

***Does the expansion of judicial
review pose a threat to democratic
governance?***

A Return to Civility

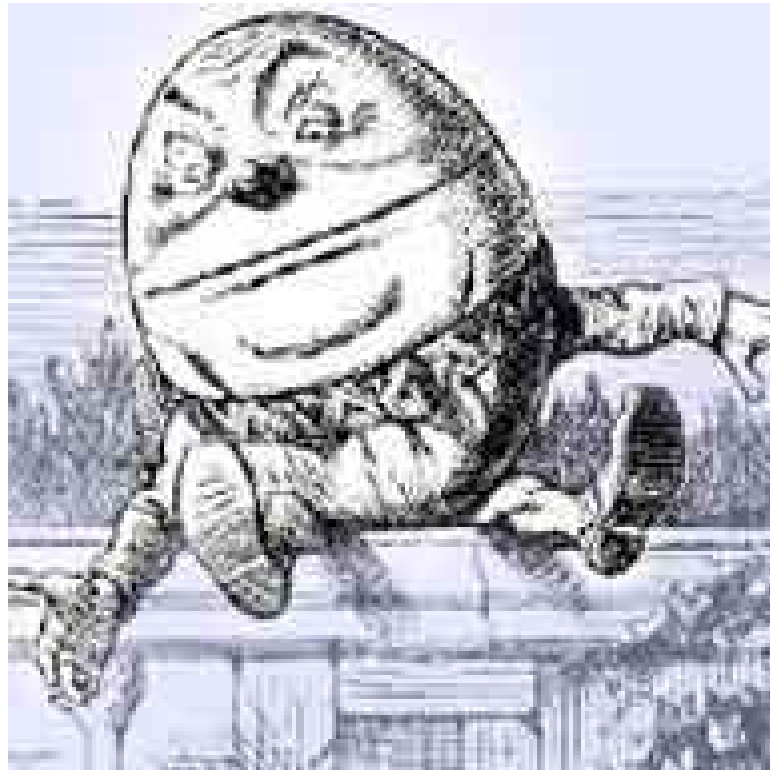
mrll kelly

MqU Law School

Some Pertinent Quotations

- Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.
 - Bishop of Bangor, Benjamin Hoadley, Sermon before George I, 31 March 1717
- But in our system the principle of *Marbury v. Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.
 - *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 263 (Fullagar J).
- It is emphatically the province and duty of the judicial department to say what the law is.
 - *Marbury v Madison* (1803) 1 Cranch 137, 177 (Marshall CJ).
- It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.
 - *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [71]
 - (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)
- An accumulation of such intrusions [of the Executive into the judicial function], each “minor” in practical terms, could amount over time to death of the judicial function by a thousand cuts.
 - *IFTC v NSW Crime Commission* (2001) 240 CLR 319, 355 [57] (French CJ)

Unintended Consequences



Coverage of paper

- Hearing rule for administrators (judges to some extent for comparison) – Effect of ADJR and *Kioa*
- ‘Jurisdictional error’
 - Except for “irrational, illogical and not based on findings or inferences of fact supported by logical grounds” (*Eshetu, S20, SGLB, SZMDS, SZJSS*) – Gummow J/A-CJ (Hayne J, Kiefel J)
- ‘Administrative justice’??
- Chilling effect on governance; Civility

ADJR and *Kioa*

- ADJR operative in 1980 s. 13
- **Reasons:** Kirby P in *Osmond v. Public Service Board of NSW* (1984] 3 NSWLR 447, 465.
- *Kioa v West (MIEA)* (1985) 159 CLR 550
 - Mason J ‘The *most important change is that brought about by s. 13 of the A.D.(J.R.) Act.* ‘In one very important respect there has been a *radical legislative change* (585).
- Effect on *Migration Act*

Reasons and Natural Justice

- *Osmond* 1986 Gibbs CJ: NO common law duty (administrators and judges) NOT part of NJ; rejects ADJR effect
 - Judges: ‘no inflexible rule of universal application’ ‘an incident of the judicial process’
- Meantime Deane J *MIEA v Pochi* 1980: **logically probative material for administrators** (higher than Evidence Act)
- *Osmond* 1986 Deane J ‘doctrine’ (c.f. *Wainohu*): reasons, ADJR, decision-makers

Reasons, Duty and ADJR

- *Craig* 1995 Courts: reasons not part of record
- *Craig* doubted in *Kirk* 2010
- *Wainohu* 2011 common law imply duty to give reasons? (cf Deane view, French CJ, Kiefel J [92])
- Heydon J dissent: Gibbs CJ position in *Osmond*; not accept Deane J position as correct [145] [182]
- BUT reasons are post decision *Osmond* (1986) *Palme* (2003): therefore how affect jurisdiction/decision/nj???
- *Palme* denies ADJR effect: the relevant act scheme the determinant [45]
- **KIOA MISCONCEIVED RE S. 13 AND EFFECT OF REASONS**
 - Throws its Mason J authority at least into doubt

Kioa: Unintended Consequences 1.

- 1. ‘procedural fairness’? Mason J (583) (c. Stephen J dissent in *Salemi* 1977?? s. of s. 5(1)(b) ADJR? Procedure not ‘substance’?)
- 2. ‘flexible’ ‘chameleon-like’ ‘variable’ “duty to act fairly’ → circumstances of case, nature of inquiry, subject-matter, rules
- ‘fairness’ content & applicability variable NO GUIDANCE

Kioa Unintended Consequences 2

- 1. *Re adverse info -- credible, relevant and significant to decision* (Brennan J *Kioa* 628) → principle in own right (*SZBEL* 2006 confirmed in *Saeed* 2010, also *VEAL* 2005, *Kumar* 2009, *SZIAI* 2009)
- 2. *proper, genuine and realistic consideration to the merits of the case* (Wilson J *Kioa* 604) → = part of 'duty to act fairly' (Gummow J *Khan* 1987, *Hindi* 1988).

Kioa Unintended Consequences 3

- ADJR FCA: natural justice includes:
 - duty to make inquiries (*Teoh* FCFA 1994; *Prasad* 1958)
 - Need for rational/logical probative evidence (Deane J: *Pochi* 1980; *Bond* 1990(366-7) AND arguably a minimum degree of proportionality)
- **The Deane Effect & Doctrine:** → Gummow J in *Eshetu?* *S20?* *SZBEL?* *SZMDS?* *SZJSS?* *Wainohu?*
- **Cross merits legality divide?**

Kioa : The two Approaches

- **Mason J:** The law has now developed to a point where it may be accepted that **there is a common law duty to act fairly**, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests **and legitimate expectations**, subject only to the clear manifestation of a contrary statutory intention. 584.
- **Brennan J:** **No free-standing common law right** to be accorded natural justice 610; **sovereignty of parliament** 611; **NO legitimate expectation**
- DIFFERENCES
- **Judicial power / legislative power;**
- **Common law /statute; Court says no diff between 2 approaches** (*Abebe, Aala, Miah, Saeed, M61*) or declined to consider any difference (c.f. *M61*)
- **EFFECTS**

Kioa (Mason J) Legitimate Expectations

- *Kurtovic* 7 February 1990 FCFA ; Gummow J: NO public law estoppel; NO substantive fairness: legitimate expectation → hearing
- *Quin* 1990 **POLICY NO legitimate expectation No public law estoppel ; separation of powers; ultra vires** 7 June 1990 3:2 Mason CJ, Brennan Dawson JJ: Deane Toohey JJ dissenting; *Kurtovic* referred to. *Brennan J reiterates Kioa re legit exp.*
- *Haoucher* 1990 **POLICY IS legitimate expectation; NO reference to no public law estoppel/Kurtovic** 7 June 1990 Deane Toohey McHugh JJ: Dawson Gaudron JJ **Deane J again 653: (adopts Mason J position)** Indeed, the law seems to me to be moving towards a conceptually more satisfying position where **common law requirements** of procedural fairness will, in the absence of a clear contrary legislative intent, be recognized as **applying generally** to governmental executive decision-making and where the question whether the particular decision affects the rights, interests, status or **legitimate expectations** of a person in his or her individual capacity is relevant to the ascertainment of **the practical content**, if any, of those requirements in the circumstances of a particular case and **of the standing** of a particular individual to attack the validity of the particular decision in those circumstances.
- **Each stage of decision-making; legit expectations: practical content and standing → substantive fairness**
- **uncertainty**

Uncertainty (Mason J *Kioa*): → *Teoh* → *M61* 2010

- *Bond* ADJR 1990: July 26 1990 NOT every stage of decision-making; REJECTS 'logical probative evidence' (Mason J)
- *Teoh* ADJR 1995: Mason CJ Deane J: *[ratification a positive statement]an adequate foundation for a legitimate expectation, **absent statutory or executive indications to the contrary**, that administrative decision-makers will act in conformity with the Convention. Substantive Fairness???*
- Ministerial Statements Labor. Coalition
 - BUT: eg *Tien* FCA 1998 Goldberg J
- ***LAM* 2003: Brennan J in *Quin* and McHugh J in *Teoh* dissenting the law of legit expectations; NO substantive fairness; doubts *Teoh*; Separation of Powers.**
- ***M61*: unanimous court; adopts Mason J's definition from *Kioa* via *Annetts*: includes legitimate expectation AND 'not necessary' to determine between Mason Brennan approaches[74] (inferentially has already done so)**

Procedural Fairness Expands

Aala, Miah (Mason J view) → *SAAP* literal view → *SZFDE*
and *Saeed*

- *Aala* 2000: 4 handwritten papers: 3 RRTs; trivial; 'constitutional writs'; jurisdictional error: Mason J approach (common law) –BUT says no diff between 2 approaches
- *Miah* 2001: original decision maker: change of government (country info) : Mason J approach (common law) BUT says no diff between 2 approaches
- **No notice taken of second reading speech, purpose of statute, Acts Interpretation Act or Explanatory Memo (c.f. S157; BUT M61) → Legislative Amendments (Procedural Fairness Act 2002)**
- *SAAP* 2005: literal reading (before PC Act)
- Extensions: **delay** (*NAIS* 2005) **fraud** (*SZFDE* 2007) (after PC Act)
- *Saeed* 2010 literal reading (singular/plural 'matter'): no real notice of 2nd reading speech
- **M61** 2010 ????? ;NOTE effect of an announcement = legal decision (contra *S157, Aala Miah* re 2nd reading speeches) Effects??? **Uncertainty. Legal/merits divide?**

Practical Unfairness?

- **Chief Justice Gleeson's Delphic utterance in *Lam* that:**
 - **Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice. No practical injustice has been shown. [37]-[38]**
- **What does this mean??? What is 'fair' Who determines 'fairness'?? The Court??? Why??? The legislature?? **What is the relevant law?? → move to merits and/or substantive fairness****
- **C.f. French CJ : 'No practical unfairness' had been shown towards Mr Parker ' in *Parker v Comptroller General of Customs 2009*; years and years before matter decided (over a decade); 1 bottle brandy; over \$1 million fined; lower courts not consider *O'Neill*, therefore (on basis of *Aala, Dranichnikov*, no real chance to put case; but found against P, Heydon J dissenting) : **why difference between administrators and courts?? (c.f. *Craig 1995*)****

Hickman, NAAV, Plaintiff S157:

Protection of decisions beyond capacity of Parliament?

- The purpose of *Hickman* : certainty; clarity (cf *Blue Sky* 1998, *Futuris* 2008): acknowledged s. 75(v) BUT gave room to manoeuvre
- Latham CJ 607; Dixon J; Starke J ('without authority and bad')
- Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body
Dixon J 'imperative duties or inviolable limitations or restraints' adds nothing to *Hickman* (*Metal Trades Employers' Association* 1951 249); gives some protection to certain jurisdictional errors? Who makes law? Purpose of law? (cf *Marbury*) Keep executive in check?? *Scientology* 1980, *Re Patterson* 2001 Court owns rule of law?? *Saeed* [15] *Enfield* [59-60]
- **NAAV 2002:** → litigious "queue jumping," (Bennett) → **S157** 2003

Procedural fairness, Jurisdictional Error

- *Craig 1995* : If such an administrative tribunal [i.e. one subject to the separation of powers doctrine] falls into an error of law which causes it to **identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion.** and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it. 179
- The effect of *Aala 2000; Yusuf 2001*: still includes legitimate expectations (*M61*)
- *What is a jurisdictional error?*
- *Kirk 2010*: questions definition as 'authority to decide' (60) endorses Jaffe[64ff] : **"tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction"**. Jaffe expressed the danger, against which the principles guarded, as being that "a tribunal preoccupied with special problems or staffed by individuals of lesser ability **is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned**". It is not useful to examine whether Jaffe's explanation of why distorted positions may develop is right. **What is important is that the development of distorted positions is to be avoided.** And because that is so, it followed, in that author's opinion, that denominating some questions as "jurisdictional"
- "is almost entirely **functional: it is used to validate review when review is felt to be necessary ...**"
- **CONSEQUENCES**

Jurisdictional error, bright lines and twilight

- *Kirk*: no bright lines (c.f. Hayne J *Aala*); Twilight (Gleeson CJ); 'It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.' WHY???
- Uncertain ambit; anything goes? If Court thinks it 'necessary'?? (Jaffe) Separation of Powers? Court or legislature determine authority?? (c.f. the Mason J view in *Kioa*)
- What is the Law and who decides? (c.f. *Marbury*: It is, emphatically, the province and duty of the judicial department to say what the law is Marshall CJ)???
- Extension into State jurisdiction of Cth privative clause court thinking (constitutional and administrative: *IFTC*, *Totani*, *Kirk*, *Wainohu*)

Chilling Effect of Judicial Review 1

- The uncertain status of the content of procedural fairness means that decision-makers cannot know whether they are abiding by the law.
 - Trivial errors may invalidate a decision made in good faith .
- Continual review of the same decision is good neither for the applicant nor for the relevant decision-maker
 - Review fatigue and stress will adversely affect the applicant.
 - Court time is taken up with multiple reviews of the same matter.
 - Morale amongst the decision-makers is bound to decrease.
- Continual re-interpretation by the courts of statutory provisions designed to implement government policy which has received the imprimatur of both Houses of Parliament results in
 - Government and the legislature constantly amending the law to ensure that the policy is implemented the way the executive and the parliament want (this is particularly obvious in the Migration Act and the Income Tax Act contexts).
 - This is not a matter of government or the legislature playing 'catch up' or trying to undermine the judiciary; rather it is a matter of ensuring proper implementation of policy according to the law.
 - Strain placed upon the relationship between the executive and the legislature and the judiciary.
 - Politicization of the original decision-making, the merits review, and the judicial review due to constraints arising from past knowledge of similar cases.
 - In the worst case scenario, this may lead to the establishment of a 'culture' which in turn may run the risk of leading to bias.
- The current understanding or lack of understanding of what will constitute a 'jurisdictional error' in any given situation leads to uncertainty and an inability in government decision-makers effectively and efficiently to implement programmes.
 - Since administrators can never determine the limits of their own jurisdiction because of the Courts' interpretation of the separation of the judicial power doctrine, there are almost insuperable difficulties for drafters in attempting to provide certainty in the texts of legislation to guide administrative decision-makers.
 - Since only a court may determine what is and what is not a jurisdictional fact or other kind of jurisdictional error, there can never be any certainty in decision-making

Chilling 2

- The adoption of the concept of 'subjective' jurisdictional fact in relation to an opinion or degree of satisfaction has had the effect of converting a duty subject to such satisfaction or opinion imposed by the legislature onto the executive into little more than a discretion subject to a malformed *Wednesbury* review.
 - Dixon J had noted in *Parisiennes Basket Shoes* that sensible legislatures would never fetter an executive authority to decide whether duty or discretion by subjecting it to an objective fact, as it would always be likely to be subject to judicial review.
 - The legislature had adopted the formula was adopted to circumvent the problems associated with 'jurisdictional facts,' so that authority to decide was not conditional upon the existence of a fact but rather on an opinion.
 - The criterion on which such 'subjective jurisdictional facts' are to be said to be valid is still uncertain.
 - But a sensible criterion could well be the view of Latham CJ in *R v Connell; Ex parte Bellbird Collieries* to the effect that in cases where a power is conditioned upon the existence of an opinion or satisfaction, 'the legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.'
 - The increasing use by courts of this process blurs even more the distinction between what is an error of fact (which is not usually judicially reviewable—*Waterford*) and what is an error of law, again raising problems for the separation of powers.
- The increasing apparent willingness of judges to entertain criteria such as 'irrationality,' 'illogicality,' and 'unreasonableness' when applied to the degree of satisfaction demanded by the legislature of a Minister of her delegate, has a number of consequences:
 - It amounts to a subversion by the courts of the legislature's intention, displaying less trust in and respect for the administration than do its political opponents (bearing in mind that Bills must pass both houses, one of which is mostly hostile to the government).
 - It amounts to the judiciary substituting its opinion for that of the decision-maker.
 - What is 'irrational,' 'illogical' or 'unreasonable' differs from person to person and profession to profession, even among psychiatrists.
- The use of terms such as 'rational probative material,' 'logical probative evidence,' 'probative evidence,' 'probative material,' or 'logical grounds' in relation to administrative decision-making wrongly imports legal standards used in courts into the executive
 - These standards are derived from and are superior to those demanded in courts.
 - Administrative decision-makers rely on data and information provided by applicants in the first instance; there are no rules of evidence for administrators.
 - Use of such terms by judicial members of administrative bodies has contributed to the judicialization of administrative review bodies.
 - Such review bodies are to use the same powers and discretions of the original decision-maker, and 'stand in the shoes of the original decision-maker': original decision-makers do not use rules of evidence.
 - When these phrases become a standard for determining invalidity of a decision, there is a very real risk of judicial officers crossing the merits legality divide and breaching the separation of the judicial power doctrine.

Chilling 3

- Privative clauses were designed to serve a purpose within the structure of government under a separation of powers, while having regard to the entrenched High Court jurisdiction in s. 75 of the *Constitution*.
 - As Kirby P acknowledged in *Svecova v Industrial Commission of NSW* (1991), it is not impossible for courts logically to see that such clauses may well serve a legitimate purpose in certain circumstances.
 - S. 75 remains the same, the need for privative clauses that had always existed has not diminished and has perhaps grown, the structure of government remains the same.
 - Perhaps all that has changed is the culture of the courts; or a growing distrust amongst the legal profession for politicians; but politicians are a necessity for good governance (see *Constitution* ss. 7, 24, 30, 64).
- If there is a legitimate need to protect decisions in certain circumstances, who is to determine the need, and the circumstances? Whoever does it, this is a political decision.
- The spread of international human rights norms, especially those arising from continental Europe's civilian system, has seen the increased attempt to establish 'proportionality' as a free-standing ground of judicial review of administrative decisions. This term is used only (and then in the author's view, somewhat doubtfully) in judicial review in relation to delegated legislation, and in constitutional review of purposive powers and of certain express or implied constitutional prohibitions.
 - To date, Australian courts have not adopted proportionality as a freestanding ground in judicial review of administrative decisions.
 - To do so would certainly run the risk of breaching the separation of powers, and once thus breached, the floodgate could well open, legislative change proving constitutionally difficult.
 - The weighing of competing policy demands as against a single individual's (or group's) interest, is something courts are neither equipped nor empanelled to do—the government and the legislature have that task.
- The spread through the High Court's use of the judicial power of the Commonwealth of High Court concepts with regard to jurisdictional errors and privative clauses, as well as of its view on an integrated Australian legal system, into State jurisdictions has seen it invalidate laws made by State parliaments, and also deprive State legislation of its intended policy purpose.
 - These move may well hold the seeds of the demise of the federation, and the Court and governments need to give serious consideration to the ramifications of the trend of recent decision.

Return to Civility

- Fullagar J *Communist party case*: But in our system the principle of *Marbury v. Madison* is accepted as axiomatic, **modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs (c.f. *Hickman*) [(1951) 83 CLR 1, 263]**
- It may well seem that the paper has nothing good to say about judicial review. This is not my view; it has served citizens and subjects well for centuries, and will continue to do so.
- However, when one considers aspects of the growth of principles over the past 36 years since *Kioa v West*, there can be no doubt that there are some areas that need improvement. The paper has suggested that in many ways these developments all proceed from the enactment of the *ADJR Act*, and the legal profession's response to it especially as manifested in *Kioa v West*, that saw all the unintended consequences outlined above come to fruition.
- What is needed now is consideration by all three arms of government about these developments, so as to guard against even further unintended consequences in the future. If the key-stone of the arch of Australian governance is not to falter, then cultivation of the mutual respect amongst the three branches as envisaged by Justice Fullagar in 1951 may well be a good place to start.