GRAHAM AND ITS IMPLICATIONS

James Forsaith*

The High Court in *Graham v Minister for Immigration and Border Protection*[1] (*Graham*) invalidated a statutory secrecy provision 'to the extent only that' it operated to restrict judicial review under or derived from s 75(v) of the *Constitution*. This confirms that s 75(v) of the *Constitution* entrenches more than just access to the Court's jurisdiction to issue the constitutional writs. But does it also mean that the High Court will deliver 'different grades or qualities of justice' in different cases depending on the source of its jurisdiction?

The High Court and s 75(v)

The early High Court took an expansive view of s 75(v). In 1910, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow*[2] (*Whybrow*), the Court rejected an argument that it could not issue the writ of prohibition to an inferior federal court because it had not been given 'general supervising jurisdiction' akin to that possessed by the English courts.[3] It held that there was no such a priori requirement. Section 75(v) itself conferred jurisdiction in all cases in which one of the named writs was sought against an 'officer of the Commonwealth' — a term which embraced officers of inferior courts as well as of the executive.[4]

In reaching this conclusion, Griffiths CJ referred to 'the necessity of such a controlling power existing somewhere'.[5] Barton J considered it 'strange indeed' if 'the *Constitution* provided no means whereby other Federal Courts might be kept within the bounds of the jurisdiction assigned them by law'.[6] O'Conner J even went so far as to suggest that, regardless of s 75(v), the High Court's judicial power, being 'the supreme judicial power of the Commonwealth', must necessarily include such jurisdiction.[7]

Whybrow was confirmed, four years later, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Ltd (No 1)*[8] (*Tramways (No 1)*). Adding to his earlier remarks, Barton J said that it would be 'grotesque' if the High Court, as the federal Supreme Court, lacked the power to restrain the wrongful assumption of jurisdiction by inferior Federal Courts.[9] It was unnecessary to determine whether 'such a power is a necessary implication of the whole scheme and structure of the Judicature chapter' because it was clearly conferred by s 75(v).[10]

As these remarks show, the early High Court was concerned to ensure that officers of the Commonwealth could be restrained from exceeding their jurisdiction. Indeed, its concerns extended beyond officers of the Commonwealth. Even in the absence of s 75(v), the Court displayed considerable hostility towards privative clauses. Most particularly, it held in *Clancy v Butchers' Shop Employees Union*[11] (*Clancy*) that the Supreme Court of New

* *James Forsaith is a public lawyer practising at the Victorian Bar. This article is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference, UNSW Law School, University of New South Wales, Sydney, New South Wales, 27 September 2018.*

South Wales could issue a writ of prohibition to the Court of Arbitration to prevent the latter from exceeding its jurisdiction. This was despite s 32 of the *Industrial Arbitration Act 1901* (NSW), which provided that:

> Proceedings in the Court shall not be removable to any other Court by certiorari or otherwise, and no award, order, or proceeding of the Court shall … be liable to be challenged, appealed against, reviewed, quashed, or called into question by any Court of judicature on any account whatsoever.

Griffiths CJ, with whom Barton J agreed, pointed to other provisions in the same Act that served to limit the Court's jurisdiction and who could invoke it. These needed to be reconciled with s 32. This was not a difficult task:

> To hold in the face of these provisions that sec 32 prevents the Supreme Court from checking any excess of jurisdiction would be in effect to give the inferior Court unlimited jurisdiction. For these reasons I have no doubt that the Supreme Court had jurisdiction to grant a prohibition.[12]

O'Conner J also agreed. It was 'the right of every person to call attention to the fact that any Court is exceeding its jurisdiction'. The legislature had the power to derogate from this principle by making the Arbitration Court 'the sole judge of the extent of its own jurisdiction', but s 32 did not achieve this.[13]

Eventually, this early jurisprudence, 'elegant in its simplicity',[14] gave way to *R v Hickman, Ex parte Fox*[15] (*Hickman*), which afforded privative clauses real work to do in restricting the scope for judicial review, including under s 75(v). *Hickman* and its progeny in turn yielded to *Plaintiff S157/2002 v Commonwealth*[16] (*Plaintiff S157*), which restored s 75(v) to prominence.[17]

Plaintiff S157 concerned s 474(1) of the *Migration Act 1958* (Cth) — a privative clause that employed familiar language. Declaring that the 'so called "Hickman principle" is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions',[18] the plurality proceeded to read down s 474(1) as capable of ousting only judicial review for non-jurisdictional errors of law on the face of the record.[19] The five-judge plurality then explained this outcome by noting that:

> The Act must be read in the context of the operation of s 75 of the *Constitution*. That section, and specifically s 75(v), introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of judicial review.[20]

As McDonald has noted, the plurality could have used the familiar language of entrenched 'jurisdiction' but instead referred to an entrenched 'minimum provision' of judicial review, suggesting that at least some substantive principles may be entrenched by constitutional implication.[21] The plurality did not identify these but hinted:

> The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the *Constitution* of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the *Constitution*, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[22]

Since then, for all its apparent significance, the High Court has only applied *Plaintiff S157* twice. First, in *Bodruddaza v Minister for Immigration and Multicultural Affairs*[23] (*Bodrudazza*), the Court invalidated rigid time limits that could, in practice, operate to deny litigants a foot in the door. This confirmed that the 'entrenched minimum provision of judicial

review' was concerned with practical, and not merely theoretical, access to the High Court's s 75(v) jurisdiction.

Most recently, in *Graham*,[24] the High Court took a much larger step by invalidating a statutory secrecy provision that did not *affect* access to its s 75(v) jurisdiction so much as the Court's ability to dispense justice in exercise thereof by engaging in judicial fact-finding. This raises questions as to what else may be entrenched by s 75(v). Furthermore, the very reliance on s 75(v) in this context — to invalidate the offending provision 'to the extent only that' it operated to restrict the exercise of judicial power under or derived from that subsection — raises questions about how the Court's s 75(v) jurisprudence fits in with its broader Chapter III jurisprudence, whereby other aspects of the judicial process have been protected more generally.

Graham, *Te Puia* and s 503A

Graham (and *Te Puia v Minister for Immigration and Border Protection* (*Te Puia*), which was heard together with *Graham*) involved challenges to visa cancellation decisions made on 'character' grounds under s 501(3) of the *Migration Act 1958* (Cth). That section gives the Minister a discretion to cancel a person's visa if he or she 'reasonably suspects that the person does not pass the character test' and 'is satisfied that … cancellation is in the national interest'.

In each case, the Minister relied on information that he understood to be 'protected from disclosure under section 503A' of the Migration Act.[25] At the time of each decision, he understood that s 503A permitted him to withhold such information not only from the person whose visa he was about to cancel but also from any court on judicial review.[26] He did not provide the s 503A information to the men whose visas he had cancelled and, when his decisions were challenged, he withheld it also from the Federal Court (in Mr Te Puia's case) and the High Court (in Mr Graham's case).[27]

Section 503A was added in 1998.[28] In recent years, it has been relied on often.[29] It provides, in subs (2), that if 'information is communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information and the information is relevant to the exercise of a power under section 501, 501A, 501B or 501C' (that is, a 'character' cancellation power) the authorised migration officer 'must not be required to divulge or communicate the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person' and 'must not give the information in evidence before a court, a tribunal, a parliament or parliamentary committee or any other body or person'.[30] He or she may, however, communicate the information to the Minister or another authorised migration officer for the purposes of the exercise of a character cancellation power.[31] Thereupon, the Minister or other officer is similarly immune from being required to divulge or communicate the information.[32] The Minister alone may waive the immunity by declaring that subs (2) 'does not prevent the disclosure of specified information in specified circumstances to be disclosed to a specified Minister, a specified Commonwealth officer, a specified court or a specified tribunal'.[33] However, his discretion to do so cannot be compelled.[34]

The 'readily apparent' purpose of s 503A, as the Full Federal Court observed in *Vella v Minister for Immigration and Border Protection*[35] (*Vella*), is to permit information relevant to character cancellation decisions to be communicated to the decision-maker without the risk of it then having to be divulged 'to any other person or body'.[36] This purpose is achieved by premising protection not upon the information itself or the need (or ongoing need) for confidentiality (howsoever assessed) but, rather, upon confidentiality simpliciter.

Save only that it must be 'relevant to the exercise of' a character cancellation power, the information could be anything at all.

Section 503A thus stands in stark contrast to common law public interest immunity (PII), where the 'foundation of the rule' is 'that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production'.[37]

Moreover, the public interest, as Lord Reid explained in *Conway v Rimmer*,[38] has two aspects:

> There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.[39]

His Lordship's view was that 'the due administration of justice may be impaired for quite inadequate reasons' if courts were required to act on the view of a Minister 'who has no duty to balance these conflicting public interests'.[40] His Lordship noted that the US Supreme Court had likewise concluded that '[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers'.[41] The High Court reached the same conclusion in *Sankey v Whitlam*.[42] Where there were competing public interests, PII claims were to be determined by weighing these in the balance. This was 'in all cases the duty of the court, and not the privilege of the executive government'.[43]

Section 503A does not purport to modify these principles so much as bypass them completely by allowing elements of the executive to decide what information is confidential and, thus, protected. This has an obvious capacity to affect the work of courts; most particularly, in reviewing decisions that were based on secret information.

The facts in *Te Puia* illustrate this. The Minister found that Mr Te Puia failed the character test by virtue of s 501(6)(b), which provides that a person does not pass the character test if:

> the Minister reasonably suspects:
>
> (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
>
> (ii) that the group, organisation or person has been or is involved in criminal conduct …

The Minister gave a statement of reasons for his decision,[44] in which he reasoned as follows in relation to the character test:

> In relation to the application of the character test in this case, I have considered information which is protected from disclosure under section 503A of the Act.
>
> Having considered this information, I reasonably suspect that Mr TE PUIA does not pass the character test by virtue of section 501(6)(b) in that I reasonably suspect that he has been or is a member of a group or organisation and that the group or organisation has been or is involved in criminal conduct.[45]

By reasoning wholly upon protected information in this way, the Minister made it practically impossible for any court to review his exercise of power on anything other than the most formal of grounds. The same vice attended his reasoning in relation to 'national interest' and his ensuing exercise of discretion.[46]

Constitutionally, it was open to challenge this vice on different levels. Messrs Graham and Te Puia advanced a (broad) Chapter III argument focused on judicial process, as well as a (narrow) s 75(v) argument focused on that particular jurisdiction. The High Court treated the two arguments very differently.

The Chapter III argument

The broad argument is based on the separation of powers implied in the text and structure of the *Constitution*. As Brennan, Deane and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*:

> the grants of legislative power contained in s 51 of the *Constitution* [do not] extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.[47]

It was, therefore, an 'impermissible intrusion' into the judicial power vested exclusively in Chapter III courts for Parliament to direct the courts as to the 'manner and outcome' of their exercise of jurisdiction.[48]

It being well established that the nature of judicial power includes its exercise in accordance with the judicial process,[49] it seems reasonable to suppose that an impermissible intrusion could relate to judicial fact-finding, which has variously been recognised as an important part thereof.[50]

Further support can be derived from *Kable* jurisprudence, having evolved along similar lines. In that context, French CJ and Kiefel J remarked in *Wainohu v NSW*[51] (*Wainohu*) that a State court's 'institutional integrity' is to be understood as its possessing 'the defining or essential characteristics of a court'.[52] Their Honours explained:

> The term 'institutional integrity', applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality. Other defining characteristics are the application of procedural fairness and adherence, as a general rule, to the open court principle.[53]

To this list of defining characteristics, their Honours added the giving of reasons:

> The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.[54]

To view judicial fact-finding as lying 'at the heart of the judicial function' is not to say that Parliament cannot regulate it, for, as French CJ observed in *Condon v Pompano*[55] (*Pompano*), 'the defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms' but 'limits … rooted in the text and structure of the *Constitution* informed by the common law, which carries with it historically developed concepts of courts and the judicial function'.[56] Whether a law crosses one of these limits is a matter of substance and degree, to be assessed by reference to 'its practical operation within the scheme of the Act'.[57]

In *Wainohu*, the High Court proceeded to invalidate a statutory scheme for the making of control orders for members of declared organisations because it permitted eligible State judges to perform the preliminary step of declaring an organisation without giving

reasons.[58] Gageler J would later describe this as a 'constitutional gnat'.[59] And so Messrs Graham and Te Puia argued:

- that a court's ability to find facts so that it can make a decision in the first place is at least as 'essential' as the giving of reasons for that decision;
- that there must therefore be limits to Parliament's ability to pass a law that derogates from judicial fact-finding;
- that the common law of PII provides the relevant baseline for assessing the extent of such derogation; and
- that s 503A crossed the line by transferring control of the evidence base to the executive, in a case in which the executive is a party, upon spurious criteria that lacked common law analogues.[60]

These arguments based on institutional integrity were disposed of peremptorily by the High Court:

> The plaintiff's argument, that a court's institutional integrity is substantially impaired by s 503A(2), is not compelling. The fact that a gazetted agency and the Minister may control the disclosure of information does not affect the appearance of the court's impartiality, as the plaintiff contends.[61]

The Court did not even acknowledge that there may be a constitutional limit:

> the question of where the balance may lie in the public interest has never been said to be the exclusive preserve of the courts, nor has it ever been said that legislation may not affect that balance.[62]

However, it was careful to carve out its s 75(v) jurisdiction for separate treatment:

> Whether the *Constitution* permits legislation to deny a court exercising jurisdiction under s 75(v) the ability to see the evidence upon which a decision was based is another matter.[63]

The s 75(v) argument

The narrower s 75(v) argument was based on the same vice as the broader Chapter III argument but focused on how this affected the High Court's 'entrenched' jurisdiction to review for jurisdictional error. In essence, it was argued that:

- what is 'entrenched' by s 75(v) is not just a person's practical ability to *access* the court's jurisdiction but also the court's practical ability effectively to *exercise* this jurisdiction;
- there must therefore be limits to Parliament's ability to interfere with this; and
- s 503A crossed those limits for the reasons aforesaid.

By a majority of six to one, the High Court agreed. The judicial process considerations did indeed give rise to constitutional limits:

> Parliament cannot … enact a law which denies to this Court when exercising jurisdiction under s 75(v) … the ability to enforce the legislated limits of an officer's power. The question whether or not a law transgresses that constitutional limitation is one of substance, and therefore of degree. To answer it requires an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power … have been observed …[64]

In this context, a 'blanket and inflexible limit on obtaining and receiving evidence relevant to the curial discernment of whether or not legislatively imposed conditions of and constraints

on the lawful exercise of powers conferred by the Act on the Minister have been observed' was problematic.[65] The Minister argued that PII claims can have the very same outcome, but the Court again emphasised judicial process:

> The court in such a case has not been deprived of access to the material *in limine*. The court has rather been able to weigh, and has weighed, the public interest in non-disclosure of the particular information against the interests of justice in the particular circumstances of the case before it and has made an assessment that the former outweighs the latter.[66]

Moreover, the Court noticed that Parliament's chosen criteria were spurious:

> This Court [is] denied the ability to require the information to be produced or adduced in evidence by the Minister irrespective of the importance of the information to the determination to be made and irrespective of the importance or continuing importance of the interest sought to have been protected by the gazetted agency when that agency chose to attach to its communication of information to an authorised migration officer the condition that the information be treated as confidential information.[67]

As these are all the very same factors that did not move the Court in the context of the broader Chapter III argument, one can only conclude that the High Court regards its judicial review jurisdiction as special and that, in other contexts, s 503A and other statutory secrecy provisions based on spurious criteria will validly operate to deny it the information it needs to dispense justice. This is confirmed in the Court's answer to Question 1 of the Special Case:

> Section 503A(2) is invalid to the extent only that s 503A(2)(c) would apply to prevent the Minister from being required to divulge or communicate information to this Court when exercising jurisdiction under s 75(v) of the *Constitution* …[68]

Different grades or qualities of justice?

As we have seen, the vice in s 503A is fundamentally about the judicial process and the High Court has significant (albeit unpredictable) Chapter III and *Kable* jurisprudence calibrated to deal with such issues, including as matters of substance and degree. But instead of developing that jurisprudence, the Court in *Graham* chose to expand its s 75(v) jurisprudence. Has it thus, by giving special treatment to s 75(v) in relation to matters of judicial process, created two different grades or qualities of justice depending on whether a constitutional writ is being sought?

The phrase 'different grades or qualities of justice' can be traced to Gaudron J's rejection of it in *Kable v Director of Public Prosecutions (NSW)*[69] (*Kable*):

> there is nothing anywhere in the *Constitution* to suggest that it permits different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by Parliament …[70]

Dawson J, dissenting, thought that this rather ignored what Chapter III actually says:

> The suggestion that the *Constitution* does not permit of two grades of judiciary exercising the judicial power of the Commonwealth, or that Ch III does not draw the clear distinction between State and federal courts which it has hitherto been thought to, simply ignores the fact that the *Constitution* ensures security of tenure and of remuneration in respect of judges of courts created by or under Ch III but does not do so in respect of judges of State courts invested with federal jurisdiction. It equally ignores the fact that the *Constitution* does not require that State courts only exercise judicial power.[71]

Nevertheless, upon this somewhat conclusory statement, Gaudron J reasoned that:

> Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth.[72]

Ever since, High Court judges have consistently rejected the idea that there can be different grades or qualities of justice as between Chapter III courts and State courts exercising federal jurisdiction.[73] So it is strange to think of the High Court itself meting out different grades or qualities of justice — by safeguarding aspects of the judicial process, or not — depending only on the source of its jurisdiction. After all, there does not appear in s 75 itself, or elsewhere in Chapter III, to be any textual or structural basis for the very sort of dichotomy that the Court so flatly rejected in *Kable*.

Let us now throw the matter open to an example. Hypothetically, would the High Court consider itself bound by a secrecy provision that allowed any 'confidential' information relevant to 'operational decision-making in relation to immigration detention centres' to be withheld from any court at the Minister's (non-compellable) discretion? Such a provision would make it very difficult for federal courts fairly to try claims by unlawful non-citizens regarding the conditions of their detention under the Migration Act. This would include claims invoking the High Court's original jurisdiction, in s 75(iii), to hear 'all matters … in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.[74]

Would the High Court permit its s 75(iii) jurisdiction to be hobbled in this way or would it elevate it alongside its s 75(v) jurisdiction by implying into s 75(iii) a similar constitutional limit on Parliament's ability to affect its exercise in practice?

Graham, to be sure, does not foreclose an argument that federal jurisdiction conferred by or under other provisions of the *Constitution* should receive similar protection to the High Court's s 75(v) jurisdiction. But any such arguments would need to be based on their own constitutional considerations. The question, to adapt what was said in *Bodrudazza*, would in each case be whether the law affects the exercise of jurisdiction under the provision in question so as to be 'inconsistent with the place of that provision in the constitutional structure'.[75] The considerations supporting such a conclusion would not necessarily need to be as weighty as those attaching to s 75(v), but any reliance on *Graham* would tend to encourage such comparisons.

Section 75(iii) is a prime candidate. In the first place, it too is 'entrenched' within s 75. This was recognised as long ago as 1923, when the High Court, in *Commonwealth v NSW*,[76] rejected an argument by New South Wales that it could not be sued in tort by the Commonwealth without its consent.[77] As with s 75(v), there was no *a priori* requirement. As Knox CJ remarked:

> power is conferred by the *Constitution* itself on this Court to take cognizance of this matter. Any legislation by Parliament directed to conferring this power would, therefore, be as superfluous as legislation by Parliament to restrict the limits of the jurisdiction would be ineffective. The argument for the applicant based on sec 78 of the *Constitution* ignores the essential distinction between matters which come within the terms of sec 75 and those which come within sec 76. In respect of the former class the jurisdiction of the High Court is independent of, while in respect of the latter class it is dependent upon, Parliamentary enactment. The result of acceding to this argument would be in effect to remove sub-sec III from sec 75 and place it in sec 76.[78]

Isaacs, Rich and Starke JJ went further, by implying into s 75(iii) and the *Constitution* more generally a rejection of the ancient maxim that 'the King can do no wrong'.[79] Were it otherwise, their Honours reasoned, the Commonwealth could legislate under s 78 to 'render a State liable to the Commonwealth, and to refuse a reciprocal liability'.[80]

In *Werrin v Commonwealth*[81] (*Werrin*), Dixon J queried whether the plurality's reasoning in *Commonwealth v NSW* not only denied the ancient maxim but also involved 'the consequence that the dilectual and contractual liability of the Commonwealth as well as, within Federal jurisdiction, of the States is imposed by sec 75 of the *Constitution* and cannot be discharged, barred or otherwise affected by any law of the Parliament as for example by an Act indemnifying the Crown'.[82] In other words, did the *Constitution* itself impose liability in tort and contract? His Honour held that it did, but only in the limited sense that, 'by the creation of a jurisdiction in which the Crown may be sued without its consent', it exposed the Commonwealth and the States (within federal jurisdiction) to 'liability … already existing *in abstracto*'.[83]

This view was endorsed by a majority in *Commonwealth v Mewett*[84] (*Mewett*) and confirmed in *British American Tobacco v Western Australia*.[85] Gaudron J in *Mewett* summarised the position thus:

> So far as it authorises laws with respect to '[m]atters incidental to the execution of any power vested by this *Constitution* in the ... Government of the Commonwealth', s 51(xxxix) of the *Constitution* permits the Commonwealth to legislate so as to prevent any liability arising for acts done in the exercise of its executive powers. But absent legislation of that kind, liability attaches to the Commonwealth under the general law and the *Constitution* applies to deny immunity from suit.[86]

Thus, although the ability to sue the Commonwealth in tort and contract is entrenched by s 75(iii), it is the common law that supplies the substance of the cause of action. Parliament can therefore legislate to affect the rights of the parties, including by denying the Commonwealth's liability altogether.[87] The extent to which s 75(iii) differs in this regard from s 75(v) would appear to depend on the extent to which various 'jurisdiction-expanding' measures, such as very broad discretions or so-called 'plenary' provisions, are effective to shrink the latter's remit by reducing the scope for error or rendering errors non-jurisdictional in nature.[88]

Regardless, there is no denying that s 75(iii) is constitutionally important jurisdiction or that it is often viewed together with s 75(v) as part of the one schema.[89]

Gageler J has spoken of s 75(iii) and (v) together as provisions whereby 'the relationship between the Executive Government of the Commonwealth and the federal Judicature was then spelt out in Ch III of the *Constitution*'.[90] Section 75(iii) 'had the consequence of exposing the Commonwealth from its inception to common law liability, in contract and in tort, for its own actions and for actions of officers and agents of the Executive Government'.[91] Section 75(v) supplemented it 'to safeguard against the possibility of [it] being read down by reference to United States case law so as to exclude a matter in which a writ of mandamus was sought against an officer of the Executive Government'.[92]

In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[93] (*Richard Walter*), Deane and Gaudron JJ remarked:

> Implicit in each of s 75(v) and s 75(iii) is a conferral of a right to invoke the jurisdiction of the Court upon any person with an interest which is sufficient to provide standing to seek judicial relief in a matter of a kind specified in the relevant sub-section. Together, the two sub-sections constitute an important component of the *Constitution's* guarantee of judicial process in that their effect is to ensure that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.[94]

For essentially these reasons, Perram J in *Habib v Commonwealth*[95] (*Habib*) rejected an attempt by the Commonwealth to argue that s 75(v) is somehow more entrenched than s 75(iii).

Mr Habib had sued the Commonwealth in tort, claiming to have suffered harm at the hands of foreign officials when he was 'rendered' to Guantanamo Bay with the acquiescence of Commonwealth officers. In order to succeed, he had to prove that foreign officials had committed acts of torture.[96] The Commonwealth, relying on the so-called 'act of state' doctrine, argued that the acts of foreign officials done in their own territories were not justiciable.[97] It conceded that the doctrine could not oust judicial review for jurisdictional error under s 75(v) but argued that a common law (as opposed to a constitutional) claim for damages brought under s 75(iii) was in a different category.[98]

Jagot J, with whom Black CJ agreed, noted that there was in fact a constitutional dimension to the case, viz: allegations that Commonwealth officials had acted in excess of the executive power conferred by s 61 of the *Constitution*.[99] The act of state doctrine did not preclude such an action brought in s 75(iii) jurisdiction.

Perram J decided the case on broader constitutional grounds. The principle expounded by Marshall CJ in *Marbury v Madison* is 'axiomatic'.[100] It ensures that questions 'as to the limits of Commonwealth power' are justiciable.[101] The judicial power of the Commonwealth was engaged not only in relation to the constitutional question identified by Jagot J but also to the question of whether Australian Federal Police and ASIO officers had acted within the constraints of their respective legislation. Even in relation to these questions, the act of state doctrine could not operate to 'confer immunity from suit on the Commonwealth', as this would be inconsistent with 'constitutional orthodoxy'[102] — namely, 'the principle in *Marbury v Madison* and the provisions of s 75(iii) and (v) taken together and the schema they express'.[103]

If, as his Honour held, the act of state doctrine cannot operate to negate the High Court's s 75(iii) jurisdiction in relation to an ordinary tort claim against the Commonwealth, it seems but a small step to suggest that, in circumstances comparable to those in *Graham*, an egregious secrecy provision should also be invalidated.

Similar arguments could be mounted in support of the jurisdiction conferred by the other subsections within s 75. Each is significant in its own way, and the framers saw fit to entrench each within that section rather than leaving the matter to Parliament under s 76. Indeed, in *Plaintiff S157* itself, the plurality emphasised the whole of s 75:

> Quite apart from s 75(v), there are other constitutional requirements that are necessarily to be borne in mind in construing a provision such as s 474 of the Act. A privative clause cannot operate so as to oust the jurisdiction which other paragraphs of s 75 confer on this Court, including that conferred by s 75(iii) in matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.[104]

To these might be added situations where the *Constitution* otherwise confers a right to proceed by implication — for example, against a State for infringing the *Constitution* itself.[105]

Accordingly, if (as *Graham* seems to imply) the High Court is to administer two 'different grades or qualities of justice' defined along jurisdictional lines, the line might logically be drawn between jurisdiction conferred by the *Constitution*, whether expressly or by implication, and jurisdiction conferred by Parliament.

Such logic does not, of course, supply a juridical basis for differentiating along jurisdictional lines in relation to some aspects of judicial process (for example, judicial fact-finding) but not others (for example, natural justice and the giving of reasons). Furthermore, in the absence of a clear textual or structural hook, the very notion of the High Court meting out

different grades or qualities of justice along jurisdictional lines still sits awkwardly alongside what was said in *Kable*.

Conclusion

The High Court in *Graham* correctly identified the vice in s 503A of the Migration Act, but its solution — loading s 75(v) with judicial process protections — raises more questions than it answers. At the same time, its peremptory (and, in the circumstances, unnecessary) rejection of the broader Chapter III argument forecloses what would appear to be the most obvious solution.

There are hundreds of secrecy provisions on the Commonwealth statute books, of which s 503A is not alone in purporting to apply in the courtroom. *Graham* will thus beget arguments that other parts of federal jurisdiction warrant the same level of protection. Such arguments, if they relate to constitutionally entrenched jurisdiction, could be dealt with piecemeal, on confined bases. But it seems likely that, sooner or later, the argument will be made in a case brought in non-entrenched jurisdiction. The spectre of different grades or qualities of justice will then cause the High Court to take another look at *Graham* and its implications.

Endnotes

1 (2007) 228 CLR 651.
2 (1910) 11 CLR 1.
3 The argument is outlined in the judgement of O'Connor J, ibid 41.
4 Ibid 22 (Griffith CJ), 33 (Barton J), 41–2 (O'Connor J).
5 Ibid 22.
6 Ibid 33.
7 Ibid 41.
8 (1914) 18 CLR 54, 61–2 (Griffiths CJ), 66–8 (Barton J), 80–1 (Isaacs J), 83 (Gavan Duffy and Rich JJ), 85–6 (Powers J).
9 Ibid 65. See also at 81 (Isaacs J).
10 Ibid 66.
11 (1904) 1 CLR 181.
12 Ibid 196–7 (Griffiths CJ), 203–4 (Barton J).
13 Ibid 204–5.
14 Will Bateman, 'The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463, 470.
15 (1945) 70 CLR 598.
16 (2003) 211 CLR 476 (*Plaintiff S157*).
17 For a 'doctrinal retrospective', see Bateman, above n 14, 470–6.
18 *Plaintiff S157* (2003) 211 CLR 476, [60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
19 Ibid [81] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
20 Ibid [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Edelman J has describes these remarks as obiter: *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350 (*Graham*), [73]. However, the remarks fall under the heading of '[g]eneral principles' and, as McDonald notes, they appear to have been included by the plurality with a view to explaining its 'entire approach': Leighton McDonald, '*Graham* and the Constitutionalisation of Australian Administrative Law' (2018) 91 *AIAL Forum* 48.
21 *Plaintiff S157* (2003) 211 CLR 476, [103].
22 Ibid [104].
23 (2007) 228 CLR 651.
24 *Graham* (2017) 347 ALR.
25 Ibid [68].
26 Ibid.
27 Ibid [6].
28 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).
29 According to information released by the Department of Immigration and Border Protection under the *Freedom of Information Act 1982* (Cth) s 503A, there were 205 visa cancellation decisions involving s 503A information in the seven years to 30 June 2015.
30 Section 503A(2)(a), (c) and (d).

31 Section 503A(1)(b).
32 Section 503A(2)(b), (c) and (d).
33 Section 503A(3).
34 Section 503A(3A).
35 (2015) 230 FCR 61.
36 At [69] (Buchanan, Flick and Wigney JJ).
37 *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822, 830 (Swinfen-Eady LJ). See also *Smith v East India Co* [1841] 1 Ph 50, 54; 41 ER 550, 551 (Lord Lyndhurst LC); *Conway v Rimmer* [1968] AC 910, 957B, 962B–C (Lord Morris), 991B–D (Lord Upjohn); *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] 1 AC 405, 433G (Lord Cross); *Sankey v Whitlam* (1978) 142 CLR 1, 43–4 (Gibbs ACJ).
38 [1968] AC 910.
39 Ibid 940C.
40 Ibid 951A.
41 Ibid 951C, quoting *United States v Reynolds* (1953) 345 US 1, 9 (Vinson CJ, for the Court).
42 (1978) 142 CLR 1.
43 Ibid 38–9 (Gibbs ACJ); see also at 58–9 (Stephen J), 95–6 (Mason J); see also *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582, 592 (Mason J).
44 Under s 501C(3) of the Migration Act, the Minister was required to give the person whose visa he had cancelled without natural justice under s 501(3) a written notice setting out his decision and particulars of any information that 'would be the reason, or part of the reason' for that decision.
45 See Mehaka Lee Te Puia, 'Applicant's Annotated Submissions', Submissions in *Te Puia v Minister for Immigration and Border Protection*, P58 of 2016, 12 December 2016, [6].
46 See *Graham* [58] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
47 (1992) 176 CLR 1, 27.
48 Ibid 36–7 (Brennan, Deane and Dawson JJ).
49 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J); *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 501–2 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Nicholas v R* (1998) 193 CLR 173, [73] (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, [103] (Kirby J), [175] (Crennan J); *Cesan v R* (2008) 236 CLR 358, [70] (French CJ); *Magaming v R* (2013) 252 CLR 381, [65] (Gageler J).
50 See, for example, *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, where a six-member plurality remarked, at [56], that '[j]udicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process'. Their Honours cited *Grollo v Palmer* (1995) 184 CLR 348, 394 (Gummow J). See also *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Condon v Pompano* (2013) 252 CLR 38, [142] (Hayne, Crennan, Kiefel and Bell JJ).
51 (2011) 243 CLR 181 (*Wainohu*).
52 Ibid [44].
53 Ibid.
54 Ibid [58].
55 (2013) 252 CLR 38.
56 Ibid [68].
57 *Wainohu* (2011) 243 CLR 181, 229 [107] (Gummow, Hayne, Crennan and Bell JJ). See also *South Australia v Totani* [2010] HCA 39, [74], 52 [81] (French CJ), 63 [134], 65 [138] (Gummow J); 67 [149], 84 [213] (Hayne J).
58 Ibid at [53]–[59], [68]–[70] (French CJ and Kiefel J); [95]–[109], [115] (Gummow, Hayne, Crennan and Bell JJ).
59 *Condon v Pompano* (2013) 252 CLR 38, [191]. In *Wainohu*, Heydon J, dissenting, noted at [119]–[121] that this argument did not even occur to the plaintiff's legal representatives but, rather, was supplied by the Court during oral argument, even then receiving 'very little attention'.
60 See Aaron Joe Thomas Graham, 'Plaintiff's Annotated Submissions', submission in *Graham v Minister for Immigration and Border Protection*, M97 of 2016, [11]–[32].
61 *Graham* (2017) 347 ALR 350, [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), [72] (Edelman J).
62 Ibid [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), [72] (Edelman J).
63 Ibid.
64 Ibid [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
65 Ibid [50] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
66 Ibid [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
67 Ibid [52] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
68 [2017] HCA 33, 4.
69 (1996) 189 CLR 51.
70 Ibid 103.
71 Ibid 82; see also at 67–8 (Brennan CJ).

72 Ibid; see also at 115 (McHugh J).
73 See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [101] (Gummow J); *Wainohu* (2011) 243 CLR 181, [45] (French CJ and Kiefel J), [105] (Gummow, Hayne, Crennan and Bell JJ); *Condon v Pompano* (2013) 252 CLR 38, [123] (Hayne, Crennan, Kiefel and Bell JJ).
74 *Plaintiff S157* (2003) 211 CLR 476.
75 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
76 (1923) 32 CLR 200.
77 Ibid 206–7 (Knox CJ), 210–11, 216 (Isaacs, Rich and Starke JJ).
78 Ibid 206–7. See also at 216 (Isaacs, Rich and Starke JJ).
79 Ibid 213.
80 Ibid 214.
81 (1938) 59 CLR 150.
82 Ibid 166.
83 Ibid 168.
84 (1997) 191 CLR 471, 491 (Brennan CJ), 531 (Gaudron J), 550–1 (Gummow and Kirby JJ).
85 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, [59] (McHugh, Gummow and Hayne JJ), [172] (Callinan J). See also at [16]–[19] (Gleeson CJ).
86 *Commonwealth v Mewett* (1997) 191 CLR 471, 531.
87 Including, it would seem, in the manner feared by Isaacs, Rich and Starke JJ in *Commonwealth v NSW* (discussed above).
88 See *Plaintiff S157* (2003) 211 CLR 476 [101]–[102]. There is considerable academic discussion on this question but little jurisprudence. See Bateman, above n 14; Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2014) 21 *Public Law Review* 14; Lisa Burton-Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 124–6.
89 For example, *Commonwealth v Mewett* (1997) 191 CLR 471, 547 (Gummow and Kirby JJ); *Habib v Commonwealth* (2010) 183 FCR 62, [32] (Perram J).
90 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [123].
91 Ibid [125].
92 Ibid [126].
93 (1995) 183 CLR 168.
94 Ibid 204–5.
95 (2010) 183 FCR 62.
96 Ibid [22] (Perram J).
97 Ibid [23] (Perram J).
98 Ibid [32] (Perram J).
99 Ibid [127]–[128].
100 Ibid [25], citing *Marbury v Madison* 5 US 137, 177 (1803).
101 Ibid [28].
102 Ibid [29].
103 Ibid [32].
104 *Plaintiff S157* (2003) 211 CLR 476.
105 See, for example, *British American Tobacco Pty Ltd v Western Australia* (2003) 217 CLR 30, [22] (Gleeson CJ), [155] (Kirby J).