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Constitutional Review of Executive Decisions – Australia's US Legacy

Chief Justice Robert French

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In the historic decision of the Supreme Court of the United States in *Marbury v Madison*[1], Marshall CJ asserted the power of the Court to decide that a law of the United States legislature is void if it exceeds the law-making power conferred upon the legislature by the Constitution.

The law struck down in *Marbury v Madison* would have conferred upon the Supreme Court original jurisdiction to issue writs of mandamus to public officers of the United States. The Court held that the Constitution did not authorise the conferring of that original jurisdiction.

Eighty-eight years later in time and half a world away, the Attorney-General of the Colony of Tasmania, Andrew Inglis Clark was preparing a draft constitution for the proposed Australian federation. He was a believer in natural rights, a republican and a great admirer of the democracy of the United States. As a democrat he claimed in his own words, "for every individual in a community the right to share in the distribution of the power by the exercise of which the makers and executors of the laws are appointed".[2] He had read and could quote "long

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1 5 US (1 Cranch) 137 (1803).

2 AI Clark, 'Why I am a Democrat', AI Clark Papers, D 38, University of Tasmania Archives, Hobart, cited in J Williams, 'With Eyes Open: Andrew Inglis Clark and our Republican Tradition', (1995) 23 *Fed Law Rev* 149 at 158.

passages" from the works of Hamilton, Madison, Jefferson, Webster, Clay and Sumner.[3] He had travelled to the US and had met Oliver Wendell Holmes with whom he became friends and established a life-long correspondence.[4] He was a believer in judicial control of official power:

> The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power.[5]

The Supreme Court of the US was a model of the judicial supremacy which Clark admired. It could, in his words, "restrain and annul whatever folly or the ignorance or the anger of a majority of Congress or of the people may at any time attempt to do in contravention of any personal or political right or privilege the Constitution has guaranteed …".[6]

Clark had of course read *Marbury v Madison*. He was probably the only delegate to the Australian Constitutional Conventions of the 1890s to have done so. Because of his concern about the deficiency in the original jurisdiction of the US Supreme Court exposed in that case, he included in his Draft Constitution for the 1891 Convention a clause conferring original jurisdiction on the High Court of Australia designed to avoid that deficiency. That jurisdiction was to be conferred in "all cases in which a writ of mandamus of prohibition shall be sought against a Minister of the Crown of the Federal Dominion of Australia." His clause was accepted by the Convention with the substitution of the words "an officer of the

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[3] Williams, ibid at 159.

[4] Ibid.

[5] AI Clark, 'The Supremacy of the Judiciary under the Constitution of the United States and under the Constitution of the Commonwealth of Australia'. See also (1903) 17 *Harv Law Rev* 1, cited in Williams, op cit at 164.

[6] AI Clark, 'The Constitution of the United States of America' (1897), quoted in Williams, op cit at 165.

Commonwealth" for "a Minister of the Crown of the Federal Dominion of Australia".

The Convention process went into abeyance for a time after 1891, but was revived with more broadly based political support in 1897. Surprisingly, at a Convention session in Melbourne in 1898, at which Clark could not be present, his proposed provision was dropped. Those who moved its exclusion had apparently not read *Marbury v Madison* and misapprehended what was in the US Constitution. The primary opposition to the provision came from Isaac Isaacs, who was later to become a Justice of the High Court, for a short time its Chief Justice, and then the first Australian-born Governor-General. Isaacs said:

> I think I am safe in saying that the power is not expressly given in the United States Constitution but undoubtedly the Court exercises it.[7]

He was not safe in saying that. He suggested that the proposed provision might have the effect that if an injunction were asked for in the High Court, the Court might ask why the words "mandamus or prohibition" had been inserted in the clause.[8] His argument seems to have been that specific reference to mandamus and prohibition might by implication have excluded other remedies. The other delegate who spoke on the matter was Henry Higgins who was also later to become a Justice of the High Court of Australia. He said:

> This provision was in the Bill of 1891 and I thought it was taken from the American Constitution.[9]

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[7] *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 1898, at 21.

[8] *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 1898, at 321.

[9] Ibid.

Clark, who was in Hobart, was informed of what had happened and sent a telegram to another leading delegate, Edmund Barton, who became the first Prime Minister and later a Justice of the High Court of Australia. He reminded Barton of the decision in *Marbury v Madison*. Barton, who may well have been embarrassed by the errors that led to the omission of the provision, wrote back to Clark:

> I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus and prohibition against Officers of the Commonwealth. None of us here had read the case mentioned by you of *Marbury v Madison*, or if seen it had been forgotten – it seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause.[10]

At the continuation of the Melbourne Convention in March 1898, Barton moved the reinsertion of a subsection conferring upon the High Court of Australia original jurisdiction in matters "in which a writ of mandamus or prohibition or an injunction is sought against an Officer of the Commonwealth".[11] He said:

> It will be remembered that in the former committee this subsection was left out. Now I have come to the conclusion that it was scarcely wise of us to leave it out.[12]

Barton posed the question whether without an express authority given in the Constitution to entertain such cases, the High Court could grant a writ of mandamus or prohibition or an injunction against an Officer of the Commonwealth. He referred to *Marbury v Madison* and quoted from the judgment. Nowhere in his speech, as recorded in the Convention Debates, was Clark given credit for the intervention that led to the restoration of the clause. Perhaps everybody remembered that Clark had

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[10] JA La Nauze, *The Making of the Australian Constitution*, Melbourne University Press (1972) 234.

[11] *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 1898 at 1875.

[12] Ibid.

proposed it in the first place. Barton acknowledged that absent the inclusion of the provision it might be held in Australia that the Courts should not exercise the power and that even a statute giving them the power would not be of any effect. He then said:

> … I think that that, as a matter of safety, it would be well to insert these words.[13]

Another delegate, Mr Symons, said: "They cannot do any harm."[14] Barton responded in terms which in the light of history may be seen as masterly understatement: "They cannot do harm and may protect us from a great evil."[15]

There was some opposition to the reinsertion of the provision on the basis that it might give the High Court a power to exercise control over the executive. Isaacs who had originally moved that the provision be dropped, was unrepentant in his opposition, but appears to have misapprehended the position in the United States under which mandamus could be issued in the exercise of the appellate jurisdiction of the Supreme Court. Concluding debate, Barton summed up the purpose of the provision:

> The object of it is to make sure that where a person has a right to ask for any of these writs he shall be enabled to go at once to the High Court, instead of having his process filtered through two or more courts. … This provision is applicable to those three special classes of cases in which public officers can be dealt with and in which it is necessary that they should be dealt with, so that the High Court may exercise its function of protecting the subject against any violation of the Constitution or of any law made under the Constitution.[16]

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[13] *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 1898 at 1876.

[14] *Official Record of the Debates of the Australasian Federal Convention,* (Sydney), 1898 at 1876.

[15] Ibid.

[16] *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 1898 at 1885.

Following his speech the amendment was accepted.

The remedies to which s 75(v) refers are mandamus, prohibition and injunction. Mandamus and prohibition were prerogative writs historically issued by the Court of Kings Bench in England. Originally prohibition was concerned with the protection of the rights of the Crown to ensure that the prerogative was not encroached upon by disobedience to the prescribed structure for the administration of justice.[17] By the end of the nineteenth century it came to be seen as protecting the rights of the subject, rather than of the Crown. The writs for which s 75(v) provides have been designated by the High Court as "constitutional writs" rather than as prerogative writs. The Court explained why in its decision in a case called *Bodrudazza* in 2007. The Court referred to the interaction between the remedies and the federal structure of the Constitution and said:

> … what was to be protected in the Australian constitutional context was not only the rights of all natural and corporate persons affected, but the position of the States as parties to the federal compact, and jurisdictional error might arise from a want of legislative or executive power as well as from decisions made in excess of jurisdiction itself validly conferred. It is out of its recognition of these features of the remedies provided by s 75(v), and their high constitutional purposes, that in more recent years this Court has described the remedies there provided as "constitutional writs", rather than (as earlier and historically in England) as "prerogative writs".[18]

The purpose of s 75(v) was described by Sir Owen Dixon in *Bank of New South Wales v The Commonwealth*[19] as being to "make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth

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[17] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 288 CLR 651 at 655.

[18] (2007) 228 CLR 651 at 665-666.

[19] (1948) 76 CLR 1 at 370.

from exceeding their power". In *Bodruddaza* the judges elaborated upon what Dixon J had said linking the purpose of s 75(v) to the essential character of the judicial power. The object of preventing officers of the Commonwealth from exceeding federal power was not to be confined to the observance of constitutional limitations on the executive and legislative powers of the Commonwealth:

> An essential characteristic of the judicature provided for in Chapter III is that it declares and enforces the limits of the power conferred by statute upon administrative decision makers.[20]

Section 75(v) was seen as furthering that end through the control of "jurisdictional error".

The terminology of "jurisdictional error", which enlivens the application of the constitutional writs, is linked to the history of their ancestors, the prerogative writs in England, and the filtering or controlling criteria for their issue. Prohibition was used by the Royal Courts of Justice to restrain inferior courts from exceeding their powers. Hence, the language of jurisdiction dates back to the seventeenth century. The application of jurisdiction error in relation to administrative decisions is concerned with the limits of executive powers. A leading Australian text writer on the subject has observed:

> Most judgments today either use ultra vires and jurisdictional error interchangeably, or else differentiate between the two only on grounds of common usage. The distinction has become purely sematic. Most Australian commentators have discarded it.[21]

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[20] (2007) 228 CLR 651 at 668.

[21] Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed, 2009 [1.70].

Examples of jurisdictional error which illustrate that point include error of law which causes the decision-maker to identify a wrong issue, ask itself a wrong question, ignore relevant material or rely upon irrelevant material and, in some circumstances, to make an erroneous finding or reach a mistaken conclusion which causes it to exceed its authority or powers. Such errors will invalidate any order or decision of the decision-maker which reflects them.[22] To put it another way, making such an error of law:

> … results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, 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.[23]

Other matters constituting jurisdictional error may include bad faith or a breach of the rules of procedural fairness on the part of the decision-maker. The rules of procedural fairness broadly require that unless excluded by the relevant statute a person to be affected adversely by a decision has an opportunity to be heard before the decision is made and to comment on or respond to material before the decision-maker which may lead to an adverse outcome. They also involve a requirement that the decision-maker be impartial in the sense that there is no actual or ostensible bias against the person affected. The rules are seen as an implied limitation of the grant of power to the decision-maker. That is unless the implication is excluded by express words or perhaps a necessary contrary implication. As former Justice McHugh said of the common law rules of natural justice in 2001[24]:

> They are taken to apply to the exercise of public power unless clearly excluded.

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[22] *Craig v South Australia* (1995) 184 CLR 163.

[23] *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 351 [82].

[24] *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

Even when they are expressly excluded by statute it is not all that easy to put the rules of procedural fairness aside. They are not just some morally pleasing gloss on the exercise of power. Generally they go to the quality of the decision. Their breach may indicate error of law on some other ground. For example, a decision-maker affected by actual bias is likely to fail to have regard to relevant considerations or may take into account irrelevant considerations. For example a decision-maker biased against people with blue eyes, who takes into account the eye colour of a person to be affected by his or her decision, will have taken into account an irrelevant consideration. A decision-maker who does not hear from the person affected by the decision may thereby fail to discharge a statutory requirement to have regard to all relevant evidence.

Ultimately the question of jurisdictional error is, for all intents and purposes, one of power. The question is, did the decision-maker have the power to make the decision or, relevantly to mandamus, did the decision-maker wrongfully decline to fulfil his or her duty to make a decision?

Because it is entrenched in the Constitution, the jurisdiction conferred by s 75(v) cannot be removed by legislation. This has implications for statutory, privative or ouster clauses which seek to exclude or limit judicial review of official decisions. In Australia, the effect of an apparently powerful privative clause in the face of s 75(v) was tested in 2003. A section was inserted in the *Migration Act 1958* (Cth) to limit judicial review of decisions made under that Act. It provided in respect of such decisions that they:

- were final and conclusive;
- must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- were not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Had that section on its proper construction operated to oust the jurisdiction conferred by s 75(v) of the Constitution it would no doubt have been invalid. However, in a case called *Plaintiff S157 v The* Commonwealth[25] the Court held that the privative clause did not oust the jurisdiction because it did not extend to decisions affected by jurisdictional error. Such decisions were only purported decisions. They were not decisions made under the Act. The application of the privative clause was to decisions made under the Act. The section had to be read so as not to refer to purported decisions vitiated by jurisdictional error. This left open the full application of the constitutional jurisdiction under s 75(v).

A failure to comply with conditions or restraints upon the exercise of statutory powers which vitiates the purported exercise of such powers, would amount to jurisdictional error. An example of that kind of error in the migration context would be misinterpretation of a condition upon the exercise of a power to grant, refuse or cancel a visa. It might also be failure to comply with the requirements of procedural fairness. These were areas of frequent contest in judicial review of migration decisions which reached significant proportions in Australia in the late 1990s and the earlier part of the first decade of this century. It was that kind of litigation that gave rise to a considerable amount of High Court case law about s 75(v).

The importance of s 75(v) as an aspect of the rule of law was underlined by an observation in *Plaintiff S157*:

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of 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. The centrality, and protective purpose, of the jurisdiction of

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[25] (2003) 211 CLR 476.

> this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[26]

Section 75(v) says nothing about certiorari or habeas corpus. The jurisdiction is defined by reference to the classes of remedies sought and the class of persons against whom they are sought. The power to grant all necessary remedies in the exercise of the jurisdiction conferred by s 75(v) may be implied from the grant and extends to remedies other than those which define the jurisdiction provided that they are ancillary to it. Certiorari is of critical importance in this respect, because it is through certiorari that the impugned decision may be quashed. Although the power of the Court to issue certiorari is not specified in Ch III, the jurisdiction to issue writs of prohibition and mandamus implies the existence of the ancillary powers necessary to its effective exercise. That includes authority to grant certiorari against the relevant officer of the Commonwealth.[27]

In order to avoid the High Court being swamped with cases brought in its original jurisdiction, the like jurisdiction has been conferred by statute upon the Federal Court of Australia and the Federal Magistrates Court. If a case is brought in the High Court under s 75(v) which could be heard in one or other of those courts, then the High Court has the power to remit the matter to the lower court.

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[26] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [104].

[27] *Re: Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [14] per Gaudron and Gummow JJ.

Not infrequently challenges to Commonwealth Executive action are brought by invoking the statutory equivalent of the constitutional jurisdiction. Such challenges may also be brought under the general provisions of the *Administrative Decisions (Judicial Review) Act 1975* (Cth) which seeks to provide a simplified form of judicial review which does not depend upon the technicalities of the common law prerogative writs or the constitutional writs. Generally speaking, such cases will involve the exercise of statutory powers and the question will be whether there has been a wrongful refusal to exercise the power or whether the power has been exceeded.

Questions have arisen in Australia from time to time about the scope of the executive power conferred directly upon the Commonwealth by s 61 of the Constitution. The closest equivalent in the United States would be Article 2 of the US Constitution. Section 61 of the Australian Constitution provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.

As the Governor-General appoints Ministers of the Crown this means that executive power can be exercised by Ministers and other officials acting on their behalf. Generally the executive power is exercised pursuant to statutory authority. There has, however, been a debate about the extent to which s 61 confers power to act without statutory authority. It has been described as including:

> An area of inherent authority derived partly from the Royal prerogative and even more from the necessities of a modern national government.[28]

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[28] Sawer, 'The Executive Power of the Commonwealth and the Whitlam Government', Unpublished (1976) p 10 cited in Winterton 'The Limits and Use of Executive Power by Government" (2003) 31 *Fed Law Rev* 421 at 430-431.

The question was raised sharply in 2001 in Australia in a rather heightened political atmosphere. A Norwegian vessel, the MV Tampa, acting on the request of the Australian Government, had rescued 433 asylum seekers from the Middle East from a wooden fishing boat in the Indian Ocean. They were apparently heading for Australia. The captain sailed to Christmas Island, an Australian Territory in the Indian Ocean, but was refused permission to enter. He was then directed by the Australian Government to leave but refused to do so because of the condition of some of his passengers and the risk of travelling across open water to Indonesia. It should be noted that once landed on Australian territory within a statutorily defined migration zone, the asylum seekers would have been able to apply for protection visas under the *Migration Act* and attract all the administrative and judicial review procedures incidental to that process.

Acting pursuant to s 61 of the Constitution, the Australian Government sent troops to secure the vessel, to provide medical and humanitarian assistance to the asylum seekers and to prevent the vessel from landing them on Christmas Island. Subsequently, an arrangement was made by intergovernmental agreement for Nauru and New Zealand to receive the asylum seekers while they were processed to determine whether any of them were entitled to the benefit of the Refugee Convention. Many of the asylum seekers ended up in Australia.

While the asylum seekers were on the boat off Christmas Island, applications were filed by a Victorian NGO and a Victorian solicitor claiming that the asylum seekers were being unlawfully detained by the Commonwealth and seeking writs of habeas corpus. The writs were granted at first instance, but overturned in the Full Federal Court.[29] As I was a member of the Full Court majority which overturned the first instance decision, I do not wish to canvass the merits of the case. It was an interesting case because the Commonwealth purported to act directly under the

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[29] *Ruddock v Vadarlis* (2001) 183 ALR 1.

executive power rather than exercising executive power pursuant to an Act of Parliament. The proceedings were brought under the Federal Court's statutory equivalent of the constitutional jurisdiction conferred on the High Court. The applicants claimed injunctions, mandamus, declaratory relief and a writ of habeas corpus. The majority view in the Full Court was that there was an executive power to exclude aliens which did not require statutory authority. The minority view, reflected in the dissenting judgment of Black CJ, was that outside the boundaries of statutory authority the executive power was confined to those powers historically associated with the Royal prerogative in the United Kingdom. Historically the prerogative did not extend to the power to exclude aliens. The events surrounding the case were of political significance in Australia in an election year and in an atmosphere of concern about international terrorism heightened by the events of 9/11 in New York. The decision of the Full Court itself attracted much academic discussion, controversy and criticism in relation to its holding about the scope of the executive power. There was an interesting sequel which reflected upon the Executive's view of its relationship with the Court. It is that sequel which conveys a point relevant to this topic.

In Australia an unsuccessful litigant will usually be required to pay the costs of the successful party. In the *Tampa Case* the Commonwealth, having succeeded on appeal, then sought an order for costs against the Victorian Council of Civil Liberties and a solicitor, Mr Vadarlis, who had brought the proceedings in their own name for the benefit of the asylum seekers**.** On public interest grounds a majority of the Court, this time comprising Chief Justice Black and myself, declined to make the usual order as to costs. The Commonwealth argued that the litigation did not fall within any public interest exception to the usual costs rule. The Commonwealth, it was said, was exercising an aspect of executive power central to Australia's sovereignty as a nation. The litigation itself was "… therefore an interference with an exercise of executive power analogous to a non-justiciable 'act of state'". Chief Justice Black and I who had disagreed in the main decision, were the majority in the costs judgment. In our joint judgment we said of the Commonwealth's proposition:

> The proposition begs the question that the proceedings raised. That question concerned the extent of executive power and whether there was a restraint on the liberty of individuals which was authorised by the power. It is not an interference with the exercise of executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope. Even in the United Kingdom, unencumbered by a written constitution, the threshold question whether an act is done under prerogative power is justiciable.[30]

Specific reference was then made to s 75(v) and its history, including its relationship to *Marbury v Madison.*

Chief Justice Marshall had another significant input into the development of the rule of law in Australia. In *United States v Fisher*[31] decided in 1805, the Court held that the United States was entitled to priority of payment out of the effects of a bankrupt and that a statute conferring such priority was a valid exercise of legislative power. In the course of his judgment, Marshall CJ made a ringing observation about his approach to the interpretation of statutes affecting rights. He said:

> Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.[32]

His statement was paraphrased and reproduced in the 4th edition of *Maxwell's Interpretation of Statutes*, published a century later in 1905. It was restated thus:

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[30] *Ruddock v Vadarlis* (2001) 188 ALR 143 at [30].

[31] 1805 2 Cranch 358.

[32] 1805 2 Cranch 358 at 390.

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[33]

That passage was in turn quoted by O'Connor J in the 1908 decision of the High Court, *Potter v Minahan*[34]. O'Connor J used the presumption to construe the *Immigration Restriction Act* 1901 so as not to include within the concept of "immigrant" the Australian born son of a Victorian woman whose Chinese father had taken him back to China at the age of five, and from which he had returned to Australia at the age of 26. He was found, on the evidence, not to have abandoned his Australian home. The passage has been much quoted since[35]. It has supported the evolution of an approach to statutory interpretation which is protective of fundamental rights and freedoms. Today it has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. The House of Lords has expounded its own version of the principle as a "principle of legality" requiring that the legislature "squarely confront what it is doing and accept the political cost".[36]

Commonwealth statutes in Australia are made pursuant to the powers conferred by a written Constitution. That Constitution does not in terms guarantee common law rights and freedoms against legislative intrusion. However, the interpretive rule which has emerged from *Potter v Minahan* has a "constitutional"

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[33] Maxwell PB, *(Maxwell) On the Interpretation of Statutes* (4th ed, Sweet and Maxwell, 1905) 122.

[34] (1908) 7 CLR 277 at 304.

[35] *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437.

[36] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131; *R v Lord Chancellor; Ex parte Withan* [1998] QB 575.

character even if the rights and freedoms which it protects do not. There have been many applications of the rule in Australia which has been restated in quite emphatic terms by the High Court from time to time. My predecessor, Gleeson CJ, described it thus in 2004:

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.[37]

Two high profile cases which involved the application of the presumption in the Federal Court in recent years were judgments of the Full Court in *Minister for Immigration and Citizenship v Haneef*[38] and *Evans v New South Wales*[39]. In *Haneef* the Full Court was concerned to construe s 501 of the *Migration Act*, defining the circumstances in which a person would not pass a statutory "character test" and so be liable for cancellation of a visa on character grounds. A person would fail the character test if he or she "had an association with someone else or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct".

The Court had to interpret the kind of association which would bring a person within the criterion. It held that it was not good enough to be a relative or a friend of a person involved in criminal conduct. Applying the principle of legality, the Court said:

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[37] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 321.

[38] (2007) 163 FCR 414.

[39] (2008) 168 FCR 576.

> Having regard to its ordinary meaning, the context in which it appears and the legislative purpose, we conclude that the association to which [the section] refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person's character.[40] (emphasis in original)

It was not sufficient, for example, to be related to a terrorist.

In the second case, *Evans*, the Court was concerned with the validity of regulations made under a law of the State of New South Wales dealing with the visit of the Pope for World Youth Day in 2006. Under the regulation, a person could be directed not to engage in conduct causing annoyance to participants in that event. The Full Court referred to cases about the interpretive presumption. It then interpreted the regulation making power according to the common law principle and found that, so interpreted, it did not authorise a broadly stated regulation directed to conduct causing "annoyance to participants in World Youth Day event".[41] The construction applied was that which minimised interference with freedom of speech.

The approach to statutory construction, reflected in what Chief Justice Marshall said in 1805, is not directly concerned with judicial review of executive action. However, it plainly has a major bearing upon that field of judicial activity for in determining the limits of executive power conferred by statute, the statute must first be construed.

Conclusion

I hope I have said sufficient to indicate the influences of two of Chief Justice Marshall's decisions in shaping review of executive action in Australia so many years after those decisions were made. That is not the only area in which the jurisprudence of the Courts of the United States has had an influence on the Courts

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[40] (2007) 163 FCR 414 at 447 [130].

[41] (2008) 168 FCR 576 at 598-599.

in Australia. There are areas of constitutional law and statute law in which we are assisted from time to time by the approaches taken by the courts of the United States. Sometimes, of course, like Inglis Clark, we are inspired to do something different.