniously for the following decade, with the majority of administrative law litigation proceeding under the *ADJR Act*; however, by 1992, Parliament had taken the view that the Federal Court was exercising its judicial review jurisdiction in the context of migration decision-making somewhat over-zealously.²² In response, it created a cluster of merits review tribunals to assume some of the court’s caseload²³ and, in 1995, limited the Federal Court’s jurisdiction to review of migration decisions generally.²⁴ With Federal Court judicial review severely curtailed by the early 1990s amendments and the field of operation of the *ADJR Act* narrowed by judicial interpretation²⁵ and legislative amendment,²⁶ interest began to rekindle in the only avenue of judicial review to remain unaffected by the suite of reforms – the original jurisdiction of the High Court under section 75(v).²⁷

1990: *Quin’s Case* – the duty of courts is to declare the limits of executive power

It is in this legislative context that we see the first of four cases that have most directly paved the way for the constitutionalisation of administrative law. *Quin’s case*²⁸ is famous for all the wrong reasons, being a case which, on the facts, purported to deal with the issue of judicial tenure in the context of the overhaul of the outmoded Court of Petty Sessions; yet, in rejecting the plaintiff’s claim that, by reason of natural justice, he was entitled to be re-appointed in the newly formed Local Court of NSW, Justice Brennan made a number of remarks which were rapidly to attain canonical status in Australian administrative law. Most memorably, he held that:

The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*²⁹; ‘It is, emphatically, the province and duty of the judicial department to say what the law is.’ The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power.³⁰

A number of points emerge from this *Quintessential* dictum. First, Justice Brennan’s great insight was to recognise in *Marbury v Madison* a broader principle of the rule of law and to

apply that principle as the foundation of judicial review generally.³¹ Second, the focus of judicial review here is directed at the conduct of decision-makers rather than the effect such conduct may have on persons aggrieved by their decisions.³² Third, it is well-documented that Brennan J was already sceptical of doctrines like *Wednesbury* unreasonableness, it being too proximate for his liking to merits review and, in this sense, the judgment in *Quin* is simply the natural conclusion that had been impending for years prior.³³ Fourth, and implicit in the above three points, Justice Brennan's view is intimately connected with the notion of separation of powers; this theme will be of central importance in this paper. Finally, as Groves points out, it is noteworthy that though the judgment is replete with constitutional *ideas*, it is devoid of any references to the *Constitution* itself.³⁴ Nonetheless, the groundwork for the cases to come was decisively laid at this point.

2000: *Aala's Case* – constitutional writs and jurisdictional error

In *Aala*,³⁵ the High Court entertained its first migration case in 15 years, brought under section 75(v) on the ground of want of procedural fairness.³⁶ The judgment in *Aala's* case essentially amounted to a repackaging of two key administrative law concepts; prerogative writs and jurisdictional error. Though prohibition and mandamus were already prerogative writs available at common law to restrain or compel certain executive actions, the High Court, in hearing a case brought explicitly under its original constitutional jurisdiction, rebranded these as 'constitutional writs'. These writs, it held, had existed since 1900 to serve the constitutional purpose of ensuring Commonwealth officers remained within their jurisdictional limits.³⁷ The reasons for this can best be summarised by the High Court's desire to break with English tradition, intentionally disavowing the notion that the court might be exercising any monarchical power, and creating in the same breath a supposedly Australian family of writs that could be issued even against superior federal courts, and that had an explicitly constitutional basis.³⁸

As these constitutional writs could only issue when a Commonwealth officer exceeded jurisdictional limits, the other result of this reasoning was to firmly entrench jurisdictional error as the sole basis for section 75(v) judicial review.³⁹ Cane accounts for the largely technical approach adopted by the court here as the result of a shift in the 'ideological centre of gravity' between the Mason Court and the Gleeson Court, in which a distinctly less policy-oriented style of reasoning can be detected.⁴⁰ So it was that jurisdictional error 'came of age',⁴¹ taking on a new life as the definitional threshold to be met before the High Court's jurisdiction to grant remedies against the executive could be enlivened; this result clearly echoes Justice Brennan's reasoning in *Quin*.

2003: *S157* – an entrenched minimum content of judicial review

If *Aala* was concerned with the *nature* of judicial review under section 75(v), *S157*⁴² was concerned with its availability. Four years prior in *Abebe*,⁴³ the High Court had upheld the constitutionality of legislative reforms in the 1990s designed to limit the Federal Court's jurisdiction to undertake judicial review of migration decisions, inadvertently revitalising in the process its own jurisdiction to hear such cases.⁴⁴ In *S157*, the High Court drew a line in the sand with respect to privative clauses, holding that there existed a constitutionally entrenched minimum standard of judicial review that Parliament could neither abrogate nor limit.⁴⁵ Again, this case builds on the logic of its predecessors, but it goes a step further to declare judicial review a constitutionally guaranteed right, this is perhaps the most pivotal moment in the constitutionalisation of administrative law.

2010: Kirk – an integrated federal constitutional administrative law system

What S157 did for Federal judicial review, *Kirk*⁴⁶ did for state judicial review. The effect of the judgment was essentially to import the doctrines expounded over the past two decades at the federal level to the state context and, in the process, create an integrated and unitary common law of judicial review applicable to all Australian jurisdictions. While previously it had been open to state parliaments to enact privative clauses precluding judicial review of executive action,⁴⁷ that position was reversed with the finding that there exists a constitutionally entrenched minimum level of judicial review at the state level.⁴⁸ Chapter III and section 73(ii) of the *Constitution* are predicated upon the continuing existence in each state of a 'State Supreme Court'.⁴⁹ A defining characteristic of such a court is, following *Quin*, its supervisory jurisdiction to 'enforce the limits on the exercise of State executive and judicial power'.⁵⁰ Finally, no parliament could therefore enact legislation that would alter the character of a State Supreme Court such that it would cease to meet the constitutional description.⁵¹

The judgment in *Kirk* was well-received, winning 'unmitigated admiration'⁵² from commentators who praised it for establishing a constitutional symmetry between the two species of judicial review (Federal and state), for filling a significant gap in the integrated character of the Australian judiciary,⁵³ and for strengthening the proposition that there is 'one common law of Australia'.⁵⁴ Yet *Kirk* has its detractors; Basten JA argues that the second limb of its argument – which characterised the supervisory jurisdiction of a federal court as a 'defining characteristic' of a 'State Supreme Court' – rests on dubious logic,⁵⁵ which perhaps went unnoticed amidst the widespread enthusiasm for *Kirk*'s result. In any case, one thing that is clear from the literature is that the decision in *Kirk* is unlikely to be overruled any time soon – nor is the constitutionalisation of administrative law likely to be undone.

II The issues with constitutionalisation***The status quo***

It is now the case that judicial review is no longer anchored in the developing common law but in 'the fairly rigid Australian constitutional structure'.⁵⁶ This is seen by some as simply the natural and inevitable conclusion of our having a written constitution to begin with,⁵⁷ while others worry that the *Constitution* will only continue its hegemonic advance, Spigelman suggests that another domain 'on the cusp of being constitutionalised' is the structure of state constitutions.⁵⁸

Stephen Gageler has described the post-*Kirk* state of affairs as a 'grand and elegant constitutional scheme; a new paradigm'.⁵⁹ As a recently appointed High Court judge, his view should be of particular interest to administrative lawyers,⁶⁰ yet though he has written extensively on the topic, it is remarkably difficult to detect in his tone a clear stance for or against the trend; at best it may be said that his Honour appears to admire the strength of the reasoning behind the present incarnation of judicial review,⁶¹ while at the same time highlighting – often almost clinically – its latent flaws, such as its clear 'ultra vires' focus⁶² and its non-conformity with international counterparts.⁶³

Others are more overt in their criticism. Daryl Williams (the then Commonwealth Attorney-General) denounced the constitutionalisation of judicial review as impeding the 'efficiency, effectiveness and accessibility of justice',⁶⁴ with Cane concurring – before *Kirk* – that our present system is complex and technical,⁶⁵ and is rendered all the more so by the 'unattractive spectre of a trifurcation of Australian administrative law into common law, statutory and constitutional regimes'.⁶⁶ Taggart has famously lamented the exceptionalism of our judicial review⁶⁷ – or in the alternative, the 'Australianisation of our law'⁶⁸ (with its

charming ‘tinge of jingoism’)⁶⁹ – arguing that our rigid separation of powers,⁷⁰ our lack of a bill of rights,⁷¹ and our commitment to ‘bottom-up’ reasoning⁷² have combined to isolate Australia from other English-speaking democracies. While this view itself is not immune from critique – Poole, for instance, notes that the human rights impetus behind developments abroad is ‘not likely to produce anything like a normatively unified jurisprudence’ – why lose sleep about our isolation from it?⁷³ Taggart’s article remains highly influential six years after its publication, and its main concerns inform much of the following analysis.

Jurisdictional error

Having considered general reactions to the constitutionalisation of administrative law, a specific bugbear identified is jurisdictional error.⁷⁴ Jurisdictional error is now the ‘central unifying principle of administrative law’,⁷⁵ yet uncertainty still abounds about what precisely it is and how exactly it works. The usual objection is that it is a ‘conclusory label’,⁷⁶ describing simply a mode of stating a conclusion without providing any useful guidance about how to arrive there.⁷⁷ John Basten rebuts this with the pithy explanation that to acknowledge an error as jurisdictional is simply ‘to identify its consequence as invalidity’, and that the reasoning used to get there is ‘neither exotic nor esoteric’.⁷⁸ The process, he continues, has two steps: the scope of the statutory power is determined and the ‘essential common law features which impose legal constraints on the power’ are applied.⁷⁹ It is the second part of this approach that is usually objected to, as it exposes jurisdictional error not as ‘a metaphysical absolute’ but simply the expression of ‘the gravity of the error’,⁸⁰ and because finding such an error is an inescapably value-laden exercise, guided by questions of degree, and all the while the term purports to be a stark binomial descriptor.⁸¹

Further, the specific grounds on which jurisdictional error can be found are not settled, with *Kirk* holding that it is ‘neither necessary, nor possible, to attempt to mark out the metes and bounds of jurisdictional error’.⁸² Even the existing grounds are supposed to be imprecise, with Groves disparaging their ‘obscure [and] malleable’ nature.⁸³ That author notes that judicial findings of jurisdictional error have little value because of ‘the vague and context-dependent process by which limitations and duties are implied’;⁸⁴ this comment is particularly relevant now given that the entire doctrine of jurisdictional error has effectively been transplanted to another new context: the *Constitution*. Nobody seems to know whether the scope and nature of jurisdictional error in its constitutional guise is the same as in its traditional conception.⁸⁵ This is a matter for the High Court to decide.⁸⁶

Qualitative judicial review

I use ‘qualitative judicial review’ as an imperfect catch-all term to refer to the merits branch of any of a number of dichotomies: merits/legality, substance/process, and policy/law.⁸⁷ Aronson conceives of the dichotomy as being between ‘rules that seek to prescribe the things that an administrative decision-maker can do, and rules that seek to control how the decision-maker is to go about doing those things’;⁸⁸ yet, to an extent, both of these – which deal with power and procedure respectively – are covered by the procedural law that the High Court has been more or less comfortable with since *Quin*.⁸⁹ Qualitative judicial review goes further, embracing considerations of what the decision-maker *should* do, and here we see clearly our legality-centric constitutionally-informed judiciary actively eschewing any such considerations⁹⁰ – ‘to the judges the law; to the others the merits’.⁹¹

Some argue that this distinction is not only undesirable but also meaningless, as there is no ‘bright line’ between merits and law, leaving many considerations in the grey area between them.⁹² Murray Gleeson – amongst others – retorts that the difference between the two ‘is not always clear-cut; but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day’.⁹³ This may be so, but still there is

consternation that the merits/law distinction is now seen to be policed too legalistically in our constitutional context, especially when the very inquiry said to be heretical in administrative law is ‘undertaken on a daily basis in the District Court.’⁹⁴

Separation of powers

What exactly is so constitutional about the taboo on qualitative judicial review? The orthodox response is now that such a prohibition is mandated by the constitutional doctrine of separation of powers, underpinned by the rule of law?⁹⁵ Anthony Mason has said that separation of powers has had ‘a stronger influence on Australian public and administrative law, especially judicial review, than it has on English, Canadian and New Zealand administrative law’,⁹⁶ and he is not the only former Chief Justice to note the comparatively hard-edged nature of the Australian version of this doctrine.⁹⁷ The doctrine is a two-way street: on the one hand, the High Court has ‘enthusiastically enforced... the separation of judicial power’,⁹⁸ striking down any legislation that purports to intrude over the dividing line. The trade-off is that the Court has had to show considerable restraint in enforcing anything that is not law, relinquishing policy and merits to Parliament and to the Executive.⁹⁹

There are overlapping rationales for this. Perram argues that the implied purpose of the separation of powers is to prevent the court from usurping the role of decision-maker, with judicial review thereby reduced to a structure that simply ensures there is no excess of authority.¹⁰⁰ Drummond, evidently on the other side of the two-way street, suggests that the doctrine serves to preserve judicial independence,¹⁰¹ with the consequences for judicial review being necessary collateral. Sackville sees the doctrine as a safeguard of effective democracy, as the High Court’s supremacy in the trifecta is well-established by virtue of its reserved right to have the final say on the constitutionality of legislation. Since this is an inherently counter-majoritarian power of the court,¹⁰² he continues, a carve-out of purely executive/legislative authority is needed to ensure any meaning in the distinction.¹⁰³ Whatever the justification, it is clear that the doctrine has had an extremely pervasive influence on the state of our judicial review.

Specific grounds of review

Grounds of review that are explicitly substantive in content have received short shrift in recent decades in the High Court. A clear example is *Wednesbury* unreasonableness¹⁰⁴ – which allows judges to overrule exceptionally unreasonable decisions – and although it has not been explicitly expunged from Australian law just yet,¹⁰⁵ many consider that the ground of review has been heading for the grave for a while, and is now simply awaiting a *Wednesbury*¹⁰⁶ (that said, a recent case¹⁰⁷ upholding reasonableness as a ground of judicial review may have now reversed this tide). Proportionality review appears to be in a similar predicament,¹⁰⁸ though unlike *Wednesbury* unreasonableness it has never been much endorsed in Australia,¹⁰⁹ and today exists only in a limited sense, being confined to contexts where statutory Charters of Rights apply¹¹⁰ (such as Victoria and the ACT). A third merit-driven ground of review so far unused in Australian law is Michael Kirby’s proposal to allow judges to overturn decisions that manifest ‘serious administrative injustice’.¹¹¹ Groves perceives a dissonance between, on the one hand, Kirby’s reliance on section 75(v) in defending the need for this ground and, on the other, the apparent absence of legal principle informing its use, arguing that such a doctrine would simply be a ‘cloak for the imposition of subjective judicial impressions rather than legal doctrine’.¹¹² This perhaps demands too much of a nascent doctrine, which could be developed along more principled lines over the course of its life, but Groves’ concerns about the qualitative aspect of this form of judicial review are certainly in keeping with the theme here.

Things start to get a little more vexed where grounds of review straddle the substantive-procedural divide. A classic example is natural justice, to which *Lam* expressed a strong reluctance to ascribe any substantive meaning. The consequence is¹¹³ that the doctrine was 'effectively stillborn'¹¹⁴ and now exists purely in a procedural sense.¹¹⁵ Similarly, the principle of legality has been controversial but, again, only insofar as it requires judges to construct common law *values* that must be adhered to in the exercise of 'broadly expressed discretions'.¹¹⁶ To finish on a highly paradigmatic example,¹¹⁷ the doctrine of legitimate expectations has traced clearly the contours of our judiciary's aversion to enforcing substantive requirements in administrative decision-making.¹¹⁸ Though it received wholesale acceptance in the United Kingdom in *Coughlan's* case,¹¹⁹ it was doused and rejected in *Lam* on the ground that such an expectation must not be allowed to require any substantive result;¹²⁰ and again, the legality-focused counterpart of this doctrine, 'procedural legitimate expectations', was allowed to subsist. Justice Brennan has been a stern opponent of this doctrine, though it is interesting to note that his primary issue with legitimate expectations is its grounding in the subjective disappointment of an individual, rather than on its substantive content per se.¹²¹ Could the door still be open for the emergence of more carefully formulated substantive grounds of review that overcome the flaws in the above proposals? Alternatively, is there a way that we can challenge the merits/law dichotomy that limits these grounds of review?

III Possible solutions

Legislative possibilities

Though not the focus of this paper, I acknowledge that there are potential legislative solutions to the issues discussed above. Gageler suggests that substantive fairness could be reintroduced into our judicial review through the enactment of 'some code or charter of administrative rights and responsibilities' or some new Part of the *Acts Interpretation Act 1901* (Cth) that necessitates substantive minimum requirements in administrative decision-making.¹²² There is some force to these suggestions, especially in that they would operate neatly within the present framework, in which judicial review is guided solely by questions of legality, as indeed it is hard to dispute the legal correctness of enforcing the requirements of enacted legislation. Yet the usual hindrances to law reform apply: Parliament would need to muster support for what would be a highly technical piece of legislation of almost no interest to voters. Further, Sackville's comments about judicial supremacy also apply,¹²³ as the legislation could be vulnerable to invalidation on grounds of, for instance, section 75(v) inconsistency. Yet it is hard to believe that the High Court's commitment to legalism so greatly trumps its deference to Parliament that it would not at least require very compelling reasons to deem such legislation unconstitutional.

Rethinking modes of constitutional interpretation

The main argument of this paper is that reform could just as conceivably come from the judiciary itself, and that this may even be preferable, as it would fix the problem at its source. I suggest that many of the problems inherent in the constitutionalisation of administrative law can be overcome by a rethinking of the modes of constitutional interpretation available to judges.

Available modes of interpretation

It is remarkably uncontroversial that the current High Court approach to legal reasoning is a formalistic one.¹²⁴ Goldsworthy summarises it as a 'devotion to legalism';¹²⁵ Taggart attributes this to the influence of Sir Owen Dixon,¹²⁶ whose 'strict and complete legalism'¹²⁷ is 'still much admired and emulated in Australia';¹²⁸ Pierce concurs that the status quo is a

reversion from the legal realism of the Mason Court to the formalism of the Dixon Court;¹²⁹ Kirby agrees¹³⁰ that the Court's common law approach has stagnated to the point of being so particularist as to lack any underlying principles;¹³¹ Varuhas conceives the issue as a preference for 'bottom-up' reasoning (which centres on rules and prioritises legal certainty) over 'top-down' reasoning (which emphasises guiding principles and broader justice considerations),¹³² and both Keith Mason¹³³ and Matthew Groves¹³⁴ use this terminology in reaching the same conclusions. Last but not least, Gageler characterises the trend as a return to pre-1970s incrementalism,¹³⁵ fuelled by the ascendancy of the 'ultra vires' school of thought over the 'natural law' school of thought.¹³⁶ The consensus is overwhelmingly clear that the current High Court approach to legal reasoning is a formalistic one.

In the context of constitutional interpretation, however, there is more than one approach that can be taken.¹³⁷ I do not advocate that any one mode is superior to another, nor do I seek to justify any mode on theoretical grounds.¹³⁸ I simply argue that judges should be cognisant of the available options, of which there are between four and eight, depending on whom you ask. For present purposes, they can be categorised broadly into: textual argument, historical (or originalist) argument, implications from constitutional structure, and arguments based on precedent.¹³⁹

Textual arguments focus on the words of the text and attribute to them the meaning they naturally bear.¹⁴⁰ The subjective intentions of the framers are irrelevant here,¹⁴¹ as contextual evidence is relevant only insofar as it helps to ascertain 'the original public meaning'¹⁴² of the words themselves.¹⁴³ Following *Engineers*,¹⁴⁴ a judge in this mode will simply give the words of the *Constitution* their 'natural' or 'ordinary' meaning, leading some to refer to this mode as 'literalism'.¹⁴⁵

Originalism goes one step further, parsing the text and contextual evidence in an attempt to deduce the 'purpose or understanding of the *Constitution's* framers'.¹⁴⁶ This mode allows reference to the Convention debates,¹⁴⁷ but tends to fall short of searching for any 'subjective beliefs, hopes or expectations' of the framers,¹⁴⁸ typically proceeding instead under the guise of 'textual originalism'¹⁴⁹ which seeks to locate the original understanding of the text itself as evidenced by historical documents.¹⁵⁰

Structuralism is a different beast again. At its most straightforward, this mode draws inferences from the structure of the constitutional text or a combination of provisions.¹⁵¹ In its more advanced form, structuralism draws conclusions from the 'nature of aspects of the system of government for which the *Constitution* makes provision'.¹⁵² The strength of this mode is said to lie in its consideration of the *Constitution* as a coherent whole, while its weakness is in its essentially inferential nature.¹⁵³

Finally there are arguments based on precedent, a mode which has been described as applying 'constitutionally relevant principles, rules or ideas derived from previous authorities in accordance with common law method[s]'.¹⁵⁴ Within this mode we find a whole family of methods of reasoning – doctrinal,¹⁵⁵ prudential,¹⁵⁶ ethical,¹⁵⁷ comparative international¹⁵⁸ – and McHugh J has argued that this mode is 'consistent with the notion that our *Constitution* was meant to be an enduring document able to apply to emerging circumstances while retaining its essential integrity'.¹⁵⁹ This mode is especially strong in its ability to adapt to unforeseen circumstances,¹⁶⁰ its allowance for the constitutional system to evolve,¹⁶¹ and its ability to fill in the gaps where there are ambiguities in the *Constitution*.¹⁶² Its weakness, on the other hand, is in its potential for unmitigated judicial activism.¹⁶³ This risk can be overstated though,¹⁶⁴ as some very sensible suggestions have been made about how to maintain an acceptable minimum level of 'judicial legitimacy',¹⁶⁵ in such reasoning,¹⁶⁶ for instance by requiring that any given judge remain consistent in approach,¹⁶⁷ thereby

avoiding the situation where the judiciary is seen as justifying subjectively chosen outcomes under the banner of whichever mode of reasoning most lends it credibility.¹⁶⁸

Using the whole toolkit

Given the many options available, there is no reason to suggest that the present mode of interpretation is in any way permanent¹⁶⁹ or even necessary.¹⁷⁰ On the contrary, modes of constitutional interpretation tend to come in and out of fashion,¹⁷¹ and often there can be staunchly divided views on the topic even within the same High Court.¹⁷² What can be said for certain is that there is no 'right answer' to interpretation,¹⁷³ and that even though several commentators argue (perhaps a touch pessimistically) that it is unlikely the Court will do so,¹⁷⁴ it is open to the High Court to depart from previous approaches and even authorities.¹⁷⁵

Reinterpreting the separation of powers doctrine

Beyond the fact that the separation of powers doctrine can have undesirable consequences in the context of judicial review, the doctrine itself is riddled with flaws at a theoretical level. First, as mentioned earlier, there is no bright-line distinction between merits and law that can serve to clearly define the 'province and duty' of the judiciary;¹⁷⁶ rather the boundary is 'porous and ill-defined'.¹⁷⁷ This is all the more apparent when one considers that the distinction is almost obliterated in the context of the separation of legislative and executive power,¹⁷⁸ a normally unnoticed black hole in the doctrine. Second, it is difficult to justify why the doctrine should have been transplanted to the state context in *Kirk*, given that the various state constitutions do not adopt an entrenched separation of powers themselves.¹⁷⁹

Most importantly however, the historical support for the doctrine is in fact quite fragile,¹⁸⁰ with the Convention debates offering 'little evidence' that the framers intended such a doctrine to be implied.¹⁸¹ Wheeler explores this in detail, arguing that while sections 1, 61 and 71 are capable, textually speaking, of supporting a legally enforceable separation of powers doctrine,¹⁸² this is not the necessary conclusion.¹⁸³ She attributes the pervasiveness of the assumption to the writers Quick and Garran, who at a very early stage suggested that 'the distinction is peremptory',¹⁸⁴ yet on an analysis of the debates, Finnis shows that '[the framers] regarded the *Constitution* as incorporating an institutional, as opposed to abstract, theory of separation of powers'.¹⁸⁵ Nowhere in the debates is there any real discussion of the doctrine at an abstract level, yet today it is taken for granted that this was the solemn and indisputable intention of the framers.

Reinterpreting section 75(v)

We can apply a similar analysis to section 75(v) of the *Constitution*. The section is not an easy one to interpret, and two immediate hurdles present themselves. The first is that section 75(v) simply names remedies for which the High Court's supervisory jurisdiction is available but says nothing about the grounds of review that lead to those remedies,¹⁸⁶ the usual assumption being that the common law will provide the grounds.¹⁸⁷ The second hurdle is that section 75(v) names three forms of relief: writs of mandamus, writs of prohibition and claims for an injunction, yet neglects in the process a number of other remedies that also existed in 1900, such as quo warranto, certiorari and habeas corpus.¹⁸⁸ It is important to proceed cautiously in reading too much or too little into the specific remedies named, as on the one hand, there appears to have been an assumption at the Convention debates that other remedies could issue regardless as remedies ancillary to the exercise of original jurisdiction¹⁸⁹ but, on the other hand, the particular remedies here all have an especially judicial review theme, suggesting that they were quite deliberately selected. It is by dint of this section that jurisdictional error is said to be entrenched.

Must jurisdictional error be retained?

Four arguments suggest that it may be possible to do away with the constitutional entrenchment of jurisdictional error as the sole basis for judicial review. First, there is the observation mentioned above that section 75(v) says nothing about grounds, yet jurisdictional error is a grounds-based discourse; Taggart argues that this sleight of hand is somewhat unconvincing¹⁹⁰ and that the unnecessary retention of jurisdictional error contributes to the 'often Byzantine quality of much of the Australian judicial and academic analysis'.¹⁹¹ Second, it is not a foregone conclusion that section 75(v) was intended to entrench a right to judicial review. The section is said to have been included for three purposes: a 'safeguarding of High Court jurisdiction' purpose (in response to *Marbury v Madison*),¹⁹² a federalism purpose, and an accountability purpose.¹⁹³ While the accountability purpose is the one relied upon to defend the entrenchment of a right to judicial review,¹⁹⁴ Stellios shows that this purpose played a relatively minor part in the Convention debates,¹⁹⁵ the framers being much more interested in ensuring the High Court's universal jurisdiction than in entrenching any corresponding right to secure relief from it. Third, it has been argued that jurisdictional error is constitutionally mandated because of the lack of a writ of certiorari in the section 75(v) list of remedies,¹⁹⁶ yet the above acknowledgement by the framers that certiorari could issue as a remedy ancillary to the others robs this argument of some of its force.¹⁹⁷ Finally and most relevantly, it is not at all clear in the new constitutional context of judicial review that jurisdictional error must still be the central unifying concept of the field. Just as the rebranding of prerogative writs to constitutional writs accompanied a rethinking of the content of those remedies,¹⁹⁸ the new terminological context in which jurisdictional error now finds itself surely necessitates a fresh analysis,¹⁹⁹ 'rather than [remaining] in terms of the inheritance of the common law'.²⁰⁰ This is all the more so given that jurisdictional error is typically understood as the outcome of a process of statutory interpretation,²⁰¹ which sits awkwardly with its elevation to a constitutional norm that sits above legislation.

Can jurisdictional error be expanded?

Alternatively, if jurisdictional error cannot be toppled, we should at least consider how it can be improved. Gageler has described the concept as a protean one,²⁰² as it appears to be in a constant state of flux; this capacity for change may yet redeem the concept. As we have seen, the plurality in *Kirk*²⁰³ went to great lengths to stress that the categories of jurisdictional error are not closed, which means it is still within the High Court's power to attribute a substantive meaning to the expression.²⁰⁴ This is precisely what was done (or attempted) during the 20th century,²⁰⁵ yet as we have seen, the creation of new categories of jurisdictional error is fraught with danger, with many of the past categories now demoted to historical relics. It is important that judges only expand the concept responsibly – as their decisions in this regard will be incapable of correction by the legislature²⁰⁶ – and that they are careful in extending the grounds only in credible directions capable of attracting wholesale support from other present judges and their future successors.²⁰⁷ Ways in which this might be done are through so-called 'variable intensity' grounds of review,²⁰⁸ or by providing a potential new ground through the requirement of 'justification of reasons',²⁰⁹ which, though procedural in nature, would ensure a higher quality of decision-making and a culture of justification,²¹⁰ both of which Taggart (and friends) view as agreeable outcomes.

IV Conclusion

The constitutionalisation of administrative law is profoundly changing the way our accountability system operates. The trend has limited the scope for qualitative judicial review in that it entrenches jurisdictional error, underpinned by the separation of powers, as the unifying feature of administrative law. This in turn has been characterised as a result of the

'formal' style of reasoning prevalent in the current High Court. I have proposed the use of alternative modes of interpretation in its place as a way to circumvent the 'dead end' conclusions at which we are arriving.

The foregoing analysis is not intended to be a comprehensive roadmap to how we might deal with the challenge of the constitutionalisation of administrative law, it is simply an appeal for us to move beyond the fatalism implicit in much of the analysis to date, and actively to seek new interpretive approaches that might tackle the issues of jurisdictional error, the prohibition on qualitative judicial review, and the technical and remedy-focussed nature of section 75(v). There is an endless variety of ways in which this could be done.²¹¹

Endnotes

- 1 I am indebted to Anthony Mason, who used this quip to describe his enthusiasm for errors of law on the face of the record: A Mason, 'The Contribution of Sir Gerard Brennan' in R Creyke and P Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (Federation Press, 2002) 38.
- 2 M Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399.
- 3 N Perram, 'Comments: Speech to Government Solicitors' Conference' (2010) 21 *Public Law Review* 223, 225.
- 4 See M Taggart 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1, 2.
- 5 J McMillan 'The Academic Contribution to Australian Administrative Law' (2001) 8 *Australian Journal of Administrative Law* 214, 217; J McMillan 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423.
- 6 R Snell 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in C Finn (ed), *Sunrise or Sunset? Administrative Law for the New Millennium* (2000) 188.
- 7 See Taggart, above n 4, 3. See also S De Smith, *Judicial Review of Administrative Action* (Stevens & Sons, 1959) 3, which describes the role of judicial institutions in the administrative process as 'inevitably sporadic and peripheral'.
- 8 Though this topic also has its scholars. See J Webber, 'Constitutional Reticence' (2000) 25 *Australian Journal of Legal Philosophy* 125; P Kildea, 'Rewriting the Federation through Referendum' in P Kildea, A Lynch and G Williams (eds), *Tomorrow's Federation*, (Federation Press, 2012), 294-309.
- 9 G Hill and A Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67, 70–1.
- 10 *Kirk v Industrial Relations Commission (NSW) (Kirk)* (2010) 239 CLR 531.
- 11 I Holloway, *Natural Justice and the High Court of Australia*, (Aldershot, 2002) Chs 1–4.
- 12 Eg regarding common law and statutory mandamus, *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477.
- 13 S Gageler, 'The Constitutionalisation of Australian Administrative Law', speech presented at the University of New England, 14 March 2011.
- 14 P Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 120.
- 15 See for example, *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 242–3.
- 16 See Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report*, Parliament of the Commonwealth of Australia Paper No 144 (Kerr Committee Report) (1971), Ch 12.
- 17 Recommendations were also made to define what jurisdiction the Commonwealth Superior Court should exercise in reviewing administrative decisions and the procedure by which review is to be obtained. See Cane, above n 14, 121.
- 18 Cane, above n 14, 124.
- 19 An export of Lord Denning's. See *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.
- 20 The blame – or gratitude – for this trend is normally given to Sir Anthony Mason, who served on the High Court from 1972–1995, and was Chief Justice for the last eight years of this period: W Gummow, 'The Permanent Legacy' (2000) 28 *Federal Law Review* 177, 186.
- 21 S Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 95.
- 22 D Jackson, 'Development of Judicial Review in Australia over the Last 10 Years: The Growth of the Constitutional Writs' (2004) 12 *Australian Journal of Administrative Law* 22, 25–6.
- 23 S Gageler, above n 21, 96.
- 24 See *Migration Legislation Amendment Act 1989* (Cth), and *Migration Reform Act 1992* (Cth).
- 25 See for example, *Australian Broadcasting Tribunal v Bond & Ors* (1990) 170 CLR 321.
- 26 Gageler, above n 13.
- 27 This is also the reason that Roger Wilkins AO, Secretary, Commonwealth Department of Attorney-General, has recently advocated for the total repeal of the *ADJR Act*: Administrative Review Council, 'Federal Judicial Review in Australia', (September 2012), Appendix A, pp195– 200.
- 28 *Attorney General (NSW) v Quin (Quin)* (1990) 170 CLR 1.
- 29 (1803) 1 Cranch 137, 177.

- 30 *Quin* (1990) 170 CLR 1, 35–6.
- 31 S Gageler, 'Sir Gerard Brennan and Some Themes in Judicial Review' in R Creyke and P Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (The Federation Press, 2002) 62, 63.
- 32 Groves, above n 2, 401 and see G Weeks, 'Achieving Public Law Goals through Private Law Means: Is This Social Justice?' (2012) *Court of Conscience* 51, 52–3: 'The remedies do not give a substantive result to a successful applicant, but... merely a remedy which... prevents invalidity'.
- 33 See Gageler, above n 13: and for an example of Justice Brennan's doctrinal 'warm-up' to *Quin*, see *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.
- 34 Groves, above n 2, 401.
- 35 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
- 36 Gageler, above n 21, 100.
- 37 *Ibid.*
- 38 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, (4th ed), (Lawbook Co, 2009) 33.
- 39 Gageler, above n 21, 100.
- 40 Cane, above n 14, 125.
- 41 *Ibid.*
- 42 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
- 43 *Abebe v Commonwealth* (1999) 197 CLR 510.
- 44 Cane, above n 14, 127. Indeed, up until the 2000s, privative clauses generally enjoyed a fairly generous treatment from the High Court, as seen for example in the *Hickman* principle: *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 631.
- 45 *Plaintiff S157/2002* (2003) 211 CLR 476, 513 [103].
- 46 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.
- 47 Subject, again, to the *Hickman* principle. See R Sackville, 'The Constitutionalisation of State Administrative Law' (2012) 19 *Australian Journal of Administrative Law* 127, 128; see also above n 44.
- 48 *Kirk* (2010) 239 CLR 531, 580–1.
- 49 Gageler, above n 13.
- 50 Sackville, above n 47, 128.
- 51 *Forge v Australian Securities and Investments Commission* [2006] HCA 44, [57].
- 52 J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 77.
- 53 Sackville, above n 47, 130.
- 54 See *Lipohar v The Queen* (1999) 200 CLR 485, 505; Groves, above n 2, 411 n 79.
- 55 J Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 279.
- 56 Gageler, above n 21, 104.
- 57 Eg Taggart, above n 4.
- 58 Though it is not obvious how the High Court will do that. J Spigelman, 'Public Law and the Executive' (2010) 34 *Australia Bar Review* 1, 6.
- 59 Gageler, above n 13.
- 60 If not for its potential to soon become law, then at least for its rigorous and comprehensive account of the history of Australian judicial review.
- 61 See Gageler, above n 31, 70–1.
- 62 See S Gageler, 'Legitimate Expectation: Comment on the Article by the Hon Sir Anthony Mason AC KBE' (2005) 12 *Australian Journal of Administrative Law* 111; Gageler, above n 21, 104.
- 63 See Gageler, above n 21, 104.
- 64 Inviting perhaps Mandy Rice-Davies' infamous quip, 'He would, wouldn't he?' All the same, see D Williams, 'Judicial Power and Good Government' (2000) 11 *Public Law Review* 133, 139.
- 65 Cane, above n 14, 131.
- 66 *Ibid.*, 127.
- 67 Noting all the while the necessary simplifications this characterisation requires. See Taggart, above n 4, 2.
- 68 A Mason, 'The Evolving Role and Function of the High Court' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 95, 116.
- 69 W Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167.
- 70 Taggart, above n 4, 1. See also Groves, above n 2.
- 71 *Ibid.*; B Galligan and F Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006) 17.
- 72 Taggart, above n 4, 28.
- 73 Poole, T. 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Pearson, L, Harlow, C, and Taggart, M. (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) 22.
- 74 J Spigelman, 'Jurisdiction and Integrity' in D Pearce (ed), *AIAL National Lecture Series on Administrative Law No 2*, (Australian Institute of Administrative Law, 2004) 28–9.
- 75 Spigelman, above n 58, 5.
- 76 Gageler, above n 13.

- 77 To put it another way, jurisdictional error is just a way of saying that some errors are more important than others; Spigelman, above n 58, 5.
- 78 Basten, above n 55, 287.
- 79 Ibid, 298.
- 80 L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact', (1957) 70 *Harvard Law Review* 953.
- 81 Gageler, above n 13.
- 82 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, [71]. There are shades of Justice Stewart's dictum in *Jacobellis* here with regard to hard-core pornography, saying that while he would not attempt to define it exhaustively, 'I know it when I see it': *Jacobellis v Ohio* 378 U.S. 184 (1964).
- 83 Groves, above n 2, 416.
- 84 Ibid.
- 85 Basten, above n 55, 298.
- 86 R Sackville, 'An Age of Judicial Hegemony' (2013) 87 *Australian Law Journal* 105, 112. Sackville expands on this last point with a (quasi-conspiracy) theory that, while Parliaments were focusing in the 2000s on rejecting a national bill of rights – on the grounds this would transfer too much power to the judiciary – the High Court stealthily presided over precisely the kind of power transfer that was mooted, with almost no public objection.
- 87 Taggart, above n 4, 27.
- 88 M Aronson, 'Process, Quality and Variable Standards: Responding to an Agent Provocateur' in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5, adopting Martinez's conception in J Martinez, 'Process and Substance in the "War on Terror"' (2008) 108 *Columbia Law Review* 1013 at 1020–21.
- 89 Gageler, above n 13.
- 90 Cane, P. 'Participation and Constitutionalism' (2010) 38 *Federal Law Review* 319, 338.
- 91 Gageler, above n 21, 104.
- 92 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed) (Thomson Law Book, 2004) 165. For a more forceful view, see P Cane, 'Merits Review and Judicial Review – The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213.
- 93 M Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 11.
- 94 Perram, above n 3, 224.
- 95 Perram, above n 3, 226.
- 96 A Mason, 'The Break with the Privy Council and the Internationalisation of the Common Law' in P Cane (ed), *Centenary of Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 66.
- 97 M Gleeson, 'Global Influences on the Australian Judiciary' (2002) 22 *Australian Bar Review* 184, 185.
- 98 J Goldsworthy, 'Australia: Devotion to Legalism' in J Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 148.
- 99 Taggart, above n 4, 4–5.
- 100 Perram goes on to quip that this state of affairs is not so far removed from Napoleon's law. Perram, above n 3, 226.
- 101 D Drummond, 'Towards a More Compliant Judiciary? – Part I' (2001) 75 *Australian Law Journal* 304, 306.
- 102 Sackville, above n 86, 108.
- 103 Ibid.
- 104 Aronson, above n 88, 10.
- 105 Anecdotal reports from the Land and Environment Court indicate that the doctrine is still very much in vogue in that particular jurisdiction.
- 106 R Harrison, 'The New Public Law: a New Zealand Perspective' (2003) 14 *Public Law Review* 41, 56.
- 107 *Minister for Immigration and Citizenship v Li* [2013] HCA 18.
- 108 Groves, above n 2, 430.
- 109 And even *Wednesbury* has never had universal acceptance; Taggart, above n 4, 24.
- 110 Aronson, above n 88, 10.
- 111 *Re Minister for Immigration and Multicultural Affairs; Ex parte S20* (2003) 198 ALR 59 [161].
- 112 M Groves, 'Substantive Legitimate Expectations in Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 511.
- 113 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 10 [28].
- 114 Groves, above n 111, 509.
- 115 Aronson, Dyer and Groves, above n 38, 408–14.
- 116 D Dyzenhaus, M Hunt and M Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 6.
- 117 And even here the list is not exhausted. Justice Gummow's requirement that decision-makers give 'proper, genuine and realistic consideration' to the submissions of affected persons is in limbo for similar reasons to the grounds discussed here: See *Broussard v Minister for Local Government and Ethnic Affairs* (1989) 21 FCR 472 at 483.
- 118 Taggart, above n 4, 26.
- 119 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] 1 QB 213.
- 120 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 10 [28].
- 121 Mason, above n 1, 51.
- 122 Gageler, above n 21, 105.

- 123 Sackville, above n 86, 108.
- 124 It should be noted that this term is subject to different meanings depending on theorist, context, and whatever counterpoint is being used in the dichotomy in which it is placed.
- 125 Goldsworthy, above n 98, 106.
- 126 Taggart, above n 4, 8; And see C Howard, 'Sir Owen Dixon and the Constitution' (1973) 9 *Melbourne University Law Review* 1, 3.
- 127 D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110.
- 128 Taggart, above n 4, 8.
- 129 J Pierce, *Inside the Mason Court Revolution: the High Court of Australia Transformed* (Carolina Academic Press, 2006), 69–75 and 147.
- 130 An uncommon phrase.
- 131 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, [122] and [156]–[168].
- 132 J Varuhas, 'Book Review: A Simple Common Lawyer: Essays in Honour of Michael Taggart' (2009) 20 *Public Law Review* 233.
- 133 K Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574.
- 134 S Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or *Constitution*?' (2000) 28 *Federal Law Review* 303.
- 135 S Gageler, 'The Legitimate Scope of Judicial Review: The Prequel' (2005) 26 *Australian Bar Review* 5, 16.
- 136 Gageler, above n 62.
- 137 S Kenny, 'The High Court of Australia and Modes of Constitutional Interpretation' in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of NSW, 2007), 2, 46.
- 138 I am following Susan Kenny's approach here: *Ibid*, 49.
- 139 A Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 41.
- 140 Kenny, above n 136, 53–4.
- 141 *Eastman v The Queen* (2000) 203 CLR 1, [46] (McHugh J).
- 142 R Kay, 'Original Intention and Public Meaning in Constitutional Interpretation' (2009) 103 *Northwestern University Law Review* 703.
- 143 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 196 (McHugh J).
- 144 *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129.
- 145 Kenny, above n 136, 53–4.
- 146 G Craven, 'Original Intent and the Australian Constitution – Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166.
- 147 Following *Cole v Whitfield* (1988) 165 CLR 360.
- 148 *Re Wakim; Ex parte McNally* (1999) 198 CLR 551, 551 (McHugh J).
- 149 T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, (5th ed), (Federation Press, 2010) 291.
- 150 But note John Basten's brooding retort that 'appeals to history are rarely what they appear to be': Basten, above n 55, 280.
- 151 C Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 293.
- 152 Saunders, above n 151, 293.
- 153 Kenny, above n 136, 63.
- 154 Saunders, above n 151, 293.
- 155 Kenny, above n 136, 74.
- 156 P Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, New York, 1982:) 7 ff.
- 157 *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).
- 158 *Al-Kateb v Godwin* (2004) 219 CLR 562, 624 (Kirby J); M Kirby, 'Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit' (2010) 12 *University of Notre Dame Australia Law Review* 95, 122; Dyzenhaus, Hunt and Taggart, above n 115, 34; A-M Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1102.
- 159 *Eastman v The Queen* (2000) 203 CLR 1, [50] (McHugh J).
- 160 *Brownlee v The Queen* (2001) 207 CLR 278, [314] (Kirby J).
- 161 All while remaining within an established minimal framework that cannot be circumvented: J Balkin, 'Original Meaning and Constitutional Redemption' (2007) 24 *Constitutional Commentary* 427.
- 162 J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1.
- 163 G Craven, *Conversations with the Constitution* (University of New South Wales Press, 2004) 156–64.
- 164 Blackshield and Williams, above n 148, 291.
- 165 Gleeson, above n 93, 5.
- 166 M Coper, 'Interpreting the *Constitution*: A Handbook for Judges and Commentators' in A Blackshield (ed), *Legal Changes: Essays in Honour of Julius Stone* (Butterworths, 1983), 52.
- 167 *Eastman v The Queen* (2000) 203 CLR 1, [81] (Kirby J).
- 168 J Austin, *Lectures on Jurisprudence Vol 2*, (John Murray, 4th ed, 1879) 1029–30.
- 169 Spigelman, above n 58, 3.
- 170 Kenny, above n 136, 55.
- 171 Spigelman, above n 58, 3.

- 172 McHugh and Kirby JJ, for instance, adopted diametrically opposite approaches during their co-tenure, with McHugh J taking an originalist approach, and Kirby J opting for a more progressive approach: see G Hill, "Originalist" vs "Progressive" Interpretations of the Constitution – Does It Matter? (2000) 11 *Public Law Review* 159, 159.
- 173 Blackshield and Williams, above n 148, 284.
- 174 Aronson, above n 88, 22; G Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100.
- 175 G Boeddu and R Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31 *Federal Law Review* 167.
- 176 *Marbury v Madison* (1803) 1 Cranch 137, 177.
- 177 Taggart, above n 4, 27.
- 178 Goldsworthy, above n 98, 106, 128–9. Hence some describe the state of affairs rather as 'separate institutions sharing powers': Spigelman, above n 58, 4.
- 179 Groves, above n 2.
- 180 Taggart, above n 4, 4 note 19.
- 181 Goldsworthy, above n 98, 128–9.
- 182 F Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96, 104.
- 183 G Sawyer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 179.
- 184 Wheeler, above n 181, 98.
- 185 J Finnis, 'Separation of Powers in the Australian Constitution' (1967) 3 *Adelaide Law Review* 159, 171–2.
- 186 Cane, above n 14, 114.
- 187 Aronson, Dyer and Groves, above n 38, 34.
- 188 Ibid, 44.
- 189 Jackson, above n 22, 24. This is now the position in modern Australian law too: *R v Cook ; Ex parte Twigg* (1980) 147 CLR 15, 26 (Gibbs J).
- 190 Taggart, above n 4, 9.
- 191 Ibid.
- 192 (1803) 1 Cranch 137.
- 193 J Stellios, 'Exploring the Purposes of Section 75(v) of the Constitution' (2011) 34 *University of New South Wales Law Journal* 70.
- 194 Sackville, above n 47, 131.
- 195 Stellios, above n 192.
- 196 Jackson, above n 22, 27.
- 197 Ibid, 24.
- 198 Spigelman, above n 58, 4.
- 199 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, [129] (Kirby J).
- 200 W Sofronoff, 'Constitutional Writs' (2007) 14 *Australian Journal of Administrative Law* 145.
- 201 L McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14, 18.
- 202 Gageler, above n 21, 104–5.
- 203 *Kirk v Industrial Relations Commission (NSW) (Kirk)* (2010) 239 CLR 531.
- 204 Sackville, above n 47, 132.
- 205 Sackville, above n 86, 110.
- 206 Basten, above n 55, 294.
- 207 Aronson, above n 88, 32.
- 208 Basten, above n 55, 299.
- 209 Dyzenhaus, Hunt and Taggart, above n 115, 6.
- 210 Ibid, 29.
- 211 Hill and Stone even moot the idea of constitutionalising the rule of law itself. See Hill and Stone, above n 9.