

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.<sup>37</sup>

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*,<sup>38</sup> 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 Kyrou 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,<sup>1</sup> 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’,<sup>2</sup> and another going further to claim that ‘our administrative law is now firmly a creature of constitutional legality’.<sup>3</sup> This paper follows the approach used elsewhere<sup>4</sup> 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 review<sup>5</sup> (namely tribunals, ombudsmen and other dispute resolution options).<sup>6</sup> 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,<sup>7</sup> 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 referenda<sup>8</sup> 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.<sup>9</sup>

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*.<sup>10</sup> 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

---

\* *Daniel Reynolds is a 6<sup>th</sup> year Bachelor of International Studies / Bachelor of Laws student at the University of New South Wales. He is the winner of the 2013 Australian Institute of Administrative Law Inc Essay Prize in Administrative Law. His thanks go to Greg Weeks at UNSW, in whose administrative law class he originally wrote this essay, and whose comments on an earlier draft were invaluable in producing the final version.*

adopting and elaborating core doctrinal concepts, such as jurisdictional and non-jurisdictional error, natural justice,<sup>11</sup> principles governing the exercise of discretion, and so on.<sup>12</sup> These principles were firmly embedded in the common law<sup>13</sup> rather than in any constitutional analysis and, indeed, ‘little progress’<sup>14</sup> was made in the first period of the High Court’s life in resolving technical questions about remedies<sup>15</sup> 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,<sup>16</sup> which argued that a more clearly delineated list of substantive grounds of review should be enacted in legislation,<sup>17</sup> 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’,<sup>18</sup> 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 expectations<sup>19</sup> and, more generally, the court’s activity during this time has been described (often pejoratively) as ‘judicial activism’.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> In response, it created a cluster of merits review tribunals to assume some of the court’s caseload<sup>23</sup> and, in 1995, limited the Federal Court’s jurisdiction to review of migration decisions generally.<sup>24</sup> With Federal Court judicial review severely curtailed by the early 1990s amendments and the field of operation of the *ADJR Act* narrowed by judicial interpretation<sup>25</sup> and legislative amendment,<sup>26</sup> 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).<sup>27</sup>

### **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*<sup>28</sup> 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*<sup>29</sup>; ‘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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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*,<sup>35</sup> the High Court entertained its first migration case in 15 years, brought under section 75(v) on the ground of want of procedural fairness.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> So it was that jurisdictional error 'came of age',<sup>41</sup> 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*<sup>42</sup> was concerned with its availability. Four years prior in *Abebe*,<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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*<sup>46</sup> 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,<sup>47</sup> that position was reversed with the finding that there exists a constitutionally entrenched minimum level of judicial review at the state level.<sup>48</sup> Chapter III and section 73(ii) of the *Constitution* are predicated upon the continuing existence in each state of a 'State Supreme Court'.<sup>49</sup> 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'.<sup>50</sup> 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.<sup>51</sup>

The judgment in *Kirk* was well-received, winning 'unmitigated admiration'<sup>52</sup> 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,<sup>53</sup> and for strengthening the proposition that there is 'one common law of Australia'.<sup>54</sup> 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,<sup>55</sup> 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'.<sup>56</sup> This is seen by some as simply the natural and inevitable conclusion of our having a written constitution to begin with,<sup>57</sup> 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.<sup>58</sup>

Stephen Gageler has described the post-*Kirk* state of affairs as a 'grand and elegant constitutional scheme; a new paradigm'.<sup>59</sup> As a recently appointed High Court judge, his view should be of particular interest to administrative lawyers,<sup>60</sup> 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,<sup>61</sup> while at the same time highlighting – often almost clinically – its latent flaws, such as its clear 'ultra vires' focus<sup>62</sup> and its non-conformity with international counterparts.<sup>63</sup>

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',<sup>64</sup> with Cane concurring – before *Kirk* – that our present system is complex and technical,<sup>65</sup> 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'.<sup>66</sup> Taggart has famously lamented the exceptionalism of our judicial review<sup>67</sup> – or in the alternative, the 'Australianisation of our law'<sup>68</sup> (with its

charming ‘tinge of jingoism’<sup>69</sup> – arguing that our rigid separation of powers,<sup>70</sup> our lack of a bill of rights,<sup>71</sup> and our commitment to ‘bottom-up’ reasoning<sup>72</sup> 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?<sup>73</sup> 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.<sup>74</sup> Jurisdictional error is now the ‘central unifying principle of administrative law’,<sup>75</sup> yet uncertainty still abounds about what precisely it is and how exactly it works. The usual objection is that it is a ‘conclusory label’,<sup>76</sup> describing simply a mode of stating a conclusion without providing any useful guidance about how to arrive there.<sup>77</sup> 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’.<sup>78</sup> 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.<sup>79</sup> 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’,<sup>80</sup> 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.<sup>81</sup>

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’.<sup>82</sup> Even the existing grounds are supposed to be imprecise, with Groves disparaging their ‘obscure [and] malleable’ nature.<sup>83</sup> 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’;<sup>84</sup> 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.<sup>85</sup> This is a matter for the High Court to decide.<sup>86</sup>

### ***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.<sup>87</sup> 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’;<sup>88</sup> 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*.<sup>89</sup> 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 considerations<sup>90</sup> – ‘to the judges the law; to the others the merits’.<sup>91</sup>

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.<sup>92</sup> 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’.<sup>93</sup> 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'.<sup>94</sup>

### ***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?<sup>95</sup> 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',<sup>96</sup> and he is not the only former Chief Justice to note the comparatively hard-edged nature of the Australian version of this doctrine.<sup>97</sup> The doctrine is a two-way street: on the one hand, the High Court has 'enthusiastically enforced... the separation of judicial power',<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> Drummond, evidently on the other side of the two-way street, suggests that the doctrine serves to preserve judicial independence,<sup>101</sup> 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,<sup>102</sup> he continues, a carve-out of purely executive/legislative authority is needed to ensure any meaning in the distinction.<sup>103</sup> 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* unreasonableness<sup>104</sup> – which allows judges to overrule exceptionally unreasonable decisions – and although it has not been explicitly expunged from Australian law just yet,<sup>105</sup> many consider that the ground of review has been heading for the grave for a while, and is now simply awaiting a *Wednesburial*<sup>106</sup> (that said, a recent case<sup>107</sup> upholding reasonableness as a ground of judicial review may have now reversed this tide). Proportionality review appears to be in a similar predicament,<sup>108</sup> though unlike *Wednesbury* unreasonableness it has never been much endorsed in Australia,<sup>109</sup> and today exists only in a limited sense, being confined to contexts where statutory Charters of Rights apply<sup>110</sup> (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'.<sup>111</sup> 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'.<sup>112</sup> 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 is<sup>113</sup> that the doctrine was 'effectively stillborn'<sup>114</sup> and now exists purely in a procedural sense.<sup>115</sup> 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'.<sup>116</sup> To finish on a highly paradigmatic example,<sup>117</sup> the doctrine of legitimate expectations has traced clearly the contours of our judiciary's aversion to enforcing substantive requirements in administrative decision-making.<sup>118</sup> Though it received wholesale acceptance in the United Kingdom in *Coughlan's* case,<sup>119</sup> it was doused and rejected in *Lam* on the ground that such an expectation must not be allowed to require any substantive result;<sup>120</sup> 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*.<sup>121</sup> 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.<sup>122</sup> 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,<sup>123</sup> 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.<sup>124</sup> Goldsworthy summarises it as a 'devotion to legalism';<sup>125</sup> Taggart attributes this to the influence of Sir Owen Dixon,<sup>126</sup> whose 'strict and complete legalism'<sup>127</sup> is 'still much admired and emulated in Australia';<sup>128</sup> Pierce concurs that the status quo is a

reversion from the legal realism of the Mason Court to the formalism of the Dixon Court;<sup>129</sup> Kirby agrees<sup>130</sup> that the Court's common law approach has stagnated to the point of being so particularist as to lack any underlying principles;<sup>131</sup> 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),<sup>132</sup> and both Keith Mason<sup>133</sup> and Matthew Groves<sup>134</sup> use this terminology in reaching the same conclusions. Last but not least, Gageler characterises the trend as a return to pre-1970s incrementalism,<sup>135</sup> fuelled by the ascendancy of the 'ultra vires' school of thought over the 'natural law' school of thought.<sup>136</sup> 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.<sup>137</sup> I do not advocate that any one mode is superior to another, nor do I seek to justify any mode on theoretical grounds.<sup>138</sup> 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.<sup>139</sup>

Textual arguments focus on the words of the text and attribute to them the meaning they naturally bear.<sup>140</sup> The subjective intentions of the framers are irrelevant here,<sup>141</sup> as contextual evidence is relevant only insofar as it helps to ascertain 'the original public meaning'<sup>142</sup> of the words themselves.<sup>143</sup> Following *Engineers*,<sup>144</sup> 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'.<sup>145</sup>

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'.<sup>146</sup> This mode allows reference to the Convention debates,<sup>147</sup> but tends to fall short of searching for any 'subjective beliefs, hopes or expectations' of the framers,<sup>148</sup> typically proceeding instead under the guise of 'textual originalism'<sup>149</sup> which seeks to locate the original understanding of the text itself as evidenced by historical documents.<sup>150</sup>

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.<sup>151</sup> In its more advanced form, structuralism draws conclusions from the 'nature of aspects of the system of government for which the *Constitution* makes provision'.<sup>152</sup> 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.<sup>153</sup>

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]'.<sup>154</sup> Within this mode we find a whole family of methods of reasoning – doctrinal,<sup>155</sup> prudential,<sup>156</sup> ethical,<sup>157</sup> comparative international<sup>158</sup> – 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'.<sup>159</sup> This mode is especially strong in its ability to adapt to unforeseen circumstances,<sup>160</sup> its allowance for the constitutional system to evolve,<sup>161</sup> and its ability to fill in the gaps where there are ambiguities in the *Constitution*,<sup>162</sup> its weakness, on the other hand, is in its potential for unmitigated judicial activism.<sup>163</sup> This risk can be overstated though,<sup>164</sup> as some very sensible suggestions have been made about how to maintain an acceptable minimum level of 'judicial legitimacy'<sup>165</sup> in such reasoning,<sup>166</sup> for instance by requiring that any given judge remain consistent in approach,<sup>167</sup> 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.<sup>168</sup>

### *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 permanent<sup>169</sup> or even necessary.<sup>170</sup> On the contrary, modes of constitutional interpretation tend to come in and out of fashion,<sup>171</sup> and often there can be staunchly divided views on the topic even within the same High Court.<sup>172</sup> What can be said for certain is that there is no 'right answer' to interpretation,<sup>173</sup> and that even though several commentators argue (perhaps a touch pessimistically) that it is unlikely the Court will do so,<sup>174</sup> it is open to the High Court to depart from previous approaches and even authorities.<sup>175</sup>

### ***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;<sup>176</sup> rather the boundary is 'porous and ill-defined'.<sup>177</sup> 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,<sup>178</sup> 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.<sup>179</sup>

Most importantly however, the historical support for the doctrine is in fact quite fragile,<sup>180</sup> with the Convention debates offering 'little evidence' that the framers intended such a doctrine to be implied.<sup>181</sup> 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,<sup>182</sup> this is not the necessary conclusion.<sup>183</sup> 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',<sup>184</sup> 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'.<sup>185</sup> 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,<sup>186</sup> the usual assumption being that the common law will provide the grounds.<sup>187</sup> 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.<sup>188</sup> 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 jurisdiction<sup>189</sup> 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 unconvincing<sup>190</sup> and that the unnecessary retention of jurisdictional error contributes to the 'often Byzantine quality of much of the Australian judicial and academic analysis'.<sup>191</sup> 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*),<sup>192</sup> a federalism purpose, and an accountability purpose.<sup>193</sup> While the accountability purpose is the one relied upon to defend the entrenchment of a right to judicial review,<sup>194</sup> Stellios shows that this purpose played a relatively minor part in the Convention debates,<sup>195</sup> 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,<sup>196</sup> 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.<sup>197</sup> 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,<sup>198</sup> the new terminological context in which jurisdictional error now finds itself surely necessitates a fresh analysis,<sup>199</sup> 'rather than [remaining] in terms of the inheritance of the common law'.<sup>200</sup> This is all the more so given that jurisdictional error is typically understood as the outcome of a process of statutory interpretation,<sup>201</sup> 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,<sup>202</sup> 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*<sup>203</sup> 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.<sup>204</sup> This is precisely what was done (or attempted) during the 20<sup>th</sup> century,<sup>205</sup> 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 legislature<sup>206</sup> – 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.<sup>207</sup> Ways in which this might be done are through so-called 'variable intensity' grounds of review,<sup>208</sup> or by providing a potential new ground through the requirement of 'justification of reasons'<sup>209</sup> which, though procedural in nature, would ensure a higher quality of decision-making and a culture of justification,<sup>210</sup> 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-focused nature of section 75(v). There is an endless variety of ways in which this could be done.<sup>211</sup>

#### 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, 4<sup>th</sup> 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.