

MODERN ADMINISTRATIVE LAW IN AUSTRALIA

CONCEPTS AND CONTEXT

Edited by

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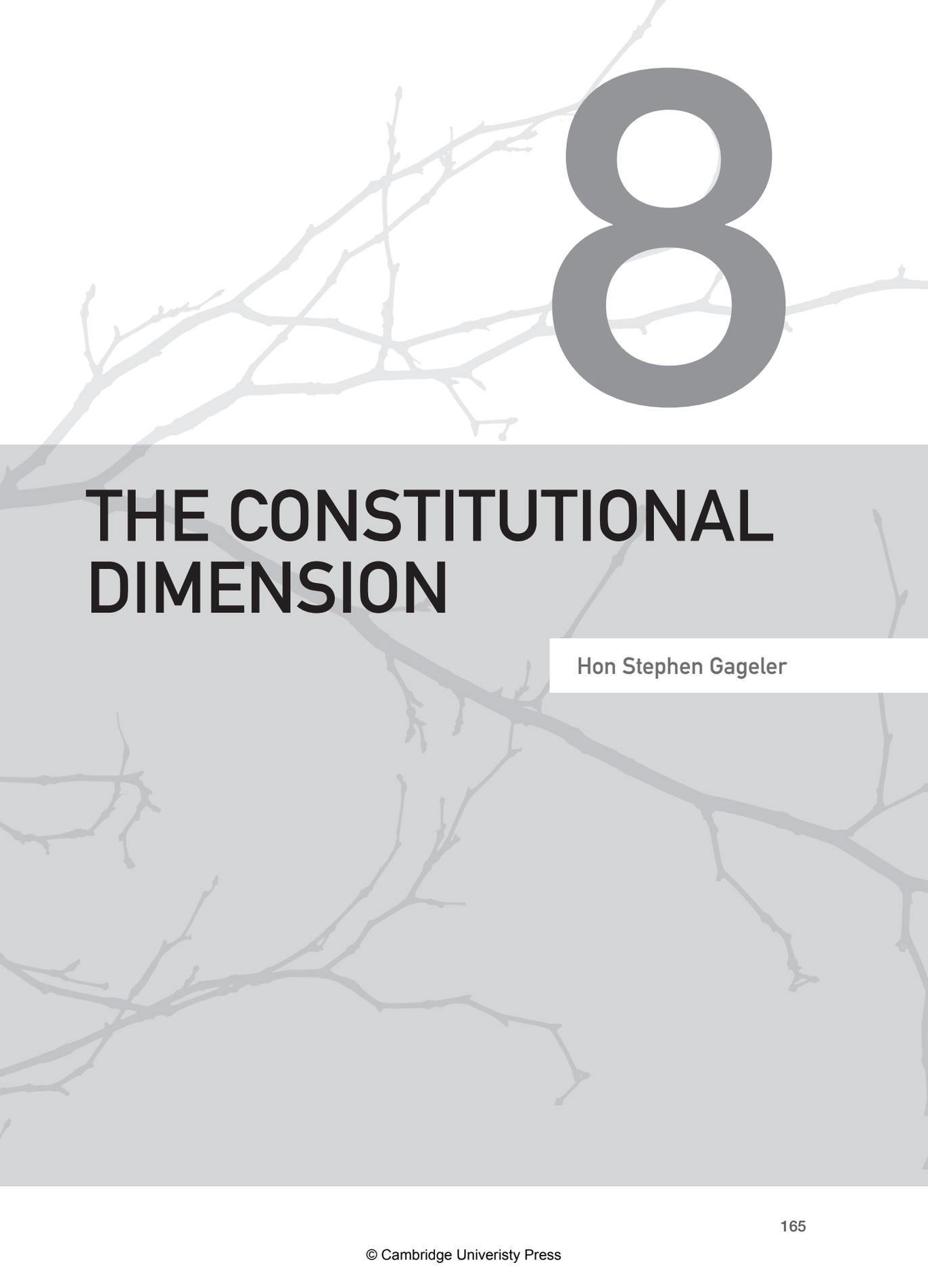
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THE CONSTITUTIONAL DIMENSION

Hon Stephen Gageler

Introduction

The *Australian Constitution* came into existence in 1901 in fulfilment of what Sir Henry Parkes had described in his Tenterfield Oration in 1889 as the aspiration to create a ‘great national government for all Australia’ under which ‘great national questions’ ‘would be disposed of by a fully authorised constitutional authority’.¹ Writing soon after, Professor Harrison Moore noted the ‘extraordinary and peculiar’ nature of the jurisdiction of courts to ‘control’ administrative decision-making by ‘public officers’ and went on to consider ‘how far the exercise of judicial control is affected by the existence of a dual system of government over the same persons and territory’.²

Given that it is in the nature of a constitution to establish a system of governance, it is hardly surprising that the *Australian Constitution* should have implications for the development of not only the institutional design of the repositories of administrative power but also that branch of Australian administrative law which is concerned with the judicial review of administrative action. What might be thought surprising in hindsight is that, but for the early insight of Professor Harrison Moore and occasional glimpses in reasons for judgment of which his one-time student Sir Owen Dixon was an author or co-author, those constitutional implications went largely unheralded for almost a century, coming to prominence only in the two decades between 1990 and 2010.

Yet the *Australian Constitution* has from the beginning been interpreted and applied within the tradition of the common law. Within that tradition, legal doctrine legitimately develops and nascent implications have been seen often to rise, sometimes later to fall, in response to the stimulus of felt necessities and in the fullness of time.

What follows is a short and deliberately uncritical description of the development of a constitutional conception of the judicial review of administrative action in Australia, together with a brief and deliberately non-committal exploration of some of its implications.

Some matters of history and structure

The basic structure of the *Australian Constitution*, as it came into existence and as it continues today, mirrors in large measure the *United States Constitution* which

1 ‘Sir Henry Parkes at Tenterfield’, *Sydney Morning Herald* (Sydney), 25 October 1889, 8, at <www.nla.gov.au/nla.news-article13746899>.

2 W Harrison Moore, *The Constitution of The Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 398–9.

provided its principal inspiration and which in 1901 had sustained a system of government for more than a century. At the national level, Chapters I, II and III provide respectively for the establishment and powers of the Commonwealth Parliament, Commonwealth executive and federal judiciary. At the State level, addressed in Chapter V, what were formerly colonial constitutions are specifically acknowledged and preserved, subject to the *Australian Constitution*, as State constitutions establishing legislative, executive, judicial and other organs of State government.

Chapter III of the *Australian Constitution*, providing for the establishment and powers of the federal judiciary, has been generally understood from at least 1918 to prevent the conferral by the Commonwealth Parliament of judicial power other than on a court,³ and from at least 1956 to prevent the conferral by the Commonwealth Parliament on a court of any function that is not within or incidental to judicial power.⁴ Despite that rigid separation of judicial power, precisely what falls within the concept of judicial power has defied exhaustive definition. The accepted 'truth', however, is that 'the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court'.⁵ That notion of the exclusive province of judicial power, encompassing the ascertainment of existing rights by the judicial determination of issues of fact or law, has never been doubted to encompass the judicial determination of whatever issues of fact or law may be necessary to the determination and enforcement of the limits and conditions of exercise of any legal power or performance of any legal duty. The High Court, in determining a constitutional case in 1955, accordingly treated as undeniable the proposition that the *Australian Constitution* 'leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires'.⁶ It elaborated:⁷

In the everyday work of this Court, we are accustomed to examining the validity of Acts of Parliament. Less often does the validity of an executive act come to be considered, but it stands upon the same footing.

Within Chapter III of the *Australian Constitution*, two structural variations from the model of the *United States Constitution* have been significant to the development of what emerged from 1990 as the Australian constitutional understanding of judicial review of administrative action. One is s 75(v). The other is s 73(ii). Both concern

³ *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed *Attorney-General (Cth) v R* (1957) 95 CLR 529.

⁵ *R v Davison* (1954) 90 CLR 353, 369.

⁶ *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 165.

⁷ (1955) 92 CLR 157, 165.

the jurisdiction of the High Court, which s 71 establishes as the ‘Federal Supreme Court’ and invests irrevocably with the ‘judicial power of the Commonwealth’. Section 75(v) is concerned with an aspect of the High Court’s entrenched original jurisdiction: it is a constitutional conferral on the High Court of original jurisdiction in any matter in which a writ of mandamus or prohibition or an injunction is sought against an ‘officer of the Commonwealth’. Section 73(ii) is concerned with an aspect of the High Court’s entrenched appellate jurisdiction: it is a constitutional conferral on the High Court, with only such exceptions and subject only to such regulations as the Commonwealth Parliament may prescribe, of entrenched appellate jurisdiction to hear and determine appeals from all judgments and orders of State Supreme Courts.

The writs of mandamus and prohibition referred to in s 75(v) of the *Australian Constitution* are particular forms of action historically administered at common law in England by the Court of King’s Bench. Together with the writ of certiorari, they came to be administered by colonial Supreme Courts during the 19th century, and continued to be administered at common law by State Supreme Courts throughout much of the 20th century by virtue of various charters establishing those Supreme Courts as superior courts of law, each capable of exercising, in its own colony or State, jurisdiction defined by reference to the jurisdiction historically administered in England by the Court of King’s Bench. Although plagued, like much of the common law, by overlaps, gaps, obscurities and technical complexities, mandamus, prohibition and certiorari together provided the basic suite of common law remedies known as the ‘prerogative writs’ which allowed Supreme Courts to supervise the exercise of power by other State courts and other State officers: mandamus to compel the performance of an unperformed duty; prohibition to restrain an unauthorised act; and certiorari to quash the legal effect of an act that was either unauthorised when it occurred or affected by an error of law apparent from the record that was made of it.

The writs of mandamus and prohibition which are able to be issued by the High Court against officers of the Commonwealth under s 75(v) of the *Australian Constitution* took their names and content from the common law. Throughout much of the 20th century, they were referred to as prerogative writs and were, by and large, conceived of in common law terms. Officers of the Commonwealth subject to those writs were held in 1910 to include holders of judicial offices, as well as holders of offices within the Commonwealth executive and holders of offices established under legislation enacted by the Commonwealth Parliament.⁸ The practices, principles and terminology that built up around the exercise of the jurisdiction conferred by s 75(v) of the *Australian Constitution* have therefore been

⁸ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1.

forced to accommodate its application to courts created by the Commonwealth Parliament exercising the judicial power of the Commonwealth as much as to the holders of other officers exercising a wide variety of powers of administration. Writs of mandamus and prohibition under s 75(v) were in practice sometimes directed to Ministers or other officers of the Commonwealth executive. Much more frequently they were directed to members of the Commonwealth Court of Conciliation and Arbitration (for 30 years from 1926 thought to have been validly established by the Commonwealth Parliament as a federal court invested with both judicial power and arbitral power) and later to members of the Commonwealth Industrial Court (established in 1956 as a court invested with exclusively judicial power) and the Commonwealth Conciliation and Arbitration Commission (established in 1956 to exercise arbitral power).

Against that background, Australian administrative law, to the extent that it may have been perceived as a distinct branch of the law at all, was very much perceived throughout most of the 20th century – the first century of the existence of the *Australian Constitution* – as a branch of the common law concerned with the application to administrative officers of the more general jurisdiction of State Supreme Courts and of the High Court under s 75(v) of the *Australian Constitution* to issue prerogative writs. The focus was in large measure on the grounds on which those writs in an appropriate case might be issued or withheld.

There was, at the Commonwealth level, a highly significant legislative reform in 1977 in the form of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'). The ADJR Act empowered the Federal Court of Australia, itself only formed in 1976, to make an order of review in respect of a decision of an administrative character made under a Commonwealth enactment where satisfied that one or more specified statutory grounds of review existed. The ADJR Act provided (and continues to provide) within its field of operation a procedurally simpler and more flexible statutory alternative to the common law writs and to those writs provided for in s 75(v) of the *Australian Constitution*. But the field of operation of the ADJR Act soon came to be narrowed by judicial interpretation⁹ and legislative amendment,¹⁰ and its statutory grounds of review were conceived and have always been interpreted and administered as reflections (and in some cases slight modifications) of the common law.¹¹ The ADJR Act was supplemented by s 39B of the *Judiciary Act 1903* (Cth) which, from 1983, conferred jurisdiction on the Federal Court in substantially identical terms to that conferred on the High Court by s 75(v) of the *Australian Constitution* and which, from 1997, also

⁹ See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

¹⁰ See, eg, *Migration Legislation Amendment (Consequential Amendments) Act 1989* (Cth).

¹¹ *Kioa v West* (1985) 159 CLR 550, 576.

conferred on the Federal Court jurisdiction in matters arising under laws made by the Commonwealth Parliament. In relation to matters within its jurisdiction, the Federal Court was given power to make orders and to issue writs of such kinds as the Court thinks ‘appropriate’.¹²

Looking then very broadly at the shape of that branch of Australian administrative law which concerned the judicial review of administrative action approaching the last decade of the 20th century, it appeared piecemeal. The various pieces – s 75(v) of the *Constitution*, s 39B of the *Judiciary Act*, the ADJR Act and the prerogative writ jurisdictions of State Supreme Courts – appeared by and large to be based on, or reflective of, the common law.

Emergence of the modern approach

While the pieces have remained, the beginning of a change from the piecemeal common law conception of Australian administrative law can be traced to 1990. One of the cases that came before the High Court by way of appeal from a State Supreme Court that year was a case brought against the Attorney-General of New South Wales by a former magistrate who had sat in the old Court of Petty Sessions, which had just been abolished, and who had not been chosen for appointment to the Local Court of New South Wales established in its place.¹³ The question was whether the former magistrate could properly obtain an order from the Supreme Court of New South Wales that would have had the effect of requiring the Attorney-General to determine his application for a position on the Local Court on its own merits without reference to the relative merits of other candidates. The High Court held, by majority, that the former magistrate could not obtain such an order, but just why not was put in different terms by different members of the majority. Sir Gerard Brennan alone went so far as to put it in terms that the making of such an order would involve the Supreme Court exceeding its legitimate constitutional role.

The ‘duty and the jurisdiction of the courts’, Sir Gerard Brennan said, ‘are expressed in the memorable words of Marshall CJ in *Marbury v Madison*’.¹⁴ *Marbury v Madison*,¹⁵ decided by the Supreme Court of the United States in 1803, has always been regarded in Australia as containing, in the judgment of Marshall CJ, a classical exposition of the justification for a court to review the constitutional

¹² Section 23 of the *Federal Court of Australia Act 1976* (Cth).

¹³ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

¹⁴ (1990) 170 CLR 1, 35.

¹⁵ 5 US 137 (1803).

validity of legislative or executive action.¹⁶ It was in 1990 well known to Australian constitutional lawyers but before then rarely, if ever, mentioned by Australian administrative lawyers. The frequently quoted words used by Marshall CJ in *Marbury v Madison* to justify a court reviewing the constitutional validity of legislative or executive action were these: 'It is, emphatically, the province and duty of the judicial department to say what the law is'.¹⁷ Those were the words quoted by Sir Gerard Brennan. That justification for the court in reviewing the constitutionality of legislative or executive action was then appropriated by Sir Gerard Brennan both to explain and to limit the legitimate role of a court in reviewing administrative action generally. 'The duty and jurisdiction of the court to review administrative action', he went on to say, 'do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power'.¹⁸ That statement of Sir Gerard Brennan was in time to become accepted as canonical, and to be the outworking of an idea in another statement of his a few years earlier, that '[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action'.¹⁹

There is a notable similarity between the conception of the duty and jurisdiction of a court to review administrative action so articulated by Sir Gerard Brennan in 1990 and what was explained in the same year by Professor Craig as 'the modern conceptual justification' for judicial review implicit in the 'rule of law', as espoused by Professor Dicey in the context of the unwritten constitution of the United Kingdom.²⁰ Professor Craig explained that Professor Dicey espoused, as an aspect of the doctrine of the 'omnicompetence' of Parliament, a doctrine of the 'monopoly' of Parliament over 'governmental' or 'public' power.²¹ The Diceyan view of the judicial review of administrative action, as Professor Craig put it, 'was designed to ensure that the sovereign will of Parliament was not transgressed by those to whom ... grants of power were made'.²²

If authority had been delegated to a minister to perform certain tasks upon certain conditions, the courts' function was, in the event of challenge, to check that only those tasks were performed and only where the conditions were present. If there were defects on either level, the challenged decision would be declared null. For the courts not to have intervened would have

16 *Australian Communist Party v Commonwealth* ('Communist Party case') (1951) 83 CLR 1, 262–3.

17 5 US 87, 111 (1803).

18 (1990) 170 CLR 1, 35–6.

19 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

20 P P Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, (Oxford University Press, 1990) 21.

21 *Ibid.*, 20.

22 *Ibid.*, 21–2.

been to accord a 'legislative' power to the minister or agency by allowing them authority in areas not specified by the real legislature, Parliament. The less well-known face of [parliamentary] sovereignty, that of parliamentary monopoly, thus demanded an institution to *police* the boundaries which Parliament had stipulated. It was this frontier which the courts patrolled through non-constitutional review.

There are also notable differences from the Diceyan conception. That conception limits judicial review to 'non-constitutional review' – that is, review concerned not with the constitutionality of administrative action, but with the compliance of that action with legislative or common law constraints. Within the context of the *Australian Constitution*, which in common with the *United States Constitution* left no room for legislative omnicompetence, and which had a strong tradition of constitutional judicial review, Sir Gerard Brennan assimilated the conceptual justification for non-constitutional judicial review with the conceptual justification for constitutional judicial review. Non-constitutional judicial review and constitutional judicial review were henceforth manifestations of one and the same constitutional duty of a court to police (declare and enforce) the whole of the law (constitutional and legislative) that limits and conditions the exercise of a repository's power.

Another significant step occurred in 2000 in a migration case brought in the original jurisdiction of the High Court under s 75(v) of the *Australian Constitution*.²³ The High Court there, in effect, adopted the explanation of the duty and jurisdiction of a court given by Sir Gerard Brennan 10 years earlier as the justification for giving a wide interpretation to the original jurisdiction conferred on the High Court itself by s 75(v) of the *Australian Constitution*. The writs of mandamus and prohibition were labelled, with emphasis, 'constitutional writs'. The issue of those constitutional writs was explained wholly in terms of enforcing the law which determines the limits and governs the exercise of a Commonwealth officer's power. For a Commonwealth officer to transgress or fail to act in accordance with the law which determines the limits and governs the exercise of that Commonwealth officer's power was explained as amounting to 'jurisdictional error'. The term 'jurisdictional error' had surfaced only on occasions in the past. From this time 'jurisdictional error' came to be used routinely to describe the necessary condition for a 'constitutional writ' to issue.

A very short step was then taken just three years later in the context of another migration case brought within the original jurisdiction of the High Court under s 75(v) of the *Australian Constitution*.²⁴ The step was to characterise s 75(v) as introducing into the *Australian Constitution* an entrenched minimum provision of judicial review which was beyond the competence of the Commonwealth Parliament

²³ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

²⁴ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

to deny. Building on an earlier observation of Sir Owen Dixon concerning the ‘impossibility’ of the Commonwealth Parliament imposing ‘limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity’, and the simultaneous deprivation of the High Court ‘of authority to restrain the invalid action of the court or body by prohibition’,²⁵ five members of the High Court spelt out ‘two fundamental constitutional propositions’ which they noted were uncontroversial as between the parties in that case:²⁶

First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.

The constitutionally entrenched minimum provision of judicial review, to the extent that it had come to be declared by the High Court by 2003, was therefore judicial review:

- by the High Court;
- under s 75(v) of the *Australian Constitution*;
- through the constitutional writs of mandamus and prohibition;
- for jurisdictional error;
- in the purported exercise of judicial or non-judicial power by any officer of the Commonwealth.

The High Court cast the constitutional net over Australian administrative law even more widely in early 2010.²⁷ Ironically, it did so in a case involving not a purported exercise of administrative power but a purported exercise of judicial power by a body constituted under New South Wales legislation as superior court of record having jurisdiction in criminal proceedings to make a decision which, according to a privative clause expressed in the legislation, was to be final and incapable of being appealed against, reviewed or called into question in any other court or tribunal. Holding the privative clause to be constitutionally incapable of preventing judicial review by the Supreme Court of New South Wales, the High Court looked at and linked two things. One was s 73(ii) of the *Australian Constitution* which, in making provision for appeals from State Supreme Courts to the High Court, necessarily recognises and requires the

²⁵ *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 616.

²⁶ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511–12 [98].

²⁷ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

existence of those State Supreme Courts. The other was the historical capacity of the Supreme Court of a State to exercise in that State the jurisdiction historically exercised in England by the Court of King's Bench to issue writs of certiorari, mandamus and prohibition to other courts and officials. The High Court combined those two things to produce the result of constitutionally entrenching judicial review in the States. The steps in its reasoning were these:

- Chapter III of the *Australian Constitution* – s 73(ii) in particular – is predicated on the continuing existence for each State of an institution meeting the description of a State Supreme Court;²⁸
- a 'defining characteristic' of a State Supreme Court is its 'supervisory jurisdiction' of determining and enforcing 'the limits on the exercise of State executive and judicial power by persons and bodies other than [the Supreme] Court', that jurisdiction being exercised 'by the grant of prerogative relief or orders in the nature of that relief';²⁹
- because 'it would remove from the relevant State Supreme Court one of its defining characteristics', a State law 'which would take from a State Supreme Court power to grant [prerogative relief or orders in the nature of prerogative relief] on account of jurisdictional error is beyond State legislative power'.³⁰

The result, reinforced by a holding later in 2010 and repeated in 2012, that 'State legislative power does not extend to depriving a state Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the executive government of the State, its Ministers or authorities',³¹ was to produce a constitutionally entrenched minimum provision of judicial review:

- by Supreme Courts;
- as recognised in s 73(ii) of the *Australian Constitution*;
- through the prerogative writs of mandamus, prohibition and certiorari or their modern statutory equivalents;
- for jurisdictional error;
- in the purported exercise of State executive power or State judicial power by any person or body other than the Supreme Court.

There is, in functional terms at least, an obvious symmetry between what has emerged as the constitutionally entrenched supervisory jurisdiction of a State Supreme Court and the constitutionally entrenched original jurisdiction conferred

28 (2010) 239 CLR 531, 580 [96].

29 Ibid, 581 [99].

30 Ibid, 581 [99], [100].

31 *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 289 ALR 1 at 17 [60], citing *State of South Australia v Totani* (2010) 242 CLR 1, 27 [26].

on the High Court by s 75(v) of the *Australian Constitution*. Like the jurisdiction of the High Court under s 75(v), the jurisdiction guaranteed to a Supreme Court under s 73(ii) ‘introduces into the *Australian Constitution* of the Commonwealth an entrenched minimum provision of judicial review’.³² Like the jurisdiction of the High Court under s 75(v), the jurisdiction guaranteed to a Supreme Court under s 73(ii) serves to ensure that there cannot be ‘islands of power immune from judicial supervision and restraint’. And complementing the original jurisdiction of the High Court under s 75(v), the appellate jurisdiction conferred on the High Court by s 73(ii) to hear appeals from State Supreme Courts serves to ensure the ‘superintendence of [the High] Court as the “Federal Supreme Court” in which s 71 of the Constitution vests the judicial power of the Commonwealth’.³³

Ambiguities and challenges of the modern approach

What has emerged is an overarching constitutional justification not only for the existence, but also for the minimum scope, of judicial review of administrative action at both the Commonwealth and State levels. The conceptual justification for judicial review at each level is no more and no less than the rule of law itself: the duty and jurisdiction of a court within the limits of its own jurisdiction to declare and enforce the law which determines the limits and governs the exercise of a repository’s power. The minimum scope of judicial review at each level, capable always of statutory expansion within constitutional limits, is review for jurisdictional error. The High Court and each State Supreme Court retain within the limits of their respective constitutionally entrenched original jurisdictions an ability to grant appropriate relief to correct a repository of Commonwealth or State power who transgresses or fails to act in accordance with the law which determines the limits and governs the exercise of that power, the High Court through its appellate jurisdiction then exercising ultimate supervision over the entire system. The result: a seemingly singular and elegant constitutional scheme; a new paradigm.

Any new paradigm brings ambiguities and challenges. The ambiguity at the core of the new constitutional paradigm of Australian administrative law lies in its adoption of the opaque terminology of jurisdictional error. The term ‘jurisdiction’, Felix Frankfurter wrote, ‘competes with “right” as one of the most deceptive of legal pitfalls’,³⁴ and is for analytical purposes ‘a verbal coat of too many colors’.³⁵

³² *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103].

³³ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99], [98].

³⁴ *City of Yonkers v United States* 320 US 685, 695 (1944).

³⁵ *United States v LA Tucker Truck Lines Inc* 344 US 33, 39 (1952).

To describe ‘jurisdictional error’ quite properly as a conclusive, not an analytical, label³⁶ is not necessarily to assent to every aspect of the post-realist insight that the adjective ‘jurisdictional’ in such a context ‘is almost entirely functional’, is ‘used to validate review when review is felt to be necessary’ and is justified only if ‘it is understood that the word “jurisdiction” is not a metaphysical absolute but simply expresses the gravity of the error’.³⁷

The principal challenge of the new constitutional paradigm lies in unpacking the analysis implicit in the application of the conclusive label of ‘jurisdictional error’ to produce clear principles of predictable application.

Sir Owen Dixon observed in 1938 that ‘[i]n the past a tendency may have appeared in the superior courts of common law to adopt constructions of statutes conferring powers on magistrates and others which would result in the withdrawal from their exclusive or conclusive determination matters which we should now think were intended for their decision’.³⁸ The Kerr Committee, on the other hand, recorded in 1971 a ‘tendency of the courts to widen the area in which they may interfere by way of judicial review in cases where the extended doctrine of ultra vires or jurisdictional excess is resorted to’.³⁹ Those contrasting references, barely thirty years apart, illustrate the reality that tendencies of courts to adopt constructions of statutes having the result of either restricting or expanding the decision-making authority conferred by legislation on repositories of administrative power have varied significantly from time to time and from court to court.

The constitutional paradigm alone does not point to either a restrictive or an expansionist approach to the decision-making authority conferred by legislation on repositories of administrative power. The constitutional paradigm alone similarly does not warrant or sustain an approach to administrative law that so diverges from that which exists elsewhere as fairly to attract the label of ‘Australian exceptionalism’.⁴⁰ To identify the duty and jurisdiction of a court as being limited to the declaration and enforcement of the law which determines the limits and governs the exercise of a repository’s power is necessarily to adopt and maintain a distinction, sometimes difficult and sometimes smacking of a degree of artificiality, ‘between acts that are unauthorised by law and acts that are authorised’.⁴¹ It is to

36 *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43, 49–50 [27].

37 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 570–71 [64], quoting Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70 *Harvard Law Review* 953, 963.

38 *Parisiene Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391.

39 *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971), 13 [33].

40 Cf Taggart, ‘“Australian Exceptionalism” in Judicial Review’ (2008) 36 *Federal Law Review* 1.

41 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 25 [77], quoting Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues’ (2002) 30 *Federal Law Review* 217, 234.

say nothing, however, of the content of the law which determines the limits and governs the exercise of the repository's power.

Adherence to the foundational principle in *Marbury v Madison* that '[i]t is emphatically the province and duty of the judicial department to say what the law is' necessitates that a court, in circumstances of controversy, fix by judicial determination of fact and law the legal boundaries of the authority delegated to or conferred on a repository of administrative power. Exposition in its country of origin illustrates, however, that the principle is not of itself inconsistent with legislative delegation to a repository of administrative power of a degree of law-making authority so as to produce interstitial interpretative outcomes which must be recognised by courts as legally effective to the extent that they are within the scope of the authority delegated.⁴² In language quoted by the High Court in 2000 and stated to be applicable within the Australian constitutional context, it has instead been explained that 'judicial review of administrative action stands on a different footing from constitutional adjudication, both historically and functionally'.⁴³

In part no doubt because alternative methods of control, both political and administrative in nature, are available to confine agencies within bounds, there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.

The constitutional permissibility of legislative delegation of law-making authority in Australia has never been doubted at the State level and has been accepted at the Commonwealth level since 1931.⁴⁴ Doctrinal adherence to the separation of judicial power by Chapter III of the *Australian Constitution* has not been replicated to produce any rigid separation of legislative and executive power by Chapters I and II of the *Constitution*. As explained in 1935 by Sir Owen Dixon:⁴⁵

The failure of the doctrine of the separation of the powers of government to achieve a full legal operation here is probably fortunate. Its failure to do so may be ascribed perhaps to mere judicial incredulity. For it seemed unbelievable that the executive should be forbidden to carry on the practice of legislation by regulation – the most conspicuous legal activity of a modern

42 H P Monaghan, 'Marbury and the Administrative State' (1983) 83 *Columbia Law Review* 1. See also *City of Arlington, Texas v Federal Communications Commission* 569 US __ (2013).

43 H P Monaghan, 'Marbury and the Administrative State' (1983) 83 *Columbia Law Review* 1, 33, quoted in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153.

44 *Victorian Stevedoring and General Contracting Company Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.

45 O Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 606.

government. What otherwise might have been treated as a rigid requirement of the supreme law has been given the appearance of the mere categories of a draftsman. Legal symmetry gave way to common sense.

Common-sense recognition of the practical demands of modern government has also meant that such judicial monopoly as exists in Australia over the ascertainment of existing rights has never been taken so far as to exclude the capacity of others to form and act upon their own judgements about the content of the law that bears upon the taking of action within such area of authority as may be granted to them.⁴⁶ To the contrary, the High Court in 1995 unanimously endorsed the statement of Lord Diplock that:⁴⁷

Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.

The High Court added:⁴⁸

The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal.

Consistent with that understanding as to the scope of legislative power to confer decision-making authority, it has been emphasised that the 'distinction between errors of fact and law' does not 'supplant or exhaust the field of reference of jurisdictional error'.⁴⁹ Indeed, it has been steadfastly maintained in Australia that a repository of power may make an 'error of law' (that is, may make a judgment about the content of the law that is different from the judgment that is or would be made independently by a court) that is not 'jurisdictional' (that is, that does not prevent the repository of the power taking action that is legally operative on the basis that the action is within the area of decision-making authority conferred on the repository by the power).⁵⁰ Decisions of long standing go so far as to

⁴⁶ *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 666; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189–90.

⁴⁷ *Craig v South Australia* (1995) 184 CLR 163, 179, quoting *In Re Racal Communications Ltd* [1981] AC 374, 383.

⁴⁸ (1995) 184 CLR 163, 179.

⁴⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 71 [54].

⁵⁰ Eg, *R v Taylor; Ex parte Professional Officers' Association-Commonwealth Public Service* (1951) 82 CLR 177, 184.

admit of decision-making authority being so defined as to render valid (within the constitutional limits of Commonwealth legislative power) purported administrative action taken bona fide by a repository of administrative power, provided only that the action relates to the subject-matter of the legislation and that the action can be determined by a court to be reasonably capable of being referable to that power.⁵¹

Conclusion

When the High Court in 1988 dramatically changed its previously long-held view of the critically important provision of the *Australian Constitution* that guarantees freedom of interstate trade, the High Court went on to explain that the view to which it had then come and which it was then expounding would not ‘resolve all problems’ but would ‘permit the identification of the relevant questions’.⁵²

The result of developments since 1990 is that the judicial review of administrative action in Australia irrevocably now has a constitutional dimension which, though it does not resolve all problems, allows identification of the relevant questions. The relevant questions now focus less on grounds upon which a court might issue writs or make other judicial orders and more on the sources and content of the law determining the limits and governing the exercise of an administrator’s decision-making authority.

What that constitutional dimension means for the content of Australian administrative law remains to be worked out, in the common law tradition, in the fullness of time.

51 Collected in *R v Coldham; Ex parte Australian Workers’ Union* (1983) 153 CLR 415, 418. For a view as to the provenance of those decisions, see I Holloway, ‘“A Bona Fide Attempt”: Chief Justice Sir Owen Dixon and the Policy of Deference to Administrative Expertise in the High Court of Australia’ (2002) 54 *Administrative Law Review* 687, 691.

52 *Cole v Whitfield* (1988) 165 CLR 360, 408.

MODERN ADMINISTRATIVE LAW IN AUSTRALIA

CONCEPTS AND CONTEXT

Modern Administrative Law in Australia provides an authoritative overview of administrative law in Australia. It clarifies and enlivens this crucial but complex area of law, with erudite analysis and thoroughly modern perspectives. The full range of the subject is explored, from first principles to the cutting edge of controversies and concerns unfolding today.

The contributors – including highly respected academics from 11 Australian law schools, as well as eminent practitioners including Chief Justice Robert French AC and Justice Stephen Gageler of the High Court of Australia – are at the forefront of current research, debate and decision-making, and infuse the book with unique insight.

The book examines the structure and themes of administrative law, the theory and practice of judicial review, and the workings of administrative law beyond the courts. Each chapter addresses an important conceptual or procedural concern within administrative law with reference to current issues and trends, including human rights, environmentalism, immigration, privacy and integrity in government.

Administrative law affects innumerable aspects of political, commercial and private life, and yet is often considered difficult to understand. *Modern Administrative Law in Australia* unravels the intricacies and reveals how they are applied in real cases. Illuminating and engaging, it is an essential reference for students and practitioners of administrative law.

Matthew Groves is an Associate Professor in the Law School of Monash University, where he teaches and researches in administrative law. He is also a member of the Commonwealth Administrative Review Council, the peak body that advises the federal government on administrative law and policy.

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