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

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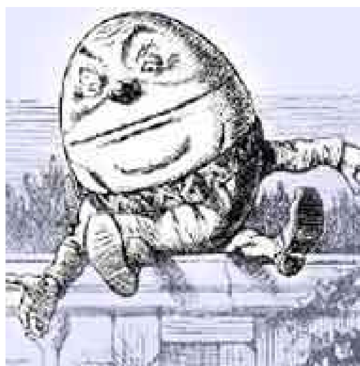

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Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.
Bishop of Bangor, Benjamin Hoadley, Sermon before George 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)

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

INTRODUCTION:

This paper in responding to the question in the title will perforce concentrate on only a few areas of the law within judicial review. The two areas chosen are the expansion of natural justice hearing rule (or procedural fairness) for administrators, and the evolution by the High Court of the concept of jurisdictional error.

Not all areas have been able to be covered and it is with regret that I have had to omit the interesting discussion arising from the basis on which *S20* (2003)[1] was argued. This development was largely due to Justice Gummow's influence when he referred in *Eshetu* (1999)[2] to what he called 'reasonableness review,' suggesting that judicial review would be permitted in cases of subjective jurisdictional fact where 'the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds.'[3] Subsequently, Justices Gummow and Hayne continued to advocate this approach,[4] with Gummow A-CJ and Kiefel J (dissenting) in *SZMDS*[5] adopting those views to the effect that that such a state of satisfaction if found by a court to be 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds' would be void for jurisdictional error. The majority disagreed.

More recently in *SZJSS* (2010),[6] where again three RRT hearings had already been held after judicial review, the High Court appeared to have an opportunity to deal with the issue of rationality, logicality and probative material, Rares J on the Federal Court having adverted to these matters.[7] The matter was decided however in the Minister's favour on grounds of lack of bias.

While these issues and the related ground of constructive failure to exercise jurisdiction are not analyzed here, they all to some extent are related to the various dicta of Deane J relation to 'logically probative material' as being a necessity in relation to natural justice.

ADJR AND *KIOA*

When the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') came into operation in 1980, its intention was to streamline grounds of judicial review for Commonwealth administrative decisions made under an enactment; Attorney-General Ellicott said the Act's purpose was '…to establish a single simple form of proceeding in the Federal Court of Australia for judicial review of Commonwealth administrative actions…,'[8] noting that

> Judicial review by the Federal Court … will not be concerned at all with the merits of the decision… The court will not be able to substitute its own decision for that of the person or body

[1] *Re MIMA; Ex parte S20* (2003) 198 ALR 59.
[2] *MIMA v Eshetu* (1999) 197 CLR 611, 650 [127] (Gummow J).
[3] *Eshetu*, ibid., 656-7 (Gummow J).
[4] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 609 [183], *MIMA v SGLB* (2004) 207 ALR 12, 20 [38] (Hayne and Gummow JJ). Reasoning similar to that of Hayne and Gummow JJ in *SGLB* was applied in *WAIJ v MIMIA* (2004) 80 ALD 568 at 573-574, and *SZLGP v MIAC* [2008] FCA 1198.
[5] *MIAC v SZMDS* (2010) 240 CLR 611, 625 [40] [2010] HCA 16 (Gummow ACJ and Kiefel J) [3;2 Heydon J, Crennan and Bell JJ: Gummow A-CJ and Kiefel J)—this was a judicial review of a decision of a third RRT..
[6] *MIAC v SZJSS* 2010 85 ALJR 306 [2010] HCA 48,
[7] See *SZJSS v MIAC* [2009] FCA 1577 [42] Rares J.
[8] House of Representatives Hansard, 28 April 1977, Second Reading Speech, 1394-6, 1394.

> whose action is challenged.[9]

This vaunted simplicity was quickly overtaken by the excitement within the legal profession at the potential breadth of the Act and the consequent creative argumentation by counsel and experimentation by the Courts. This attitude can be summed up by Kirby P in *Osmond v. Public Service Board of NSW* (1984), who, drawing upon the passage of the *ADJR Act* to justify his conclusion that natural justice must include a duty to give reasons, said:

> where a number of relevant Parliaments have enacted laws elaborating modem conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course.[10]

While that view was repudiated on appeal to the High Court[11] by Gibbs CJ[12] (Wilson J,[13] Brennan J[14] and Dawson J[15] agreeing; Deane J also agreeing[16]), in the intervening year the High Court heard the matter of *Kioa v West (MIEA*) (1985) 159 CLR 550 (*Kioa*).

The *ADJR Act* had enabled judicial review of administrative decisions made under the *Migration Act 1958*. Consequently, after obtaining reasons pursuant to s. 13 of the *ADJR Act* for the decision to deport them, the Kioas sought ADJR review of the basis of a breach of the natural justice hearing rule. The facts of that case (spelled out in the reasons of Chief Justice Gibbs) are well known, and the case has been forensically examined by Professor McMillan.[17]

Of significance to this paper is the appellant's submission 'the coming into operation of the A.D.(J.R.) Act, [has] rendered those decisions [*Ratu*[18] and *Salemi*[19]] distinguishable and inapplicable.'[20] Those decisions had held that there was no obligation to accord natural justice in relation to deportation decisions. Notwithstanding that all members of the Court found that the mere itemization of a breach of natural justice as a ground of review in s. 5 of the *ADJR Act* did not import an obligation for decision-makers under relevant Acts to accord natural justice,[21] another aspect of the *ADJR Act* (s. 13) would prove crucial to the decision. Mason J acknowledged that 'the primary object of the A.D.(J.R.) Act was to achieve procedural reform and *not to work a radical substantive change* (author's emphasis) in the grounds on which administrative decisions are susceptible to challenge at common law.'[22] Later Mason J said: 'The legislative amendments which have been made since *Salemi* [No. 2) and *Ratu* were decided in 1977 are of such significance that we should not regard those decisions as foreclosing the answers to the questions that the appellant's argument now raises. The *most important change is that brought about by s. 13 of the*

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[9] Ibid..
[10] *Osmond v Public Service Board NSW* [1984] 3 NSWLR 447, 465.
[11] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 (*Osmond*).
[12] *Osmond,* 668-70
[13] Ibid., 671.
[14] Ibid., 675.
[15] *Osmond*, 678.
[16] Ibid., 676; but he also endorsed Kirby P's reference to the proactive effect of enactments such as ADJR: *see* 675. Note also Deane J's predilection for natural justice to include the giving of reasons: *Osmond*, 675-6 and *ABT v Bond* (1990) 170 CLR 321, 566-7.
[17] See John McMillan, 'Judicial Restraint and Activism in Administrative Law,' (2002) 30(2) *Federal Law Review* 335; also John McMillan, 'The courts vs the people: have the judges gone too far?' Paper presented to the Sixth Colloquium of the Judicial Conference of Australia Inc, 27 April 2002 (http://www.jca.asn.au/attachments/mcmillan.pdf).
[18] *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461.
[19] *Salemi v. MacKellar* [No. 2] (1977) 137 CLR 396.
[20] *Kioa v West (MIEA)*, (1985) 159 CLR 550, 560 (Gibbs CJ), 576 (Mason J).
[21] *Kio*a, 566-6 (Gibbs CJ); 576-7 (Mason J); 594-5 (Wilson J); 625 (Brennan J); 630 (Deane J).
[22] *Kioa*, ibid., 577 (Mason J).

A.D.(J.R.) Act. (author's emphasis)'[23] While Mason J acknowledged that 'The *Migration Act* plainly contemplates that in the ordinary course of events a deportation order will be made ex parte,'[24] he later stated:

> In one very important respect there has been *a radical legislative change* (author's emphasis). The exercise of the power is susceptible of judicial review and an element in that review is the obligation, on request, to furnish a statement setting out material findings of fact, referring to the evidence and other materials, and giving the reasons for the decision. In the light of this it can scarcely be suggested now that the existence of an obligation to comply with the requirements of procedural fairness is inconsistent with the statutory framework…[25]

Essentially in *Kioa*, admittedly in the Commonwealth and not the NSW jurisdiction, Mason J[26] in particular appears to be adopting something very close to Kirby P's reasoning in *Osmond v PSB (NSW)*—that is, the fact that the Commonwealth *ADJR Ac*t enables by s. 13 the giving of reasons on request by a person with appropriate standing is sufficient to import into *the statute under which the decision was made*, a requirement to accord natural justice. Nothing of this kind had been in contemplation in the Kerr or Ellicott Reports, nor had it ever occurred to the government or the legislature of the time that this may be a consequence of s. 13. The prime reason for the inclusion of s. 13 was to override in relation to relevant enactments the common law position where neither administrators[27] nor judges[28] are required to give reasons for a decision. As Gibbs CJ noted in *Osmond:*

> It has long been the traditional practice of judges to express the reasons for their conclusions by finding the facts and expounding the law … That does not mean that a judicial officer must give his reasons in every case; it is clear, to use some of the words of Woodhouse P. in *Reg. v. Awatere*,[29] that there is no "inflexible rule of universal application" that reasons should be given for judicial decisions. Nevertheless, it is no doubt right to describe the requirement to give reasons, as Mahoney J.A. did in *Housing Commission (N.S.W) v. Tatmar Pastoral Co.*,[30] as "an incident of the judicial process", subject to the qualification that it is a normal but not a universal incident.[31]

Natural Justice and Reasons

Meanwhile Deane J on the Federal Court had developed his ideas of natural justice to include fact

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[23] *Kioa*, ibid., 578; see also 596-7, 600 (Wilson J); 630-1, 632 (Deane J); contra Brennan J 625 (but note qualification on 626).

[24] *Kioa*, (1985) 159 CLR 550, 586.

[25] *Kioa*, ibid., 585-6.

[26] Deane J agreed with Mason j, and also endorsed Kirby P's understanding of the impact of the *ADJR Act 1977*—*Kioa*, 603, 632-3 respectively (Deane J).

[27] *Osmond* (1986) 159 CLR 656, 662, 670 (Gibbs CJ).

[28] *Osmond*, ibid., 666-7 (Gibbs CJ); note however that dicta (French CJ and Kiefel J) in *Wainohu v New South Wales* [2011] HCA 24 {s. 75(v) special case}—[6:1 for W: French and Kiefel J; Gummow, Hayne, Crennan and Bell JJ: Heydon J dissenting]—[57], [58], [68] states that the giving of reasons is 'an [essential] incident of the judicial function,' or is 'an essential incident of the judicial process' [54], [55], and is 'a hallmark of [judicial] office;' the plurality (Gummow, Hayne, Crennan and Bell JJ) stated that the giving of reasons was 'a hallmark distinguishing substantive judicial decisions from arbitrary decisions' [92], with the qualification at [98] that only substantive judicial decisions require reasons. However, the plurality adverted in the NSW statutory context to the possible applicability of Deane J's dictum in *Osmond*, that reasons for administrative decision-makers should be a concomitant of natural justice (in its extended sense covering legitimate expectations), and in the absence of a statutory provision, courts should imply the requirement into the statute. ((1986) 159 CLR 656, 676); Heydon J did not necessarily accept that dictum as being correct [145]. French CJ and Kiefel J at [54] quote elliptically and considerably misleadingly from Gibbs CJ in *Osmond*—the complete relevant text of Gibbs CJ's reasons accompanies n. 44.

[29] (61 (1982) 1 N.Z.L.R., at p. 649).

[30] (62 [1983]3 N.S.W.L.R. 378, at p. 386.),

[31] *Osmond*, n. 27, 666-7 (Gibbs CJ).

finding based on 'logically probative material,'[32] a standard far higher than that required under the *Uniform Evidence Act* (original decision-makers and administrative review bodies know nothing of the rules of evidence).[33] On the High Court in *Osmond*, while he agreed with Gibbs CJ, he uttered dicta to the effect that:

> … the statutory developments referred to in the judgments of Kirby P. and Priestley J.A. in the Court of Appeal in the present case are conducive to an environment within which the *courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected by it.* Where such circumstances exist, statutory provisions conferring the relevant decision-making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision-maker an implied statutory duty to provide such reasons. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision-maker give reasons for his decision are special, that is to say, exceptional.[34]

In considering the dictum in *Craig*[35] that reasons do not form part of the record for courts, the Court in *Kirk* (a case where the relevant Court by statute was required to give reasons)[36] doubted the viability of the *Craig* reasoning;[37] however, it appears that *Kirk* accepted Gibbs CJ's conclusions in *Osmond* as to the common law rules with regard to the giving of reasons, subject to their displacement by statute.[38] Even more recently, the accepted view in *Osmond has* been subject to some interrogation by the High Court in *Wainohu v New South Wales* [2011] HCA 24, where whether the common law would repair an omission of the legislature in a statute, deliberate or otherwise, to require reasons from an administrator or a judge, (whether sitting on a court or not), 'does not have to be answered for present purposes.'[39] Heydon J dissenting reiterated the current position, relying on *Osmond*—'Statute apart, administrators have no duty to give reasons for their decisions.'[40] But both the plurality and French CJ and Kiefel J gave comfort to Deane J's very extended notion of natural justice as including the giving of reasons;[41] Heydon J did not accept the Deane 'doctrine'[42] as being correct.[43]

However, the High Court in *Osmond*,[44] and later in *Palme*,[45] made it clear that the giving of reasons occurs subsequent to the making of a decision, and in *Palme* the plurality denied any relevance of s. 13 *ADJR* in conflating reasons with natural justice, noting that it was the 'overall scheme' *of the relevant Act* that was the determining factor.[46] If this is so, it is difficult logically to see how a

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[32] *MIEA v Pochi* (1980) 44 FLR, 67-8.

[33] The *Evidence Act 1995* (Cth) is riddled with references to 'evidence' of 'probative value.' 'Probative value' is defined in the Act to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'—Dictionary, Part 1. See also discussion below.

[34] *Osmond*, 167 (Deane J) author's emphasis.

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

[36] *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531, 578 [89] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[37] *Kirk*, ibid, 577-7 [84]-[89] especially [87].

[38] Kirk, ibid., 277 ff, [83] ff

[39] *Wainohu*, n. 28 above, [68] (French CJ and Kiefel J).

[40] *Wainohu*, ibid., [147] (Heydon J).

[41] See n. 28 above.

[42] See text accompanying n. 34.

[43] *Wainohu*, ibid., [145] (Heydon J); see also [182]..

[44] *Osmond*, ibid., 666-7, 670 (Gibbs CJ).

[45] *Re MIMIA; Ex parte Palme* (2003) 216 CLR 212, 225 [44], (Gleeson CJ, Gummow and Heydon JJ). C.f. *Evans v The Queen*, (2007) 235 CLR 521, 595-596, [246] (Heydon J), [34] Gummow and Hayne JJ] [2007] HCA 59; *Wainohu v New South Wales* [2011] HCA 24 [98], (Gummow, Hayne, Crennan and Bell JJ).

[46] *Palme*, 225-6 [47], (Gleeson CJ, Gummow and Heydon JJ)—though of course by the time that the decision at issue in *Palme* was made, most *Migration Act* decisions had been removed from *ADJR* jurisdiction (*Migration Reform Act 1992*(Cth) Part 4B (later renamed Part 8) s. 166LK (later s 485)).

failure to give reasons could be an error of procedural fairness going to the jurisdiction of the relevant decision-maker.[47]

This analysis has proceeded at some length, so as to demonstrate an infirmity (in addition to those already identified by Gibbs CJ in his dissent and by Professor McMillan,[48]) in that the ground upon which the *Kioa* decision was made (importing assumptions as a result of the passage of the *ADJR Act*) was misplaced. Moreover, as McMillan has noted, while *Kioa* is often credited with requiring natural justice in decisions under the *Migration Act*, 'it is … clear from the facts that the Department [of Immigration] was already providing a hearing of sorts to people facing deportation, despite an earlier High Court decision in 1977 saying that it didn't have to.'[49]

Subsequent to *Kioa*, judicial review of decisions particularly of those affecting non-citizens under the *Migration Act*, proceeded apace. It is in the migration jurisdiction that the development of administrative law principles has primarily evolved.

KIOA, ADJR AND UNINTENDED CONSEQUENCES?

Clearly, the result in *Kioa* was a consequence unintended by the legislature at the time. But *Kioa* had further unintended consequences.

Procedural Fairness—ADJR

For reasons best known to himself, and perhaps influenced by the wording of s. 5(1)(b) of the ADJR Act,[50] or perhaps by Stephen J's dicta dissenting in *Salemi*[51] that 'The rules of natural justice are "in a broad sense a procedural matter"[52]' as opposed to 'substantive law,' and that in relation to the Minister's discretionary power to order deportation, the exercise of the power required 'due observance of long-established patterns of procedural fairness,'[53] Mason J proposed the use of the words 'procedural fairness' instead of the term 'natural justice' to apply to administrative decisions.[54] This term has been used extensively by High Court judges since, and has continued to evolve.[55]

But the content of procedural fairness has varied markedly. As the judges themselves noted in *Kioa*, procedural fairness or natural justice is 'flexible,' 'chameleon-like,' 'variable,'[56] and is a 'duty to act fairly' depending on 'the circumstances of the case [including] the nature of the inquiry, the subject-matter and the rules under which the decision-maker is acting.'[57] However procedural fairness would not be required when its provision would serve only to facilitate evasion and frustrate the objects of the statute.[58] Thus both the content and applicability of the appropriate 'fairness' is variable.

In addition, some dicta of the judges in *Kioa* assumed the status of a principle of law—for example, Brennan J suggested that in '…the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is *credible, relevant and significant to the decision to be made*.'[59] This remark was factored by a later High Court into a

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[47] C.f. *Re RRT; Ex parte Aala*, (2000) 204 CLR 82.
[48] McMillan, n. 17 above.
[49] John McMillan, 'Better decision-making: in whose eyes?' *The Canberra Times*, 4 June 2002.
[50] *Kioa*, (1985) 159 CLR 550, 576-7 (Mason J).
[51] *Salemi* 1977, n. 19 above, 442.
[52] *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396.
[53] *Salemi*, n. 19 above, 442 (Stephen J)
[54] *Kioa*, (1985) 159 CLR 550, 583-4 (Mason J).
[55] *See* the concept of 'practical fairness' or practical unfairness as enunciated by Gleeson CJ and French J: text accompanying notes 198-201 refers.
[56] *Kioa*, 612 (Brennan J).
[57] *Kioa*, 584-5 (Mason J).
[58] *Kioa*, 586 (Mason J), 615 (Brennan J).
[59] *Kioa*, 628-9 (Brennan J).

principle in its own right.[60] Similarly, Wilson's J's remark on the need by decision-makers for 'proper consideration'[61] was later fashioned by Gummow J into a concomitant of the 'duty to act fairly' as the need to give '*proper, genuine and realistic consideration to the merits of the case*.'[62]

Justice Kirby noted the 'expanded notion of procedural fairness in Australia.'[63] As a result of the enabling of judicial review by the *ADJR Act* on multiple grounds, and irrespective of whether the decision in question was one of duty or discretion, the notion of natural justice as mentioned in s. 5(1)(a) of ADJR, the provision at issue in *Kioa*, certainly expanded.

The natural justice hearing rule (or procedural fairness) under ADJR thus came to be seen by some to include:

- A duty to make inquiries (*Teoh v MIEA* (1994) 49 FCR 409, 422-3 (Lee J), 434, 439-40 (Carr J); c.f. *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 164-70 (Wilcox J).
- A duty to consider the legitimate expectations of an applicant as a result of a holding out by the Executive (*MIEA v Kurtovic* (1990) 21 FCR 193; *Haoucher v Commonwealth* (1990) 169 CLR 648 [1990] HCA 22 (contra *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, [1990] HCA 21); *MIEA v Teoh* (1995) 183 CLR 273).
  - And this despite there being no estoppel in public law (*MIEA v Kurtovic* (1990) 21 FCR 193, 201 (Ryan J), 207-219 (Gummow J); *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J);[64] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 17 (Mason CJ);[65]
- The need for rational/logical probative evidence: *Re Pochi and MIEA*[66] (1979) 36 FLR 482, 490-2 (Brennan J); *MIEA v Pochi*[67] (1980) 44 FLR 41; (1980) 31 ALR 666, 685, 689, 690 (Deane J);[68] *ABT v Bond* (1990) 170 CLR 321, 366-7 (Deane J);
  - And/or 'arguably a minimum degree of "proportionality"' (*ABT v Bond* (1990) 170 CLR 321, 367 (Deane J)).

The Deane J Dilemma

Deane J said in *Pochi* (1980)[69] that it would be 'both surprising and illogical …if …the rules of natural justice were restricted to the procedural steps' which would amount only to 'an illusion of fairness.'. He referred to a '…requirement that findings of material fact of a statutory tribunal must ordinarily be based on logically probative material and the requirement that the actual decision of such a tribunal must, when relevant questions of fact are in issue, ordinarily be based upon such findings of material fact and not on mere suspicion or speculation.'[70] This is difficult to reconcile with the fact that decision-makers are not courts, do not deal with evidence in the legal sense, but rather with information provided in response to applications, that judicial review may occur only for

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[60] See *SZBEL v MIMIA* (2006) 228 CLR 152 at 162 [32], (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ), as confirmed in *Saeed v MIAC* (2010) 241 CLR 252, 261 [19] (per curiam, French CJ, Gummow, Hayne, Crennan and Kiefel JJ); see also *VEAL v MIMA* (2005) 225 CLR 88, *per curiam*; also see *MIAC v Kumar* [2009] HCA 10, *MIAC v SZIAI* [2009] HCA 39.

[61] *Kioa*, (1985) 159 CLR 550, 604 (Wilson J).

[62] *Re: Sabrina Khan; Khan v MIEA* [1987] FCA 457 [25]-[26], [43]—this was an *ADJR* case concerning improper purpose. See also *Hindi v MIEA* (1988) 20 FCR 1, 12-15(Shepherd J); and note Spigelman CJ's cautionary words in *Bruce v Cole* (1998) 45 NSWLR 163, 186.

[63] *NAFF v MIMIA* (2004) 221 CLR 1, 22-3 [68] (Kirby J); see also *Ainsworth v Criminal Justice Commission*, (1992) 175 CLR 564, 581 ((Mason CJ, Dawson, Toohey and Gaudron JJ).

[64] 'No doctrine of administrative estoppel has emerged.' See also discussion below.

[65] 'Accordingly, it has been said that "a public authority ... cannot be estopped from doing its public duty", to use the words of Lord Denning M.R. in *Lever Finance v Westminster London Borough Council* [[197111 Q.B. 222, at p. 230].'

[66] *Re Pochi and MIEA* (1979) 36 FLR 482, 490-2 (Brennan J).

[67] *MIEA v Pochi* (1980) 44 FLR 41; (1980) 31 ALR 666, 685, 689, 690 (Deane J).

[68] 'requirement that findings of material fact of a statutory tribunal must ordinarily be based on logically probative material' *MIEA v Pochi* (1980) 44 FLR, 67-8 (Deane J).

[69] *Pochi*, (1980) 31 ALR 666, 689-690; (1980) 44 FLR 41, 67-8 (Deane J).

[70] *Pochi*, ibid., (Deane J).

errors of law, and that there is no error of law in making a wrong finding of fact.[71] Deane J's view in *Pochi* was repudiated by Mason CJ in *Bond,* (1990)[72] saying: 'The approach adopted in [that case] has not so far been accepted by this Court.'

But in *Bond*, Deane J extrapolated further on his view of natural justice saying:

> If the actual decision could be based on considerations which were irrelevant or irrational or on findings or inferences of fact which were not supported by some probative material or logical grounds, the common law's insistence upon the observance of such a duty [to accord natural justice] would represent a guarantee of little more than a potentially futile and misleading facade[73]

and going further for administrative tribunals, suggesting that their obligation to accord natural justice includes 'arguably a minimum degree of "proportionality"…'[74]

Deane J's position has still not been accepted, though it would appear likely to have influenced Justice Gummow in *Eshetu*, *SGLB* and *SZMDS*.[75] It still has not been so accepted, the current law being that explicated by Gleeson CJ—there must be *some* evidence (or data). The Chief Justice in *MIMA v Rajamanikkam* (2002)[76] referred to the Deane dicta, but concluded[77] that the rule is that a decision-maker must base her decision upon evidence, going on to observe:

> The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction. The duty to base a decision on evidence, which is part of a legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts**.**[78]

Clearly to adopt the Deane position, or that taken by Gummow A-CJ and Kiefel J in *SZMDS*[79] runs grave risks of crossing the merits/legality divide and thus breaching the separation of powers doctrine. It would have the consequence of judges interrogating the rationality and logicality of decisions reached by administrators in circumstances and for purposes different from those to which the judiciary is accustomed, substituting their views for those of the executive, and by so doing causing disruption to policy implementation, and incurring costs to both executive and the judiciary in terms of time and money.

***Kioa*: The Two Approaches to Procedural Fairness**

The remarkable thing about *Kioa v West* was the divergence in approaches by Mason J and Brennan J as to the basis upon which natural justice would be implied into a statute authorizing decisions. Mason J asserted that:

> 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.[80]

Brennan J stated that:

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[71] *Waterford v. The Commonwealth* (1987) 163 CLR 54, 77 '[t]here is no error of law simply in making a wrong finding of fact,' (Brennan J) *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 154 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

[72] *ABT* v *Bond*, (1990) 170 CLR 321, 357 (Mason CJ).

[73] *Bond*, ibid., 366 (Deane J).

[74] *Bond,* ibid., 367 (Deane J).

[75] See Introduction.

[76] *MIMA v Rajamanikkam* (*Rajamanikkam*) (2002) 210 CLR 222, 232-3 (Gleeson CJ).

[77] *Rajamanikkam* 232 [26] (Gleeson CJ).

[78] *Rajamanikkam*, (2002) 210 CLR 222, 232-3 [26] (Gleeson CJ).

[79] *MIAC v SZMDS* (2010) 240 CLR 611, 625 [40] [2010] HCA 16 (Gummow ACJ and Kiefel J); see also Introduction.

[80] *Kioa v West (MIEA)*, (1985) 159 CLR 550, n. 20 above, 584 (Mason J).

> There is no free-standing common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power.[81] …
> The supremacy of Parliament, a doctrine deeply imbedded in our constitutional law and congruent with our democratic traditions, requires the courts to declare the validity or invalidity of executive action taken in purported exercise of a statutory power in accordance with criteria expressed or implied by statute. There is no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.[82]

In addition, a further difference between the two justices was their approach to 'legitimate expectation'—Mason J affirming that its existence gave rise to a duty to accord procedural fairness, and Brennan J denying the legal efficacy of the term and warning that its use could facilitate a breach of the merits/legality divide.[83]

Some commentators (including Sir Anthony Mason himself)[84] and judges[85] have suggested that there is no difference between the two approaches, and the High Court itself has refused to examine whether there is in fact any difference.[86] There is, however, one fundamental difference—that is the basic assumption from which the judges proceed: one proceeds from the supremacy of the common law as requiring the duty (subject to statutory exclusion); the other gives due respect to the supremacy of parliament, operating from the 'threshold question' of whether it was parliament's intention that decisions be made according to natural justice principles. The first emphasises the judicial power and the power of the courts, the second emphasises statutory intention and the power of the legislature.[87] There are serious ramifications arising from which of these divergent views judges adopt: one highlights common law judicial power, the other pays respect to the legislature.

As the Hon JJ Spigelman CJ noted, while courts may presume that parliament did not intend to deny procedural fairness to persons affected by the exercise of public power,[88] 'the judiciary must always remember that the interpretive principles are rebuttable;'[89] later the Chief Justice noted:

> 'The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.[90] The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.[91]

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[81] *Kioa*, ibid., 610 (Brennan J); see also *Annetts v McCann* (1990) 170 CLR 596, 606 (Brennan J)—'The only sound foundation for judicial review is, in my opinion, the statute which creates and confers the power, construed to include any terms supplied by the common law.'

[82] *Kioa*, ibid., 611 (Brennan J).

[83] *Kioa*, 584, 585, 587, 588 (Mason J); 617-622, 623, 627 (Brennan J).

[84] Sir Anthony Mason, 'Judicial Review: 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).

[85] See, e.g. *Abebe v The Commonwealth* (1999) 197 CLR 510, 553 [112] (Gaudron J); *Re RRT; Ex parte Aala*, (2000) 204 CLR 82, 100 [38) (Gaudron and Gummow JJ)l *Re MIMA; Ex parte Miah* (2001) 206 CLR 57, 83 [89] (Gaudron J); *Saeed v MIAC* 241 CLR 252, 258-9 [11]-14] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Plaintiff M61 v Commonwealth* (2010) 85 ALJR 133, 147-8 [74] *per curiam* (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[86] *Plaintiff M61 v Commonwealth* (2010) 85 ALJR 133, 147-8 [74] *per curiam* (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[87] See *Kioa*, 611 (Brennan J), n. 82 above; see also 622-3 (Brennan J)

[88] Relying on '*Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395–396; *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575–576.'

[89] Hon J. J. Spigelman Chief Justice of NSW, 'The Common Law Bill of Rights,' First Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 10 March 2008; at ***http://acthra.anu.edu.au/resources/McPherson%20Lectures%2010%5B1%5D.3.08%20First.doc*** .

[90] See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995); *Pinder v The Queen* [2003] 1 AC 620 at [24].

[91] *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168–169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1

'…

'…the position in Australia is that identified by Stephen J:

"It is no power of the judicial function to fill gaps disclosed in legislation."[92]

'Indeed Justice Stephen subsequently said:

"To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing."[93]'[94]

Legitimate Expectations?

Partly as a result of the expansion of the content of natural justice (as well as of improper purpose, relevant and irrelevant considerations and unreasonableness under ADJR) by the courts, the Labor Government with bipartisan support removed the majority of migration decisions from both ADJR and s. 39B jurisdiction,[95] and established through what became Part 8 of the *Migration Act* only certain confined grounds of review that excluded the natural justice hearing rule, unreasonableness and relevant and irrelevant considerations. While the constitutionality of this measure was upheld in *Abebe*[96] as being consistent with s. 77 of the *Constitution*, expansion of the concept of natural justice actually continued to grow.

First, outside the Commonwealth jurisdiction, relying on Mason J's dicta in *Kioa*[97] and that of Deane J in *Haoucher*,[98] the High Court in *Annetts v McCann*[99] found that the *Coroners Act 1920* (WA) did not display a legislative intention to exclude the appellants' 'common law right to be heard' in relation to themselves and their deceased son.[100] Brennan J dissented on the ambit of natural justice requiring consideration of 'legitimate expectations.'[101] In *Ainsworth v Criminal Justice Commission*,[102] again relying upon Mason J's dictum in *Kioa* as endorsed by the plurality in *Annetts*,[103] the majority found a breach of the rules of procedural fairness in the making of a report by a statutory authority, though again Brennan J dissented on the inclusion of 'legitimate expectation' as part of a criterion for the application of procedural fairness.[104]

Secondly, the doctrine of 'legitimate expectation' had a mixed history. In *Attorney-General (NSW) v Quin*[105] Mason CJ discussed the concept at some length, noting that 'there may be some cases[involving 'legitimate expectation'] in which substantive protection can be afforded and ordered by the court, without detriment to the public interest.'[106] In the same case, Brennan J again disputed the existence of any doctrine of 'legitimate expectation' in Australian administrative

All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AC* [1975] AC 591 at 613G, 645C–V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.

[92] *Marshall v Watson* (1972) 124 CLR 640 at 648; See also *Council of the City of Parramatta v Brickworks Ltd* (1971) 128 CLR 1 at 12; *Ruzicka* at [6]; *VOAW* at [12]; *Cornwell v Lavender* (1991) 7 WAR 9 at 23.

[93] *Western Australia v Commonwealth* (1975) 134 CLR 201 at 251.

[94] Hon J. J. Spigelman Chief Justice of NSW, 'Legitimate and Spurious Interpretation,' Third Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 12 March 2008, at **http://acthra.anu.edu.au/resources/McPherson%20Lectures%2012%5B1%5D.3.08%20Third.doc**.

[95] *Migration Reform Act 1992* (Cth): see n. 46 above—(Part 4B (later renamed Part 8) s. 166LK (later s 485)).

[96] *Abebe v The Commonwealth* (1999) 197 CLR 510.

[97] *Kioa*, (1985) 159 CLR 550, 584 (Mason J)—n. 80 above refers.

[98] *Haoucher v Commonwealth* (1990) 169 CLR 648, 653 (Deane J)

[99] *Annetts v McCann* (1990) 170 CLR 596 (*Annetts*).

[100] *Annetts*, ibid., 598-9 (Mason CJ, Deane and McHugh JJ).

[101] *Annetts*, ibid., 605-7 (Brennan J).

[102] *Ainsworth v Criminal Justice Commission*, (1992) 175 CLR 564.

[103] *Ainsworth*, (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[104] *Ainsworth*, ibid., 591-2 (Brennan J).

[105] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, [1990] HCA 21 (*Quin*).

[106] *Quin*, (1990) 170 CLR 1, 23 (Mason CJ).

law,[107] his prime concern being, as it had been in *Kioa* and in *Annetts*, that such a doctrine had the potential to 'divert inquiry from what is procedurally reasonable and fair into an examination of the merits' of a case.[108]

Quin was decided on 7 June 1990 by a 3:2 majority (Mason CJ, Brennan J, Dawson J: Deane J, Toohey J dissenting). Earlier that year on 7 February 1990, the Full Court of the Federal Court had considered in *Kurtovic* (an ADJR case) the questions of 'legitimate expectation,' procedural fairness and 'substantive fairness.'[109] The case was an appeal from Marcus Einfeld, then a judge of the Federal Court, who had ordered an estoppel against the Minister, and an order restraining the Minister from deporting Kurtovic.[110] Counsel submitted an estoppel arose against the then Minister on the basis of a letter written on behalf of the first of his predecessors on 17 December 1985, and that on the basis of a holding out by virtue of Ministerial policy announcements made by his predecessor in 1983 and 1984,[111] Kurtovic had an expectation that the substantive matters mentioned in the policy announcement would be adhered to.[112] The Court considered and dismissed both these arguments, stating that only procedural fairness could arise; Gummow J considered UK decisions where 'substantive fairness' rather than 'procedural' had received support.[113]

On 7 June, the same day that *Quin* was decided, the High Court also brought down its decision in the ADJR case of *Haoucher*.[114] This case raised the concept of 'legitimate expectation' in circumstances not dissimilar those that had been at issue in *Kurtovic*, where a published Ministerial policy was said to be sufficient to engender a 'legitimate expectation' that must sound in procedural fairness. What is interesting here is that the two minority judges in *Quin* (Deane J and Toohey J) together with McHugh J who did not sit in *Quin*, formed the *Haoucher* majority, while Dawson J from the majority in *Quin*, together with Gaudron J who did not sir in *Quin*, formed the *Haoucher* minority.

While the factual and legislative circumstances and the of *Quin* and *Haoucher* were different, there were two compelling similarities: both involved a policy and its repudiation in the light of circumstances, and both involved what was said to be a 'legitimate expectation.' In the first, the capacity of the executive to change its policy in accordance with circumstances was acknowledged, in the second, it was repudiated; in the first, policy changes could not give rise to administrative law consequences; in the second they did. In the first, the lack of applicability of the private law doctrine of estoppel to policy changes was acknowledged, Gummow J's explication of the issues in *Kurtovic* being acknowledged;[115] in the second the applicability of estoppel to policy was implicitly acknowledged, and *Kurtovic* was not mentioned at all. More worryingly still, the dictum of Deane J

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[107] *Quin*, ibid., 35 (Brennan J)—'The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual's legitimate expectations against adverse exercises of the power? I have no doubt that the answer is: none. Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power. If it were otherwise, the courts would be asserting a jurisdiction, in protection of individual interests, to override the law by which a power to affect those interests is conferred on the repository.'

[108] *Kioa*, (1985) 159 CLR 550, 627 (Brennan J); see also *Annetts*, n. 99 above, 604-7 (Brennan L).

[109] *MIEA v Kurtovic* (1990) 21 FCR 193, (1990) 92 ALR 93, (Neaves, Ryan and Gummow JJ) (*Kurtovic*).

[110] See the orders No. 2 and No. 5 reproduced in the reasons of Neaves J, *Kurtovic*, ibid., 194.

[111] *Kurtovic*, 224 (Gummow J)

[112] *Kurtovic*, 226 (Gummow J)

[113] *Kurtovic*, 226-7 (Gummow J) referring to R *v Secretary of State for the Home Department; Ex parte Kahn* [1984] 1 WLR 1337; [1985] 1 All ER 40; R *v Secretary of State for the Home Department; Ex parte Ruddock* [1987] 1 WLR 1482; [1987] 2 All ER 518, and *Oloniluyi v Secretary of State for the Home Department* [1989] Imm AR 135; he also referred to Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) CLJ 238.

[114] *Haoucher v Commonwealth* (1990) 169 CLR 648, [1990] HCA 22.

[115] *Quin*, 17-18(Mason CJ).

in *Haoucher* that is so often partially cited with approval, actually foreshadowed even more radical change; relying on *Kioa*,[116] he said:

> '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[117] 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.'[118]

Effectively this is a statement endorsing the capacity of 'legitimate expectation' (based on Mason J's understanding in *Kioa*) to provide the practical content of and a substantive outcome of the provision of 'procedural fairness' as well as being determinative of standing; moreover, such 'procedural fairness' is to apply at each stage of the decision-making process.[119] It was a move not only towards an administrative nightmare but also towards 'substantive fairness,' as was later recognized by J J Spigelman QC when he appeared for the Commonwealth in *Teoh*.[120] Dawson J's dissent starkly put the consequences of the majority position: 'To accede to the appellant's argument would be to require the Minister to give a further hearing on every occasion upon which he wished to depart from the recommendation of the Tribunal. To impose such a requirement accords neither with principle nor with authority.'[121] This too, no doubt, was the view of the Labor Immigration Minister who had already tabled in the parliament reasons for not accepting AAT recommendations in 10 deportation cases, one of which was that of Mr Haoucher.[122]

This analysis shows a more than disquieting split in the High Court in its analysis of both the factual and policy circumstances and of the appropriate law to be applied in a relevant case, and in its appreciation of the roles of the executive and the legislature in making and implementing policy. There was no coherence at all as between the approaches of members of the Court in these two cases. Certainty for administrators would appear not to have been a consideration for the Haoucher majority. (As it turned out the Minister's position in *Haoucher* was later vindicated.[123])

While in *ABT v Bond*[124] (another ADJR case decided prior to *Quin* and *Haoucher*) the High Court appeared to recognize at least some of the dangers in Deane J's approach emerging from *Pochi* (as

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[116] *Haoucher*, 653 (Deane J), most particularly, Mason J's dictum at

[117] Footnote reference here to '(cf. Halsbury's Laws of England, 4th edn. (1989), vol. 1(1), par 85).'

[118] *Haoucher*, 653 (Deane J)—the author has kept the exact words of the dictum, but has inserted the footnote and reformatted the sentence for greater ease of understanding, together with emphases.

[119] *Haoucher*, 653 (Deane J).

[120] *MIEA v Teoh* (1995) 183 CLR 273, 276-7 (JJ Spigelman QC in argument).

[121] *Haoucher*, 663 (Dawson J).

[122] On 8 December 1988, Senator Ray, the Immigration minister, had tabled in the Senate a *Ministerial Statement on Criminal Deportations*. Which conveyed information relating to ten cases where he and his predecessors had not accepted AAT recommendations not to deport: one of these related to the complainant in *Haoucher v MIEA* (1990) 169 CLR 648. He said: 'And, occasionally, the Tribunal appears to have misunderstood the Government's policy and intent to which it must have regard. It is hoped that this statement will provide it with a better understanding of the Government's aims in this matter. In general, I would hope that, consistent with the Government policy, the Tribunal gives weight to the need to protect Australian society from non-citizen residents convicted of serious or multiple offences. Conversely, the Government considers that it could give a reduced weighting to the views of the offender and that person's family and to the adverse consequences for them of deportation.' (Hansard, Senate, 8 December 1988, 3769).

[123] See Roger Douglas (ed.), *Douglas and Jones's Administrative Law*, (5th edn., Federation Press, 2006), 522-3.

[124] *ABT v Bond* (1990) 170 CLR 321, [1990] HCA 10.

to logical probative evidence)[125] and later in *Haoucher* (as to applicability of natural justice to every stage of the decision-making process),[126] in that the Court repudiated both these stances, from an administrator's point of view worse was to come.

Teoh

In 1995, the High Court in *Teoh* found that a legitimate expectation to be accorded procedural fairness arose, if a decision-maker failed to take into account any obligation the Commonwealth had assumed under a ratified treaty that was relevant to the matter under decision, and this whether the applicant or the decision-maker was aware of the obligation. The ratification by the Executive under the prerogative or the executive power was said to constitute a holding out not only to the international community, but also to the domestic community, and failure to take that into account (and notifying the application of the intention not to take it into account) was a breach of procedural fairness. Neither *Kurtovic* nor 'substantive fairness' was mentioned in the decision, though both had been raised by JJ Spigelman for the Minister.[127]

Mason CJ and Deane J said:

> …ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. *That positive statement is 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*[128] and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.[129]

The Labor Government immediately issued[130] a joint press release (Minister for Foreign Affairs, Mr Gareth Evans, and the Attorney-General, Mr Michael Lavarch), stating (amongst other things) that entry into a treaty was no reason for raising any expectation that government decision-makers would act in accordance with the treaty. On the change of government, the Coalition Minister for Foreign Affairs (Mr Alexander Downer), the Attorney-General (Mr Daryl Williams) and Minister for Justice (Senator Amanda Vanstone) issued a Joint Ministerial Statement to the same effect on 25 February 1997. In addition the Labor Government introduced into the Senate on 28 June 1995, the *Administrative Decisions (Effect of International Instruments) Bill 1995* to achieve legislatively the same effect as the joint press statement had done executively, but it lapsed with the change of government. On 18 June 1997, the Coalition government introduced the *Administrative Decisions (Effect of International Instruments) Bill 1997* but it too lapsed when Parliament was dissolved pending the election. On 13 October 1999, the Coalition government re-introduced the *Administrative Decisions (Effect of International Instruments) Bill 1999*; while it passed the House of Representatives on 11 May 2000, it faced opposition in the Senate on matters of detail, and never became law. These moves were intended as the appropriate executive and/or legislative statement of intention as envisaged in Mason CJ's and Deane J's reasons.

A reasonable person may well have thought that this would put en end to the matter, the government and the Opposition both being exercised at what they interpreted as an inappropriate if not unlawful intrusion into, and blatant subversion of, the executive and legislative decision-

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[125] See text accompanying n. 67 above; *ABT v Bond*, (1990) 170 CLR 321, 357 (Mason CJ); though at *Bond* 366-7 Deane J adhered to his earlier position in *MIEA v Pochi* [(1980) 44 FLR 41; (1980) 31 ALR 666, 685, 689, 690] adding to the natural justice requirements '…a minimum degree of "proportionality"…' .

[126] *Bond*, 336, 341-2 (Mason CJ).

[127] *Teoh*, 275, JJ Spigelman in argument.

[128] 'C.f. *Simsek v Macphee* (1982) 148 CLR 636 at 644.'

[129] *MIEA v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J), author's emphasis. [A 4:1 decision—(Mason CJ and Deane J; Toohey J; Gaudron J: McHugh J dissenting).

[130] *Teoh* was decided on 7 April 1995; the Ministerial statement as issued on 10 May 1995.

making fields by the High Court. However, Federal Court judges continued to accept *Teoh* as authority, despite the evidence of contrary executive intention (approved as they would have been by Cabinet). Goldberg J in *Tien v MIMA*[131] said:

> Notwithstanding the publication of this statement I do not consider that the statement has the effect apparently intended. I consider that the reference to "statutory or executive indications to the contrary" referred to by Mason CJ and Deane J in *Teoh* is a reference to indications made at or about the time the relevant treaty is ratified.[132]

The authority of the doctrine of legitimate expectation and the authority of *Teoh* were severely undermined by the plurality reasons in *Re MIMIA; Ex parte Lam (Lam),*[133] a 2003 procedural fairness case arising in the High Court's s. 75(v) jurisdiction. All the Court found no breach of procedural fairness. McHugh and Gummow JJ stated that on 'legitimate expectation' the views of McHugh J dissenting in *Teoh*[134] and Brennan J in the majority in *Quin*[135] should be accepted as representing the law in Australia—'The decision in *Teoh* does not require any contrary or other understanding of the law.'[136] On *Teoh* itself McHugh and Gummow JJ expressed considered doubt as to the reasoning, especially having regard to the separation of powers,[137] as did Hayne J[138] and Callinan J.[139]

By no means however can one consider the 'legitimate expectation' doctrine dead, despite Kirby J's acknowledgement of it as a 'fiction' now of 'limited utility' given the 'expanded notion of procedural fairness in Australia.'[140]

Post Lam

There has been some loose use of the words 'legitimate' and 'expectation' together in a fashion with no administratively legal meaning.[141] However, the High Court in coming to a number of recent decisions has continued to use the rubric of Mason J from *Kioa v West* that asserts that the content of natural justice and whether it applies arises from '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.'[142]

There are a number of High Court dicta on 'legitimate expectation' in the sense of passing comments that were not critical to the ratio of the relevant case—Gleeson CJ[143] and Callinan J[144] in

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[131] *Tien v MIMA* (1998) 89 FCR 80
[132] *Tien*, ibid., 103 (Goldberg J).
[133] *Re MIMIA; Ex parte Lam* (*Lam*) (2003) 195 CLR 502 (Gleeson CJ; McHugh and Gummow JJ; Hayne J; Callinan J).
[134] *Teoh* (1995) 183 CLR 273, 311-312 (McHugh J).
[135] *Quin* (1990) 170 CLR 1, 39 (Brennan J).
[136] *Lam*, 28, [83] (McHugh and Gummow JJ).
[137] *Lam*, 32-4 (McHugh and Gummow JJ).
[138] *Lam*, ibid., 38 (Hayne J).
[139] *Lam*, ibid., 45-8 (Callinan J).
[140] *NAFF v MIMIA* (2004) 221 CLR 1, 22-3 [68] (Kirby J).
[141] See, e.g. *Waterways Authority v Fitzgibbon* [2005] HCA 57, [40] (Kirby and Heydon JJ,); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4, [41] (Gummow, Hayne, Heydon. Heydon and Kiefel JJ, quoting Deane J in *Australian Broadcasting Commission v Parish* [1980] FCA 33; (1980) 29 ALR 228 at 255); *Saeed v MIAC* [2010] HCA 23 [62] (Heydon J—but neither he nor the majority decided that case on the 'legitimate expectation' doctrine); *Finch v Telstra Super Pty Ltd* [2010] HCA 36 [33] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *South Australia v Totani* [2010] HCA 39 [240] (Heydon J).
[142] The *Kioa* Mason J text is above at n. 80.
[143] *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 224 CLR 44, 56-7, [24]-[26] (Gleeson CJ, at [24] relying on Mason CJ, Deane and McHugh JJ in *Annetts v McCann* 1990] HCA 57, (1990) 170 CLR 596, 598, who in turn had relied upon Mason J's definition in *Kioa v West* at (1985) 159 CLR 550, 584(the Mason J text is above at n. 80) and also upon his own dicta in *Al Kateb v Goodwin* [2004] HCA 37, (2004) 78 ALJR

Jarratt (2005); Kirby J in *Shi* (2008);[145] and in some cases, members of the High Court have refused, or found it unnecessary, to consider the content of 'legitimate expectation'—e.g. *Sanders v Snell* (1998)[146] and more recently in *SZMDS* (2010).[147]

But in *Plaintiff M61 v Commonwealth*[148] the unanimous Court reiterated the view of Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[149] that 'that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests *or legitimate expectations*, principles of natural justice generally regulate the exercise of that power.[150] Of course, that plurality in *Annetts* used Mason J's definition of procedural fairness from *Kioa*, not that of Brennan J, who had been ferocious in a continuity of cases to repudiate the existence of any such doctrine. It would have appeared that in *Lam*, the High Court had gone quite a long way towards accepting the Brennan view. In *Annetts*, Brennan J had warned again of the potential for courts' engagement with 'legitimate expectations' to facilitate courts' crossing the Rubicon of the merits/legality divide.[151] He noted that there is no 'explicable legal principle' i.e. *no legal content*,[152] to any notion of 'legitimate expectation.'[153] Without such principle or content, he warned, as he had in *Quin*, that 'the courts will be perceived to be asserting an authority to intervene in the affairs of the Executive Government whenever the court determines for itself that intervention is warranted. The essential authority of the courts to enforce the law governing the extent and exercise of executive and administrative power would be undermined.'[154]

In *M61* the Court apparently turned its back upon Sir Gerard Brennan not only with respect to legitimate expectations, but also with regard to its understanding of natural justice or procedural fairness itself. The Court not only reiterated the Mason-*Kioa* rubric as adopted by the plurality in *Annetts*, it said that:

> *It is unnecessary to consider* whether identifying the root of the obligation remains an open question[155]. or whether the competing views would lead to any different result.[156]

1099, 1105 [20])—'Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain. This principle of interpretation is an acknowledgment by the courts of Parliament's assumed respect for justice.

144 *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 224 CLR 44, 88 [138] (Callinan J, quoting Mason CJ, Deane and McHugh JJ in *Annetts v McCann* 1990] HCA 57, (1990) 170 CLR 596, 598, who in turn had relied upon Mason J's definition in *Kioa v West* at (1985) 159 CLR 550, 584—the Mason J text is above at n. 80.

145 *Shi v Migration Agents Registration Authority* [2008] HCA 31 [42] (Kirby J, quoting from *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, (1986) 162 CLR 24, 45 (Mason J))

146 *Sanders v Snell* (1998) 196 CLR 329 at 348 [45] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), referred to and quoted by Callinan J in *Jarratt* n 144 above at 89 [140].

147 *MIAC v SZMDS* (2010) 240 CLR 611, 620 [27] (Gummow A-CJ and Kiefel J refused to consider 'legitimate expectation' as it was not raised in argument.

148 *Plaintiff M61 v Commonwealth* (*M61*) (2010) 85 ALJR 133, 147-8 [74], [2010] HCA 41, per curiam (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

149 *Annetts v McCann*, [1990] HCA 57, (1990) 170 CLR 596, 598.

150 Author's emphasis; *M61*, n. 148 above, 147-8 [74].

151 *Annetts*, 606 (Brennan J).

152 C.f. the majority in *NSW v Commonwealth* (2006) 229 CLR 1, 120-21 [196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) [2006] HCA 52.

153 *Annetts*, 697 (Brennan J).

154 *Annetts*, ibid.

155 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 142-3 [168] (Hayne J); 75 ALJR 52; *Saeed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507 at [11]-[13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

156 *M61* 148 [74].

It was 'unnecessary to consider' this matter, but nevertheless the Court implicitly approved the Mason J view from *Kioa*, by stating: 'It is well established, as held in *Annetts*,[157] that the principles of procedural fairness may be excluded only by "plain words of necessary intendment".'[158] It can only be concluded that the doctrine of legitimate expectation on the basis of the Mason J *Kioa* view, and not the Brennan approach, now finds favour with the modern Court, despite its preoccupation with the separation of powers.[159]

Wider still and wider[160]

Despite attempts by successive governments to translate their policies endorsed by the electorate into law through legislation,[161] especially the Labor amendments to Part 8 of the *Migration Act*, the ambit of the natural justice hearing rule widened.

- ***Aala*:**[162] here the High Court found, despite 2 RRT hearings and 2 reviews by the Federal Court, that a statement by the RRT member that s/he would take into account all the material that had been before the Federal Court, but in fact had failed to consider 4 handwritten bits of paper that had been supplied to that Court, was a breach of procedural fairness, as it disenabled the applicant from actually putting his case in relation to the actual state of affairs.
    - The writs mentioned in s. 75(v) should be known as 'constitutional writs;'[163]
    - *Certiorari* in the High Court's original jurisdiction (75(v)) is ancillary to prohibition and mandamus;[164]
    - A breach of breach of natural justice/procedural fairness by an officer of the Commonwealth will occur when making a decision under a statute that did not 'relevantly (and validly) limit or *extinguish any obligation to accord procedural fairness*'[165]
    - A breach of procedural fairness, even a trivial breach, constitutes a jurisdictional error for administrators.[166]

- ***Miah***:[167] the High Court held with regard to an original decision-maker that there was a breach of procedural fairness in not advising M of the change of government (based on the country information available) and giving him an opportunity to make a case as to why he

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[157] *Annetts v McCann* (1990) 170 CLR 596 at 598; 65 ALJR 167. See also *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.

[158] *M61*, n. 156 above.

[159] E.g. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, *Baker v The Queen* (2004) 223 CLR 513, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531, *Wainohu v New South Wales* [2011] HCA 24.

[160] *Land of Hope and Glory*, lyrics, A. C. Benson, music Edward Elgar, 1902—'Wider still and wider shall thy bounds be set;…'.

[161] C.f. 'An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.' *Lam*, n. 133 above, 24-5 [76] (McHugh and Gummow JJ).

[162] *Re RRT; Ex parte Aala* (2000) 204 CLR 82 (*Aala*).

[163] *Aala*, ibid., 93-4, 97 [24]-[25],[34] (Gaudron and Gummow JJ).

[164] *Aala*, 90-91 [14], (Gaudron and Gummow JJ), affirmed *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 507 [80] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[165] *Aala*, ibid., 97, 101; [34], [41] (Gaudron and Gummow JJ), author's emphasis.

[166] *Aala*, ibid., 109 [59]-[60] (Gaudron and Gummow JJ), relying on Deane J in *Kioa* (1985) 159 CLR 550, 632-633, and *Haoucher* (1990) 169 CLR 648, 652-653.

[167] *Re MIMA; Ex parte Miah* (2001) 206 CLR 57 (*Miah*), s. 75(v) case: 3:2 (Gaudron J, McHugh K, Kirby J: Gleeson CJ and Hayne J dissenting).

still would be persecuted.

- Gaudron J adverted to the 2 competing theories as to natural justice that arose from Mason J and Brennan J in *Kioa*, and said, relying on her dicta with Gummow J in *Aala* that whichever approach was adopted, in the end the question is whether the legislation, on its proper construction, relevantly (and validly) limits or extinguishes the obligation to accord procedural fairness.[168]
- The provisions in the statute, even though headed up 'Code,' did not constitute a Code, and the statute did not exclude compliance with the rules of natural justice.[169]
- The Explanatory Memorandum and any statement by the Minister in introducing the Bill (i.e. Second Reading speech) are not relevant in that the 'court will not give the enactment that meaning if such a reading is not justified. The need to act on the text of the enactment and not the Minister's statements is particularly important when the Minister's meaning has serious consequences for an individual[170].'[171]

- No reference was made to sections 15 AA or 15 AB of the *Acts Interpretation Act 1901* (Cth).
- The existence of a right of appeal in the statute, or a *de novo* merits review, would only cure defects in natural justice in certain circumstance.[172]

Those cases had occurred on the basis of the Part 8 inserted in the *Migration Act*. However, given the clear intention of the Court to ignore the legislature's intention, the Coalition government with bipartisan support enacted the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth), which inserted sections into the Act declaring that certain provisions in respect of decision-making under that Act were to be taken to be 'an exhaustive statement of the requirements of the natural justice hearing rule.'

In anticipation of hearing a case reviewing a decision made under this new legislation, the High Court majority in ***SAAP*** (2005)[173] (which concerned a decision made before the *Procedural Fairness Act* came into operation) adopted what can only be described as an intensely literal, fine-tooth comb approach to interpreting the words of specific provisions. Any reference to *Kioa* was eschewed, and instead of implying natural justice into the statute by virtue of what was not specifically excluded, the majority looked instead at what was specifically *included*, concentrating on finding a jurisdictional error through failure to comply with the exact words of the statute. This time, McHugh J examined the Explanatory Memorandum and Second Reading speech, finding them 'neutral.'[174] As a result of this case, (together with ***Al Shamry***[175] and ***SZEEU*** (2006)[176] the Commonwealth Parliament moved to enact the *Migration Amendment (Review Provisions) Act*

[168] *Miah*, ibid., 84, [90] (Gaudron J).
[169] *Miah*, ibid., 86-7, 88 [98]-[99], [102], [104]-[105].
[170] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520 per Mason CJ, Wilson and Dawson JJ, 532 per Deane J.
[171] *Miah*, n. 167 above, 95[132] (McHugh J).
[172] The majority denied any intention in the *Migration Act* to cure defects through RRT review, with McHugh J outlining seven factors which a court will consider in determining whether such an intention exists—*Miah*, 99-102; c.f. *Twist v Randwick Municipal Council* (1976) 136 CLR 106.
[173] *SAAP v MIMIA* (2005) 228 CLR 294, [2005] HCA 24, (*SAAP*), a s. 39B matter on appeal from FCFCA],by 3:2 (McHugh, Kirby and Hayne JJ: Gleeson CJ and Gummow J dissenting). The case concerned *Migration Act* s. 424A, interpreted to mean that certain information was to be given to the applicant in writing was construed strictly as being a mandatory requirement and failure to do so was a breach of procedural fairness; and that its effect was not confined to the pre-hearing stage.
[174] *SAAP*, 62 [316] (McHugh J).
[175] *MIMA v Al Shamry* (2001) 110 FCR 27.
[176] *SZEEU v MIMIA* (2006) 150 FCR 214.

2007 (Cth) to attempt to overcome the problem.[177]

In ***NAIS*** (2005),[178] where the decision occurred also before the entry into force of the *Procedural Fairness Act*, such an extended delay occurred that the majority held that a breach of procedural fairness may arise not only from a denial of an opportunity to present a case, but also *from denial of an opportunity to consider it*; the excessive delay amounted to 'self disablement' by the RRT, effectively equivalent to the self disablement caused by bias.[179] Gummow J dissenting referred to Brennan J's dicta in *Quin*,[180] noted the High Court proceeding was a Chapter III proceeding involving the judicial power of the Commonwealth, and noted that 'maladministration is not to be confused with the illegality which founds judicial review.'[181]

SZFDE v MIAC[182] (2007) decided by a unanimous High Court after the *Procedural Fairness Act* entered into force, concerned fraud by a purported solicitor and migration agent. The Court held that a fraud perpetrated upon an applicant in this fashion amounted to a fraud upon the Tribunal, and that this conclusion was strengthened by the new provision exhausting natural justice—fraud subverts the Tribunal's capacity to accord procedural fairness, and 'given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the *Constitution'* this was a 'matter of the first magnitude.'[183]

Fairness? Administrative Justice?

Despite Brennan J's warning in *Quin* that, given the separation of the judicial power doctrine, there can be no attempt by courts to pursue 'administrative justice' to rectify perceived wrongs,[184] the remit of the courts being confined to determining legality according to the power conferred on the decision-maker, that phrase has become popular. In recent times its main proponent has been Kirby J, beginning his mission as Kirby P in *Osmond v PSB*[185] and continuing in *S20*,[186] *Griffith University v Tang*[187] and in *NAIS*.[188]

The AIAL National Forum in 2010 devoted its programme to the concept.[189] Chief Justice French has spoken of the term as having been 'born with a noble purpose, but also to have been engaged for most of its life in a search for meaning a concept in search of meaning.'[190] French CJ suggests that the content of the phrase ought to have content that 'identif[ies]at least normative standards which can legitimately be said to answer to the designation 'just' and which are capable of general

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[177] *See* Sue Harris Rimmer, 'Migration Amendment (Review Provisions) Bill 2006,' *Law and Bills Digest*, Commonwealth Parliamentary Library, 14 February 2007, at ***http://202.14.81.34/library/pubs/bd/2006-07/07bd075.pdf***.

[178] *NAIS v MIMIA* (2005) 228 CLR 470, [2005] HCA 77; (Appeal from FCFCA, s. 39B proceeding)— 4:2 (Gleeson CJ, Kirby, Callinan and Heydon JJ: Gummow J and Hayne J dissenting)..

[179] *NAIS*, 526, [172] (Callinan and Heydon JJ)

[180] *Quin*, (1990) 170 CLR 1, 35-36.

[181] *NAIS*, 447, [14] (Gummow J).

[182] *SZFDE v MIAC* (2007) 232 CLR 189, 201 [31-32] per curiam (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

[183] *SZFDE*, ibid..

[184] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 25-37 (Brennan J)—'nor is the adversary system ideally suited to the doing of administrative justice'(37).

[185] *Osmond v Public service Board NSW* [1984] 3 NSWLR 447, 465 (see also n .10 above); c.f. *Public Service Board NSW v Osmond* (1986) 159 CLR 656, 669 (Gibbs CJ).

[186] *Re MIMA; Ex parte S20* (2003) 198 ALR 59, 98 [169]-[170] (Kirby J dissenting—'Conclusion: Vigilance and administrative justice.')

[187] *Griffith University v Tang* (2005) 221 CLR 99, 137[110] (Kirby J dissenting).

[188] *NAIS v MIMIA* (2005) 228 CLR 470, 506 [119] (Kirby J, in the majority); see also n. 178 above.

[189] Australian Institute of Administrative Law (AIAL) National Forum, 'Delivering Administrative Justice,' 22-3 July 2010, ***http://law.anu.edu.au/aial/NationalForum/ANFIndex.html***.

[190] Chief Justice Robert French, 'Administrative Justice – Words in Search of Meaning,' Address to the Australian Institute of Administrative Law Annual Conference, National Administrative Law Forum 2010, 'Delivering Administrative Justice,' 22 July 2010, at ***http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22july10.pdf***.

application to our system of administrative law and practice.'[191] Academic writes have also adopted the phrase.[192]

The loose use of the phrase, whose content (like that of other terms in legal use like 'rule of law,' 'natural justice.' 'procedural fairness' and 'jurisdictional error') is subject to different meanings depending on the perception of those who use it, is not helpful when confronting the morass of administrative applications which daily require decisions. The Chief Justice referred to Sir Francis Bacon writing *On Judicature* in his address,[193] but perhaps he forgot that Sir Francis also wrote in that essay that:

> JUDGES ought to remember that their office is *jus dicere*,[194] and not *jus dare*;[195]*;* to interpret law, and not to make law, or give law. Else will it be like the authority claimed by the Church of Rome, which under pretext of exposition of Scripture doth not stick to add and alter; and to pronounce that which they do not find; and by show of antiquity to introduce novelty. Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue.[196]

This concept of Integrity is of overwhelming importance, former Chief Justice Spigelman devoting all three of his 2004 Lectures for the AIAL to that subject.[197] 'Administrative justice' is a chimera, a lawyers' mare's nest, the result of transposition of legal thinking and legal attitudes onto the legislature and the executive, a metaphoric repositioning of powers. The legal system itself cannot be said to be 'just'—judges are to 'do right according to law'—and if judges fail, why graft an inapposite concept onto administrators whose purpose is to implement policy.

The idea that the legal system is not always just may be seen by reference to a few examples.

Perhaps the most significant development in natural justice has been that following from 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.

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[191] French CJ, ibid..

[192] See e.g. P P Craig, 'The Common Law, Reasons and Administrative Justice,' (1994) *Cambridge Law Journal* 282; AW Bradley, 'Administrative Justice: A Developing Human Right?' (1995) 1 *European Public Law* 347 at 351; R Creyke and J McMillan, 'Administrative Justice – The Concept Emerges' in R Creyke and J McMillan (eds) *Administrative Justice – The Core and the Fringe* (Australian Institute of Administrative Law, 2000); M Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) 25 *Law & Policy* 323; R Creyke, 'Administrative Justice – Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705; M Adler (ed) *Administrative Justice in Context* (Hart Publishing, Oxford. 2010); many of these were referred to by French CJ in his address to the AIAL Forum. 'Administrative Justice—Words in search of Meaning', 22 July 2010.

[193] French CJ, n. 190 above.

194 *jus dicere*—to declare the law. This word is used to explain the power which the court has to expound the law; and not to make it, *jus dare*.

195 *jus dare* —to give or to make the law. *Jus dare* belongs to the legislature; *jus dicere* to the judge.

[196] Sir Francis Bacon, Sir Francis Bacon, (1561–1626), *Essays, Civil and Moral*, LVI *Of Judicature* (The Harvard Classics, 1909–14).

[197] See J J Spigelman 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724. J J Spigelman 'Jurisdiction and Integrity', The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law (2004) at 26; J J Spigelman 'The Significance of the Integrity System' (2008) 4(2) *Original Law Review* 39 at 47, reprinted in Tim D Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008), CS2N Publishing at 326; see also Hon J. J. Spigelman Chief Justice of NSW, 'The Common Law Bill of Rights,' First Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 10 March 2008; at ***http://acthra.anu.edu.au/resources/McPherson%20Lectures%2010%5B1%5D.3.08%20First.doc*** ;Hon J J Spigelman Chief Justice of NSW, 'Legitimate and Spurious Interpretation,' Third Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 12 March 2008, at ***http://acthra.anu.edu.au/resources/McPherson%20Lectures%2012%5B1%5D.3.08%20Third.doc***.

> No practical injustice has been shown.[198]

'Fairness' means different things to different people, depending upon their circumstances and personal disposition; but 'practical unfairness' or 'practical injustice' in the administrative context has now entered the lexicon. *Parker v Comptroller General of Customs*[199] was a case involving 'extraordinary delay,' where the appellant had been pursued through the courts for well over a decade in relation to an alleged offence of failing to pay duty on one imported bottle of Cheval Napoleon Old French Brandy, he finally being fined over $1 million.[200] Parker alleged a breach of procedural fairness by the courts, in that he was not given an adequate opportunity to make his case. The Court, Heydon J dissenting, found against him, French CJ saying that '[no] practical unfairness' had been shown towards Mr Parker.[201]

In addition, the rule against bias for judges has been compromised, the High Court in *Ebne*r and *Clenae*[202] doing away with the common law rule of automatic disqualification for judges on the basis of pecuniary interest. Unlike politicians and Ministers,[203] judges do not have to disclose their interests.[204] In breach of the maxims that judges must not sit in their own cause,[205] and that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done,'[206] Australian judges themselves hear application to recuse themselves, the High Court saying this is 'the ordinary and …correct practice.'[207] The recent case of *British American Tobacco Australia Services Ltd v Laurie* (2011)[208] may however prove somewhat of a turning point; there the joint majority found apprehended bias against a judge,[209] and some of its reasoning could well open up the concept of bias in judges sitting on Chapter III courts who perennially deal with the same kind of issue.[210]

JURISDICTIONAL ERROR AND NATURAL JUSTICE

The paper has concentrated up natural justice/procedural fairness for the reason that *Aala*[211] saw a breach of procedural fairness emerging as a jurisdictional error.

The decision in *Aala* is always cited these days as being authority for the proposition that a breach of natural justice/procedural fairness is a jurisdictional error. It is also cited as authority for the proposition that to enliven the original jurisdiction under the constitutional writs in *Constitution* s. 75(v) a jurisdictional error needs to be proved. The citations almost always do not have any

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[198] *Lam*, n. 133 above, 14 [37]-[38] (Gleeson CJ).
[199] *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, (4:1—French CJ, Gummow, Hayne, and Kiefel JJ: Heydon J dissenting.)
[200] *Parker*, ibid.—the facts may be found at 496, 497, 511 [4], [7]. [9], [105].
[201] *Parker*, 498, [12] (French CJ).
[202] *Ebner v Official Trustee in Bankruptcy*; *Clenae v ANZ Banking Group* (2000) 205 CLR 337 (*Ebner* and *Clenae*), (6:1 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: Kirby J dissenting). .
[203] See Register of interests resolution of the House of Representatives on 8 October 1984 and the Senate on 17 March 1994; the registers were further extended in 2003 to increase the value of gifts received that must be declared; see also see *Cabinet Handbook* 2.24-2.26).
[204] *Ebner and Clenae*, n 202 above, (Gleeson CJ, McHugh, Gummow and Hayne JJ, 205 CLR 337, 359-61 [66]-[73])—there is no duty on a judge to disclose relevant interests; rather, as a matter of 'prudence and professional practice' judges *should* disclose interests and associations '*if* there is a serious possibility that they are potentially disqualifying'—but failure to disclose has no legal significance other than possibly constituting evidence that may go towards showing apprehended bias.
[205] Sir Edward Coke, *Dr Bonham's case*, 8 Co. Rep., 114a, 118a; *Dimes v Proprietors of the Grand Junction Canal* (1852) 3HCL 759, 10 ER 301, 793 (Lord Campbell).
[206] *R v Sussex Justices; Ex parte McCarthy* (1924) 1 KB 256, 258-259 (Lord Hewart CJ).
[207] *Ebner and Clenae*, (2000) 205 CLR 337, 361 [74] ((Gleeson CJ, McHugh, Gummow and Hayne JJ), contra Callinan J. 397 [185] (c.f. *Kartinyeri v Commonwealth* (1998) 156 ALR 300, [1998] HCA 52, 5 February 1998).
[208] *British American Tobacco Australia Services Ltd v Laurie* (2011) 85 ALJR 348 [2011] HCA 2 (*BATAS*) (3:2 for BATAS— Heydon, Kiefel and Bell JJ: French CJ; Gummow J.
[209] *BATAS* ibid., 374, [117], [124], 376 [137], 377 [139], 378 [144]-[145] (Heydon, Kiefel and Bell JJ).
[210] *BATAS* ibid., 374, [117], 375-6 [133]-[134] [137], 377 [139], 378 [144] (Heydon, Kiefel and Bell JJ).
[211] *Aala*, n. 162 above.

references to specific pages or paragraphs in *Aala*.[212]

As noted above, the passage of the *Procedural Fairness Act 2002* in the Migration jurisdiction spurred the High Court to the adoption of a strict and rigid literal interpretation of the *Migration Act*. The extended nature of procedural fairness, a breach of which all the Court now uncritically accepted as a jurisdictional error, and the accepted necessity to show a jurisdictional error thus enlivening its original jurisdiction, meant that creative thinking became a hallmark of High Court jurisprudence, encouraged on occasion it could be said by over-zealous assistance by members of the Court.[213]

***Craig* , *Kirk*, and Jurisdictional Errors**

The dictum of the unanimous Court in *Craig v South Australia* (1995)[214] stated a position on jurisdictional errors for administrators as follows:

> 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.[215]

This was accepted in *Yusuf* (2001)[216] by McHugh, Gummow and Hayne JJ with the addendum that this list was 'not exhaustive,' that any such error of law as identified in *Craig* ***will be*** a jurisdictional error, and noting in the footnote that according to *Aala* any breach of natural justice will also be a jurisdictional error.[217] It must be noted that amongst the jurisdictional errors for tribunals are some errors that traditionally applied only to discretionary exercises of power, which had earlier thought to be 'intra-jurisdictional' errors—i.e. the relevant and irrelevant consideration ground.[218] The logical conclusion from *Craig* and *Yusuf* is that for Commonwealth administrators at least, there was very little margin for error, as any error of law could be a jurisdictional error, and this will not be known until a court has ruled on it, since the administrator or tribunal is incapable of determining the limits of her own jurisdiction.[219] However, *Craig* maintained the distinction between jurisdictional and intra-jurisdictional errors for courts,[220] refusing to follow the UK line of cases developing from *Anisminic*.[221]

The ambit of what constitutes a 'jurisdictional error' is now so wide and uncertain as to be preposterous. No executive government, nor any legislature can be capable of determining what constitutes a jurisdictional error, as this is an aspect of the judicial power arrogated to Chapter III courts by the *Boilermakers'* principle.[222]

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[212] See e.g. *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 496 [45] re jurisdictional error); 508 [82] re enlivening 75(v) jurisdiction (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[213] See, e.g. [2002] HCATrans 414 (30 August 2002) *Applicant S154* (Gaudron J) 795-860, 1025, 1160-80, 1340-1415, 1455-1710, 1775-1790, 1870-1890, 1980-2045; [2002] HCATrans 542 (1 November 2002), *Applicant S154* (Gaudron J) 2885-2920, 2970-3045,3155-3160, 3255-3300, 3360-3410; see also *Re MIMA; Ex parte S154* (2003) 77 ALJR 1909, 1909 [7], (2003) 201 ALR 437, 439 [7] (Gummow and Heydon JJ).

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

[215] *Craig*, ibid., 179 per curiam (Brennan CJ, Deane, Toohey, Gaudron and McHugh JJ)

[216] *MIMA v Yusuf* (2001) 206 CLR 323 (*Yusuf*), 351[82] (McHugh, Gummow and Hayne JJ).

[217] *Yusuf,* ibid..

[218] C.f. *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, 228 (Lord Greene).

[219] See *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 484 [9] (Gleeson CJ, relying on *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419); 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

[220] *Craig*, n. 214, 177-9.

[221] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

[222] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; see also nn. 214 and 216 above.

More recently, the *Craig* position with respect to both tribunals and courts has received considerable analysis by the Court in *Kirk v Industrial Court (NSW)* 2010,[223] the Court noting that no application had been made to reconsider *Craig*[224] (an opportunity gone begging given the internal inconsistencies in the *Craig* reasoning, and the apparent unwillingness in that Court to accord any regard to administrative bodies[225]). *Kirk* itself acknowledged frailties in the *Craig* reasoning on jurisdictional error, and threw doubt upon the segregation of courts from the whole category of jurisdictional errors.[226] (It will be recalled that *Craig* stated that courts will continue to be able to make errors of law that do not go to jurisdiction, where e.g. a mistake occurs in the identification of relevant issues; a mistake occurs in the formulation of relevant questions; a mistake occurs in the determination of what is and what is not relevant evidence; there is a failure to take into account a relevant consideration; and where the court takes into account an irrelevant consideration—all these are jurisdictional errors for administrators).[227]

While the Kirk position may go some way towards ameliorating the heavy burden administrators work under, a burden of error far greater than that Courts apply to themselves, in that at least the playing field would be the same for both courts and administrators, this has to be doubted on a careful reading of *Kirk*.

'Jurisdiction' and 'Authority to decide'

It has long been the High Court's understanding that 'jurisdiction means 'authority to decide;' in *MIMA v B*, Gleeson CJ and McHugh J said: 'In a legal context the primary meaning of jurisdiction is "authority to decide"[228].'[229] However, in *Kirk* the plurality in a discursive analysis[230] threw doubt on this proposition, particularly in relation to the idea of jurisdictional error as enunciated by Lord Denman in *R v Bolton*, where he said that '[t]he question of jurisdiction does not depend on the truth or falsehood of the charge [laid before the justices], but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry.'[231] The plurality disagreed with this, noting on the basis of *Aala* that some errors going to jurisdiction appear only after commencement of the matter and become known only at its end.[232] Such a view is of course dependent of the correctness of the finding in *Aala* that even a trivial breach of procedural fairness is for administrators an error going to jurisdiction (of course this is not necessarily the case for courts—see *Parker* (2009)[233] *Ayles v The Queen* (2008),[234] *Gately v The Queen* (2007),[235] *Stead* (1986)[236].

The *Bolton* approach can be assimilated to that adopted by Brennan J in *Quin*, and your ordinary administrator would certainly agree that logically, one cannot begin to make a decision until one is empowered or authorized to do so; and if she makes a mistake while exercising that authority, then that is exactly what it is: something that occurs during the use of her authority. But courts are now

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[223] *Kirk v Industrial Court NSW* 239 CLR 531, (*Kirk*) 572 ff [67] ff, (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[224] *Kirk*, ibid., 577 [85].
[225] *Craig*, n. 214 above, 176-7.
[226] *Kirk*, 577-8 [86]-[87]
[227] *Craig*, ibid., 179-80.
[228] See *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.
[229] *MIMIA v B* (2004) 219 CLR 365, 377 [6] (Gleeson CJ and McHugh J).
[230] *Kirk*, n. 223 above, 569-73 [60]-70] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[231] *R v Bolton* (1841) 1 QB 66, 74, [113 ER 1054, 1057].
[232] *Kirk*, n. 223 above, 569 [60], footnote 174.
[233] *Parker v Comptroller General of Customs*(2009) 83 ALJR 494, (4:1—French CJ, Gummow, Hayne, and Kiefel JJ: Heydon J dissenting); see n. 199 above.
[234] *Ayles v The Queen* (2008) 232 CLR 410, [2008] HCA 6, [82]Kiefel J (majority, with whom Gleeson CJ and Heydon J agreed): Gummow and Kirby JJ dissenting.
[235] *Gately v The Queen* (2007) 232 CLR 208, [2007] HCA 55, Gleeson CJ, Hayne, Heydon and Crennan JJ, Kirby J dissenting.
[236] *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145 per curiam (Mason, Wilson Brennan, Deane and Dawson JJ).

telling her that in fact if she makes a mistake while exercising her authority, she never had it at all;[237] this flies in the face of both logic and experience.[238]

What is concerning in *Kirk*, is that the plurality relying on Jaffe[239] endorses the view that 'concept of jurisdiction takes insufficient account of the public policy necessity to compel inferior tribunals to observe the law.'[240] They assert that '[a]s Jaffe rightly points out'[241]:

> it is important to recognise the use to which the principles expressed in terms of "jurisdictional error" and its related concept of "jurisdictional fact" are put. The principles are used in connection with the control of tribunals of limited jurisdiction on the basis that a "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".[242] 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[243], 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 …"[244]

Concern arises from first the Court's apparent willingness to embrace public policy in relation to the determination of jurisdictional error, something for which Courts are not equipped.[245] Secondly, the paragraph displays significant lack of regard or respect for the executive. Thirdly, the Court appears to endorse an open-ended approach to determining jurisdictional error, leaving it apparently completely up to the courts' discretion as to when it is 'felt' 'necessary' to find a jurisdictional error. Fourthly, by apparently treating with disregard the only logical approach to what is and what is not outside the authority to decide, the Court maintains the uncertainty surrounding administrative decision-making, where administrators wander in a court-created morass of conflicting views, which can only be settled in a court by the court's providing its view.[246] And finally, while one would agree that the development of distorted positions it to be avoided, the Court could assist in this by leading by example.

What is a 'jurisdictional error'?

It would be all very well for the High Court to say there is no 'bright line'[247] between jurisdictional and non-jurisdictional errors, drawing upon Hayne J in *Aala*,[248] were it comprised of poets. But it neither either satisfactory nor sufficient for the highest court in the land to say

> It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional

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[237] *MIMA v Bhardwaj* (2002) 209 CLR 597, 614-5 [51] 'A decision that involves jurisdictional error [defined as discussed above in this paper]is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all' (Gaudron and Gummow JJ).

[238] C.f. Oliver Wendell Holmes Jnr, *The Common Law* (1881), 1—'The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.'

[239] LL Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact,' (1957) 70 *Harvard Law Review*, 953.

[240] *Kirk*, n. 223 above, 570 [62].

[241] *Kirk*, n. 223 above, 570 [64], referring to Jaffe, n. 239 above, 962-963.

[242] Jaffe, n. 239 above, 963.

[243] Jaffe, n. 239 above, 963 (footnote omitted).

[244] *Kirk*, n. 223 above, 570 [64].

[245] See *Quin*, n. 184 above, 37, (Brennan J).

[246] C.f. *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

[247] *Kirk*, n. 223 above, 571 [66].

[248] *Aala*, (2000) 204 CLR 82, 141 [163] (Hayne J.)

error.[249]

This is the job of the High Court. Musings on how ‘Twilight does not invalidate the distinction between night and day,’[250] are fine in a philosopher, but applying this to the law is apt to leave administrators in the Twilight Zone.[251] One of the basic underlying principles of the law is that it applies equally to all, and is known to all. Fuller, for example, set down a number of principles concerning good laws (the following is gratefully quoted from Colleen Murphy, ‘Lon Fuller and the Moral Value of Law’ *Law and Philosophy* (2005) 24: 239–262, 240-1):

> ‘In *The Morality of Law*, Fuller identifies eight requirements of the rule of law.[252] Laws must be **general (#1)**, specifying *rules* prohibiting or permitting behavior of certain kinds.[253] Laws must also be widely **promulgated (#2)**, or publicly accessible. Publicity of laws ensures citizens know what the law requires. Laws should be **prospective (#3)**, specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past. Laws must be **clear (#4)**. Citizens should be able to identify what the laws prohibit, permit, or require. Laws must be **non-contradictory (#5)**. One law cannot prohibit what another law permits. Laws must **not ask the impossible (#6)**. Nor should laws change frequently; the demands laws make on citizens should remain relatively **constant (#7)**. Finally, there should be **congruence between what written statute declare and how officials enforce those statutes (#8)**. So, for example, congruence requires lawmakers to pass only laws that will be enforced, and requires officials to enforce no more than is required by the laws. Judges should not interpret statutes based on their personal preferences and police should only arrest individuals they believe to have acted illegally.’

If Courts actually ‘make’ the law, as Kirby J suggested,[254] then perhaps the ‘laws’ made should be scrutinised more carefully.

As it is, the judicial position on interpretation of the law, common, statute or constitutional, is penned around with thickets of obscurity; how judges actually make decisions is something to viewed through a glass darkly, and Ministers and administrators may find themselves threatened with contempt of court for lack of appropriate deference.[255]

Some examples

***Saeed*:**

Here the High Court found a jurisdictional error through scrutinising the respective relevance of the singular and the plural of the word ‘matter’[256] which led to a jurisdictional error for an action that was not therefore protected by the exhaustive statement of natural justice inserted by the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.

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[249] *Kirk*, n. 223 above,

[250] Murray Gleeson, ‘Judicial Legitimacy,’ (2000) 20 *Aust Bar Rev* 4, 11.

[251] With apologies to the TV Series *Twilight Zone*.

[252] ‘Fuller, Lon, *Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), p. 39. Fuller has an extended discussion of each criterion from pp. 46–90. My summary of Fuller is based on *The Morality of Law* as well as on Jeremy Waldron “Why Law- Efficacy, Freedom or Fidelity?”, *Law and Philosophy* 13 (1994): 259–284, David Luban, “Natural Law as Professional Ethics: A Reading of Fuller”, *Social Philosophy and Policy* (2001), and Gerald J. Postema, “Implicit Law”, *Law and Philosophy* 13 (1994): 361–387.’

[253] ‘Fuller notes that this generality requirement is consistent with general injunctions on behavior being issued to specific individuals or groups. To meet the generality requirement, laws need not apply to the entire population.’

[254] See, e.g., The First Hamlyn Lecture 2003 (shortened version), The Hamlyn Lectures, Fifty-Fifth Series, ‘“Judicial Activism” Authority, Principle and Policy in the Judicial Method’. The Hon Justice Michael Kirby AC CMG, High Court of Australia, Delivered 19 November 2003, University Of Exeter, UK.

[255] See e.g. ‘Statement by the Chief Justice of the Federal Court with the concurrence of other members of the Full Court in the course of proceedings in the matter of *NAAV v MIMIA*’ 3 June 2002, discussed in Enid Campbell and H P Lee, ‘Criticism of Judges and Freedom of Expression, (2003) 8 *Media & Arts Law Review* 77, available at ***http://www.law.unimelb.edu.au/cmcl/malr/8-2-1%20Campbell%20Lee%20Criticism%20of%20Judges%20formatted%20for%20web.pdf***

[256] *Saeed v MIAC* (2010) 241 CLR 252, 263-7 [27]-[41], [42] (per curiam); see also n. 60 above.

- The Explanatory memorandum and the Minister's second Reading Speech were dismissed without thanks.[257]
- A very stringent literal meaning was given to the words of the statute, as had been foreshadowed back in *SAAP* in 2005.[258]

Plaintiff M61

In devising a successor to the Coalition government's arrangements for dealing with asylum seekers arriving unlawfully on Australian shores, usually off Christmas Island and Ashmore Reef, the Labor Government in 2008 established what it thought was a non-statutory scheme for assessing on Christmas Island claims to be a refugee.[259] The reasoning in *M61* is difficult to follow, and what follows is merely an attempt to understand it. It appears to proceed on the basis that for the detention of alien asylum seekers on Christmas Island to be lawful, it had to have been authorized under the *Migration Act*,[260] therefore, the Court could and would use the case-law under the *Migration Act* to apply to the asylum seekers. But the asylum seekers could not make a valid visa application under the Act, and the original and review assessment regime established on the Island was merely to recommend to the Minister as to whether he should consider granting a visa to such a person, but he was under no duty either to make a decision, or to consider making a decision.

What the Court did was to state that an announcement by the Minister on 29 July 2008 that the assessment and review process would be strengthened, in fact amounted in law to a decision to consider whether to consider the recommendations if any of the original and reviewing decision-makers on the Island.[261] Subsequently, for a number of reasons, the Court found that there had been a denial of procedural fairness,[262] one ground being that because the asylum seekers were outside the Migration zone and their review processes were not established under the *Migration Act*, they were obliged to be given notice of the 'country information'[263] (the matter which had been in issue in *Miah*, and which had been excluded from the ambit of judicial review by provisions of the *Procedural Fairness Act 2002* and the *Migration Litigation Reform Act 2005;* but these provisions applied only to protect the RRT and not the Christmas Island review processes).

As opposed to many recent cases where important Ministerial statements made in parliament, such as the Second Reading Speeches, have received short shrift,[264] here a Ministerial announcement was said to have legal force amounting in effect to a decision.

Privative Clauses and *Hickman*

Hickman

R v Hickman, ex parte Fox and Clinton,[265] was a case concerning *National Security (Coal Mining Industry Employment) Regulations* enabling Local Reference Boards to settle disputes 'as to any

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[257] *Saeed v MIAC* (2010) 241 CLR 252, 264-3 [30]-[31.]
[258] See *SAAP*, n. 173 above.
[259] See the relevant Administrative Arrangement Order (AAO) for 2008; the current AAO, 14 October 2010 states: Part 12, The Department of Immigration and Citizenship [administered by the Minister pursuant to *Constitution* s. 64] ***Matters dealt with by the Department*** : Entry, stay and departure arrangements for non-citizens; Border immigration control… the 2008 AAO would have included similar provisions.
[260] *Plaintiff M61 v Commonwealth* (*M61*) (2010) 85 ALJR 133, [2010] HCA 41, 139-41 [21]-[35], 145-6, [63]-[65], 147 [71] per curiam (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); see also n. 148 above.
[261] *Plaintiff M61,* ibid., 141 [35], 146, [66]-[67], 147 [71]
[262] See, e.g. *Plaintiff M61,* ibid., 148-9 [76]-[78]
[263] *Plaintiff M61,* ibid., 150-1 [91].
[264] See particularly *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 499, 502 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[265] *R v Hickman; Ex parte Fox and Clinton*, (*Hickman*) (1945) 70 CLR 598

local matter likely to affect the amicable relations of employers and employees in the coal-mining industry.' The Board's decisions were protected by a privative clause (reg. 17). The Court held that, as the prosecutors were engaged in the transport industry and not the coal-mining industry, the Board's decision was made without jurisdiction and was thus void (or, to use Starke J's words,[266] 'without authority and bad'). Latham CJ noted that:

> Such a provision cannot, in my opinion, fairly be construed as declaring an intention of Parliament that a Board constituted under the Regulations should have jurisdiction to make decisions in matters which have no relation to the coal mining industry… If reg. 17 were construed so as to give an unlimited jurisdiction to the Board to make any order whatever in relation to any person whatever ID respect of any matter whatever (whether industrial or not industrial), the validity of the Regulations would obviously be open to question. In my opinion, therefore, the Regulations, including reg. 17, should be construed as limited in their operation to the coal mining industry, and the powers of a Local Reference Board should be interpreted accordingly.[267]

Latham CJ had earlier said[268] of the same privative clause 'that it did not profess to give validity to an invalid award' and proceeded : 'Further, if a pretended award were so completely beyond any possible jurisdiction that it could not reasonably be said to be "an award"' other questions would come up for consideration.'[269]

In that case, Dixon J developed his view of how in the middle of the 20th century privative clauses were to be construed, into what has become known as the *Hickman* principle, but first he noted

> 'The particular regulation (the privative clause) is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of [the privative clause] is well established.'[270]

He then went on to say:

> 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.[271]

He found that there was no authority for the Board to make such a decision because the words in the regulation, 'in the coal mining industry' were 'words of final limitation upon the powers, duties and functions of the Board(s)'[272]—i.e., a jurisdictional fact was contravened. He would later put the same concept of 'jurisdictional fact' into other words in the *Metal Trades Employers' Association case,* where 'imperative duties or inviolable limitations or restraints'[273] had been infringed. These 'imperative duties or inviolable limitations or restraints' are sometimes said to be an addition to the *Hickman* provisos—but Dixon J himself in the *Metal Trades* case stated that it adds nothing to what he had said in *Hickman* as outlined above.[274]

There is certainly an argument to be made for thinking that the intention was in the 20th century,

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[266] *Hickman*, ibid, 612 (Starke J).
[267] *Hickman*, ibid., 607.
[268] *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co. Ltd.* (1942) 66 CLR 161, 177 (Latham CJ).
[269] As referred to by Dixon J in *Hickman*, n. 265 above, 616.
[270] *Hickman*, ibid., 614-5 (Dixon J).
[271] *Hickman*, ibid., 615.
[272] *Hickman*, ibid., 618.
[273] *R v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian section* (1951) 82 CLR 208, 248 (Dixon J).
[274] *Metal Trades Employers' Association*, ibid., (1951) 82 CLR 208, 249-50 (Dixon J); c.f. *R v Murray; ex parte Proctor* (1949) 77 CLR 387, 400-401 (Dixon J).

that the High Court would not invalidate certain (real) decisions protected by a privative clause, even if they did exhibit jurisdictional errors as understood in *Parisienne*.[275] Spigelman CJ has noted that 'The concept underlying the *Hickman* principle is that there was a core content of jurisdictional error, narrower than the full range of jurisdictional error, which would remain subject to judicial review, almost by way of a conclusive presumption of the law of statutory interpretation.'[276] The question then is, what has so changed in the relationship between the judiciary and the other two arms of government that this situation is no longer even considered to be tenable?

Plaintiff S157

It is worth recalling that the government had sought advice from 6 independent counsel before enacting the privative clause into the *Migration Act*. In the Second Reading speech to the *Migration Legislation Amendment (Judicial Review) Bill 2001* the Minister stated:

> The legal advice I received was that a privative clause would have the effect of narrowing the scope of judicial review by the High Court, and of course the Federal Court. That advice was largely based on the High Court's own interpretation of such clauses in cases such as *Hickman's case*, as long ago as 1945, and more recently the *Richard Walter case* in 1995 Members may be aware that the effect of a privative clause such as that used in *Hickman's case* is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently. In practice, the decision is lawful provided:
>
> - the decision-maker is acting in good faith;
> - the decision is reasonably capable of reference to the power given to the decision maker—that is, the decision maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member;
> - the decision relates to the subject matter of the legislation—it is highly unlikely that this ground would be transgressed when making decisions about visas since the major purpose of the *Migration Act* is dealing with visa applications; and
> - constitutional limits are not exceeded—given the clear constitutional basis for visa decisions making in the *Migration Act*, this is highly unlikely to arise.[277]

The Minister was relying directly on the finding in *Hickman*, and what the Court had been saying was good law. He also relied on statements of High Court judges when he referred to '*expand[ing] the legal validity of the acts done and the decisions made by decision makers.*' While this is not a felicitous means of describing the operation of a privative clause, the following judges have done so:

- Brennan J in *Deputy Commissioner of Taxation* v *Richard Walter Pty Ltd* (1995) 183 CLR 168, 194—The privative clause treats an impugned act as if it were valid. In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded.
- Mason CJ—[the privative clause] 'extends the limits of the award-making power and governs the effect of its exercise,' *O'Toole v Charles David* (1990) 171 CLR 232, 250-1 and Brennan J also in that case at 275;
- Murphy J, *R v Coldham; Ex parte AWU* (1982) 153 CLR 415, 421-3.

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[275] See *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369—see also text accompanying nn. 295-299.

[276] Spigelman CJ, 'The Centrality of Jurisdictional Error,' Keynote address, AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010, *http://www.hrnicholls.com.au/articles/Other/spigelman250310%5B1%5D.pdf*

[277] House of Representatives Hansard, 3 September 1997, 7615.

The then Solicitor-General later noted of the insertion of the privative clause that it:

> represented an attempt as the highest example yet of cooperation between the courts and the Legislature. The Court had told Parliament that certain words will be construed as having a particular effect and Parliament took the hint and used those precise words with the expressed intention of having that precise effect.[278]

The effect of the privative clause was challenged in *NAAV*,[279] but before any appeal was heard on the finding in *NAAV*, the High Court pursued the matter of *Plaintiff S157*[280] in its original jurisdiction.

I do not propose to examine *Plaintiff S157* in great detail. Suffice to say that this was, as David Bennett QC put it, an example of 'what one might see as an example of litigious "queue jumping,"'[281] the High Court voluntarily depriving itself of the benefit of the concerted knowledge of five senior judges in *NAAV*[282] —but then *NAAV* had upheld both the constitutionality and the operation of the privative clause inserted into the *Migration Act* by the *Migration Legislation Amendment Act 2001* (Cth).

All the *NAAV* court endorsed the *Hickman* principle with its three provisos, adding that the purported exercise of power must not contravene any inviolable limitation upon the powers of the decision-maker.[283] Three judges (Black CJ, Beaumont and von Doussa JJ) also adhered to the 'extension of the jurisdiction of the decision-maker' idea of privative clauses, in that they 'validated' decisions by extending the authority and powers of decision-makers so as to render lawful 'irregularities that would otherwise constitute jurisdictional error in the broad sense of that term'—e.g. von Doussa J.[284] In the event, the application of the privative clause to protect the impugned decisions was upheld by a majority, subject to its inapplicability to a fundamental jurisdictional fact of the kind on which jurisdiction itself is founded (as in *R v Murray*[285]).

But *Plaintiff S157* is a different story. Relying on *Aala* and *Bhardwaj* (2002),[286] counsel for S157 argued that if there were a breach of procedural fairness, then this constituted a jurisdictional error, which would render the 'decision' under the Act no decision at all, and therefore it could not be a 'decision under this Act' and could not be protected by the privative clause, which serves only to protect 'decisions' and not 'non-decisions' as a court might later determine. Despite what the Court attempted to say, the finding rendered the privative clause impotent.

With the greatest respect, the outcome in this case leads the High Court down the road of *doublethink,*[287] running the risk of Humpty Dumpty.[288]

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[278] David Bennett, 'Privative Clauses—An Update on the Latest Developments,' paper delivered at the Australian Institute of Administrative Law (AIAL) forum, Canberra, 13 March 2003, in AIAL Forum, No 37, April 2003, at 20.

[279] *NAAV v MIMA* 123 FCR 298 [2002] FCFCA 228 (15 August 2002).

[280] *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476.

[281] David Bennett QC, (then Solicitor General), 'Privative Clauses – An Update on the Latest Developments,' A paper delivered at the Australian Institute of Administrative Law forum in Canberra on Thursday, 13 March 2003; at ***http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~Privative20+March+2003.pdf/$file/Privative20+March+2003.pdf***.

[282] *NAAV v MIMA* (2002) 123 FCR 298 [2002] FCFCA 228 (15 August 2002).

[283] *NAAV*, ibid.: see e.g. Black CJ 309 [12], Von Doussa J [624] relying on *R v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian section* (1951) 82 CLR 208, 248 (Dixon J).

[284] *NAAV* (2002) 123 FCR 298, 479 [636].

[285] *R v Murray; ex parte Proctor* (1949) 77 CLR 387, 399 (Dixon J)

[286] *MIMA v Bhardwaj*, see. n. 237 above.

[287] C.f. George Orwell, *1984*, Secker and Warburg, London, 1949.

[288] Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1871) (Charles Lutwidge Dodgson). Chapter 6—`When *I* use a word,' Humpty Dumpty said in rather a scornful tone, `it means just what I choose

Moreover, so far as taking notice of the Second Reading speech was concerned, of it, and of the Minister's reliance of earlier judicial comments on 'expanding' the jurisdiction of decision-makers, the plurality said:

> Of course, the Minister's understanding of the decision in *Hickman* cannot give s 474 an effect that is inconsistent with the terms of the Act as a whole.[289]

The tone of the reasons in *Plaintiff S157* is also of significance; it is redolent of the idea that the prime purpose of judicial review is to be check on the executive[290](rather than to serve the citizen), and its secondary one to ensure that the Court is the sole arbiter of what constitutes 'the rule of law.'[291] The privative clause would:

> … confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.[292]

Plaintiff S157 demonstrates, as few other cases can, both the disregard into which the High Court has cast the Executive and the Legislature, and also the dangers that the developments outlined above pose to the doctrine of *stare decisis*, once thought to be the lynch-pin of the common law, upon which all persons might rely.

S157, *Blue Sky* and *Futuris*

In *Plaintiff S157*, other approaches were available to the Court. The principle of *Project Blue Sky* (1998) had been argued before the Court; there the plurality has said that the test for determining whether a decision is invalid (void, because marred by a jurisdictional error) or merely unlawful (voidable, because the error does not go to jurisdiction, i.e. is an intra- or non-jurisdictional error) will depend on

> whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment.[293]

But the Court in *S157* made only passing reference to the case, and did not refer to the principle.

More recently, the High Court had tried to bring some clarity to why 'jurisdictional errors' are

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it to mean -- neither more nor less.' `The question is,' said Alice, `whether you *can* make words mean so many different things.' `The question is,' said Humpty Dumpty, `which is to be master - - that's all.' Alice was too much puzzled to say anything, so after a minute Humpty Dumpty began again. `They've a temper, some of them -- particularly verbs, they're the proudest -- adjectives you can do anything with, but not verbs -- however, *I* can manage the whole of them! Impenetrability! That's what *I* say!'— This passage was used in Britain by Lord Atkin and in his dissenting judgement in *Liversidge v. Anderson* (1942), where he protested about the distortion of a statute by the majority of the House of Lords. It also became a popular citation in United States legal opinions, appearing in 250 judicial decisions in the Westlaw database as of April 19, 2008, including two Supreme Court cases (*TVA v. Hill* and *Zschernig v. Miller*): see MRLL Kelly, '*Through the Looking Glass*—Reflections on People, Constitutional Law and Governance,' paper given to the Conference on National Engagement with International and Foreign Law and Governance, Sydney, 2 December 2010.

[289] *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 499 [554] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). C.f. *Saeed v MIAC* (2010) 241 CLR 252, 264-3 [30]-[31].

[290] C.f. *Church of Scientology v Woodward* (1980) 154 CLR 25, 70 (Brennan J). see also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, [68] (Gaudron J) who says that s 75(v) 'provides the mechanism by which the Executive is subjected to the rule of law.'

[291] See, e.g. *Saeed* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ; see also *Corporation of the City of Enfield*, n. 246 above and n. 312 below, [59]-[60] (Gaudron J).

[292] *Plaintiff S157*, 505-6 [73]-[75]

[293] *Project Blue Sky v ABA* (1998) 194 CLR 355, 388-9 [91] (McHugh, Gummow, Kirby and Hayne JJ).—this was a s. 75(iii) case.

called 'jurisdictional errors.' In the High Court joint judgement of Gummow, Hayne, Heydon, Crennan JJ in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008)[294] they said:

> In *Parisienne Basket Shoes Pty Ltd v Whyte*[295] Dixon J referred to the maintenance of "the clear distinction ... between want of jurisdiction and the manner of its exercise". His Honour in this context also used the phrase "excess of jurisdiction"[296] and, with respect to relief under s 75(v) of the Constitution, the same idea had been conveyed as early as 1914 in *The Tramways Case (No 1)*,[297] by such expressions as "usurp jurisdiction", "wrongful assumption of jurisdiction" and "proceeding without or in excess of jurisdiction". Thereafter, in his submissions in *R v Kirby; Ex parte Transport Workers' Union of Australia*,[298] Dr Coppel QC is reported as using the term "jurisdictional error".

Such references might have suggested that the Court was rethinking its position on the utter voidness of a decision made by an administrator marred by any error of law, and certainly in *Futuris* the Court did apply the *Project Blue Sky* approach as to ascertaining the intention of Parliament as to the consequences of invalidity, rather than first adopting a wide-ranging judicial definition of 'jurisdictional error.' This, together with the *Parisienne* reference may have suggested that some judges at least were beginning to consider that there is a clear (and maybe a constitutional) difference between a 'jurisdictional' error, and an 'intra-' or 'non-jurisdictional' error (or, to define 'intra-jurisdictional' error another way as did those judges, an error '*within, not beyond*' jurisdiction.)[299] If this is so, then it could well be that Commonwealth executive administrators, of whom the Taxation Commissioner is one, may in fact make both jurisdictional and intra-jurisdictional errors, just as may Commonwealth judicial administrators in the Chapter III courts.

Administrators should not get too excited about this possibility, however. In the very same paragraph as the four judges refer apparently approvingly to Dixon J's *Parisienne* observation, in a footnote they simultaneously refer to the very confusing analysis in *Craig*. Again, however, any jubilation among Commonwealth Ministers and administrators at any incipient demise of the *Plaintiff S157* interpretation on privative clauses must be very constrained. Firstly, because in *Futuris* the judges specifically did not address the privative clause issue in this case (the relevant clause was a 'saving' clause), saying only '*Plaintiff S157/2002* has placed "the *Hickman* principle" in perspective;'[300] there is nothing overt in the judges' reasons to suggest that they disapproved of *Plaintiff S157*; and in fact the joint judgement refers to that case five times, thrice in the text and twice in footnotes.

All this of course occurred before the developments in *Kirk* (2010) discussed above. It also occurred before the High Court began flexing its judicially powered muscle to render unconstitutional and inoperative provisions in State legislation containing privative clauses,[301] and before State legislatures began to fall before the constitutional onslaught of the judicial power.[302]

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[294] *Federal Commissioner of Taxation v Futuris Corporation Ltd* (*Futuris*) (2008) 82 ALJR 1177, 1182-3; [2008] HCA 32 [5] (Gummow, Hayne, Heydon, Crennan JJ)

[295] *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389. See, further, *Craig v South Australia* (1995) 184 CLR 163 at 176-180; 69 ALJR 873.

[296] *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389. Writing in the first edition of his work, published in 1959, Professor de Smith traced the development of judicial review in terms of jurisdiction to the 17th century: de Smith, Judicial Review of Administrative Action (1959), pp 65-66.

[297] *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54 at 62, 65, 72.

[298] *R v Kirby; Ex parte Transport Workers' Union of Australia* (1954) 91 CLR 159 at 168.

[299] *Futuris*, n. 294 above, [45] author's italics].

[300] *Futuris*, n. 294 above, [70]

[301] See *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180; *Batterham v QSR Ltd* (2006) 225 CLR 237, (Kirby and Heydon JJ dissenting in both cases); *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531.

[302] See the line of cases through *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 through *Baker v The Queen* (2004) 223 CLR 513, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 and *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 to *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237

DEMOCRACY, JUDICIAL REVIEW, AND RESPECT

Dislike it as many might, Australia is a representative democracy, with a representative and responsible government[303] where the power to make laws for the people has been given to the Parliament.[304] Governments govern; they make decisions; they have to regard the national not sectional or individual interests. While majoritarianism seems to be out of favour these days, this is the way that democracy works; even the High Court operates on the basis of majority rule.

Perhaps judges and lawyers have been misled by the passing comments of John Marshall in *Marbury v Madison*:

> It is, emphatically, the province and duty of the judicial department to say what the law is.[305]

Again with respect, it is not courts who say what the law is; it is the legislatures. The 'great case' of *Marbury* is often misunderstood,[306] and certainly was by Andrew Inglis Clark who is responsible for the inclusion of s. 75 in the *Constitution*. Contrary to those who think the founding fathers knew what they were doing when they agreed to insert s. 75 at the last moment, Justice Heerey has written:[307]

> 'At the 1898 Convention debate arose as to whether the clause which later became s 75(v) should be struck out. Clark, following proceedings closely from Hobart, telegraphed Barton to remind him of the United States Supreme Court decision in *Marbury v Madison*. Barton wrote back thanking Clark and saying:
>
> > *None of us had read the case mentioned by you, or if seen it had been forgotten – it seems to be a leading case. I have given notice to restore the words on reconsideration of the clause*.[308]
>
> 'The clause was duly restored by Barton, citing the American decision – although without public acknowledgement of Clark. 'None of us' must presumably have included Griffith, Kingston and Deakin.'

The ramifications of s. 75 are being felt severely today by both state and Commonwealth governments.[309]

For years, the High Court used the rubric of *Marbury* being 'axiomatic' to justify their capacity to interpret the law and the *Constitution*:

> First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources. Secondly, unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements. As Fullagar J said, in *Australian Communist Party v The Commonwealth*, 'in our system the principle of *Marbury v Madison* is

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CLR 501, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, to *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531.

[303] *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; *Constitution* ss. 7, 24, 30, 51, 64.

[304] *Constitution* s. 1, s. 51.

[305] *Marbury v Madison* (1803) 1 Cranch 137, 177 [5 US 87 at 111] (Marshall CJ).

[306] See MRLL Kelly, '*Marbury v Madison:* An Analysis,' 2005 *High Court Quarterly Review*, Vol. 1(2), 58 -141, (Sandstone Academic Press, South Yarra, Vic, Australia), ISSN 1449-9037.

[307] Justice Peter Heerey, *Andrew Inglis Clark: The man and his legacy*, (2009) 83 ALJ 199, 200 ; 4 December 2008, available at National Archives of Australia**,** ***http://naa.gov.au/whats-on/constitution-day/talks/heerey.aspx*** --- an edited version of an address at the Supreme and Federal Court Judges' Conference, Hobart, 28 January 2009

[308] Barton to Clark, 14 February 1898, Clark papers, University of Tasmania Archives C 4/C 15, cited in FM Neasey and LJ Neasey, *Andrew Inglis Clark* (University of Tasmania Law School, 2001) 195.

[309] C.f., *Plaintiff S157*; *IFTC*; *Totani*; *Wainohu*.

> accepted as axiomatic'. It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power.[310]

In fact, Justice Fullagar did not say that all; he said:

> 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*.[311]

But the Court has refused to give the respect, as Fullagar J said it in the *Communist Party case* it must do, 'to opinions of the legislative and executive organs.' This has been made painfully obvious in recent cases. In the *Corporation the City of Enfield*,[312] the Court eschewed any doctrine of deference to the executive, specifically refusing to apply the *Chevron* doctrine, which arose from *Chevron USA Inc v Natural Resources Defense Council Inc* (1984).[313] That doctrine established for the US Supreme Court that where a statute regulating administrative-agency action is reasonably open to more than one interpretation, the court should defer to the agency's interpretation of the legislation. The reason for the High Court's approach is based ironically on 'the principle' of *Marbury v Madison.*[314] In Australia, the separation of the judicial power is of prime importance, and the merits/legality divide is said by the Court to be a crucial tenet in basic principles of administrative law respecting the exercise of discretionary powers.[315]

Deference is not perhaps the correct word. Respect is really what is owed by the judiciary to the executive and the legislature since this is what it itself demands. What could be called distaste if not contempt for the elected government representatives has been articulated by senior judges of the Court. Mason J as long ago as 1981 in *The Queen v. Toohey; Ex parte Northern Land Council* said:

> 16. To these remarks I should add the comment that the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.[316]

Kirby J said in *Hot Holdings* in 1992:

> 'When this analysis [of ministerial accountability] is kept in mind, it is easier to understand the recent growth of administrative law remedies. In common law countries they have developed to such an extent that Lord Diplock described them as the most significant legal advance of his judicial lifetime[317]. It is not coincidental that this growth in administrative law remedies has occurred at a time when the theory of ministerial responsibility, as an effective means of ensuring public service accountability, has been widely perceived as having serious weaknesses and limitations[318].'[319]

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[310] *Attorney-General (WA) v Marquet* 2003] HCA 67; (2003) 78 ALJR 105 at 116 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[311] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 263 (Fullagar J), author's emphasis.

[312] *Corporation of the City of Enfield v Development Assessment Commission* (*Enfield*) [2000] HCA 5; (2002) 199 CLR 135; 169 ALR 400; 74 ALJR 490; see also n. 246

[313]*Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837; for a discussion of developments in the deference doctrine in the US, see KE Hickman and MD Krueger, 'In Search of the Modern Skidmore Standard,' 2007 *Columbia Law Review*, Vol. 107:1235.

[314] C.f. *Enfield*, 152-3 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

[315] *Enfield*, 152-4, [43]-[44]).

[316] *The Queen v. Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170, 222 (Mason J).

[317] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 641.

[318] Mulgan, "The Processes of Public Accountability", (1997) 56(1) *Australian Journal of Public Administration* 25 at 31; Thompson and Tillotsen, "Caught in the Act: The Smoking Gun View of Ministerial responsibility", (1999) 58(1) *Australian Journal of Public Administration* 48 at 50. For similar observations in the context of the United Kingdom see Turpin, "Ministerial responsibility: Myth or Reality?", in Jowell and Oliver (eds), *The Changing Constitution*, 3rd ed (1994) 109 at 114-115, 144-145; Lewis and Longley, "Ministerial responsibility: The Next Steps", (1996) *Public Law* 490 at 503-504; Scott, "Ministerial Accountability", (1996) *Public Law* 410 at 415.

With the greatest respect, this view is misplaced.

The entire administrative law system as we know it has been the result of successive executive governments, aided by all the representatives in the Houses of Parliament to make the laws under which the current merits and judicial review regimes operate.[320] Ministers are more accountable in the 21st century than they have ever been: to their constituents, to the members of Parliament, to the people generally at elections, and continually to the media and the population at large through the 24 hour news cycle. They must answer questions in parliament both with and without notice, declare their interests in a register of interests, not mislead the parliament, and not sit in cabinet on a matter in which they have a personal interest. They give speeches, make policy statements, debate their policies in parliament, are interviewed by the media at the drop of a hat, their personal and public personas are criticised and evaluated constantly. They and their departments are subject to wide-ranging freedom of information laws.

By comparison, the judiciary is sequestered, jealous of its power, and ever looking to new territory. Neither individual High Court judges, nor the High Court itself is subject to judicial review,[321] but as Chapter III judges are subject to removal pursuant to *Constitution* s. 72, and do have to retain the good will of the Australian people and their representatives. Thomas Jefferson wrote:

> The great object of my fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot and unalarming advance, gaining ground step by step and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them.[322]

The Chilling Effect of Judicial Review

Having regard to the examination above, the following adverse effects on good government are to be noted:

- 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’[323] which in turn may run the risk of leading to bias.[324]

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[319] *Hot Holdings Pty Ltd v Creasy* (2002) 219 CLR 438, [2002] HCA 51, [93] Kirby J.

[320] Refer to John McMillan, The Ombudsman and the Rule of Law, (2005) 44 AIAL Forum, 1-16—Revised version of a paper presented at ANU Public Law Weekend, Canberra, 6 November 2004.

[321] *Re Carmody; Ex parte Glennan* (2003) 198 ALR 259, 260 [6], (Gummow, Hayne and Callinan JJ).

[322] Thomas Jefferson to Spencer Roane, 1821. ME 15:326

[323] C.f. Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, (the Palmer Report) .

- 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,[325] there can never be any certainty in decision-making
- 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 *Parisienne 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 subject to judicial review.[326]
    - The legislature had adopted the formula of 'satisfaction' or 'opinion' 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.[327]
  - The criterion on which such 'subjective jurisdictional facts' are to be said to be valid is still uncertain.[328]
    - But a sensible criterion could well be the view of Latham CJ in *R v Connell; Ex parte Bellbird Collieries*[329] 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*[330]) 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 or 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 but are in fact 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.

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[324] C.f. *BATAS*, n. 208 above.
[325] *Enfield*; *Plaintiff S157*.
[326] *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 389 (Dixon J).
[327] *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385, 403 (Isaacs and Rich JJ); see also *Re MIMA; Ex parte S20* (2003) 77 ALJR 1165, 1175 [54]; (2003) 198 ALR 59, 71-2 [54] (McHugh and Gummow JJ).
[328] See *SGLB*, *SZMDS* (Gummow ACJ and Kiefel J dissenting); *SZJSS*.
[329] *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 (Latham CJ).
[330] *Waterford v. The Commonwealth* (1987) 163 CLR 54, 77 (Brennan J).

      - Use of such terms by judicial members of administrative bodies has contributed to the judicialization of administrative review bodies.[331]
      - 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'[332]: original decision-makers do not use rules of evidence nor anything remotely like them.
  - 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.
- 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),[333] 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,[334] and in constitutional review of purposive powers and of certain express or implied constitutional prohibitions.[335]
  - To date, Australian courts have not adopted proportionality as a freestanding ground in judicial review of administrative decisions.[336]
  - 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.[337]
- 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,[338] and also deprive State legislation of its intended policy purpose.[339]
  - 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 decisions.

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[331] C.f. *Re Pochi and MIEA* (1979) 36 FLR 482, 490-2 (Brennan J); *MIEA v Po*chi (1980) 44 FLR 41; (1980) 31 ALR 666, 685, 689, 690 (Deane J; Evatt J said 'I agree' (680); Smithers J dissented; in the author's view, Smithers J's views are more appropriate to an administrative decision-making body).
[332] For the phrase, see Smithers J dissenting in *MIEA v Pochi* (1980) 31 ALR 666, 670-1.
[333] *Svecova v Industrial Commission of NSW* (1991) 39 IR 328.
[334] *South Australia v Tanner* (1988) 166 CLR 161.
[335] E.g. *Constitution* s. 51(5), s. 92, the implied freedom of political communication, the implied nationhood power.
[336] See e.g. Brennan J in *Quin*; Spigelman CJ (four other judges agreeing) in *Bruce v Cole* (1998) 45 NSWLR 163, 186.
[337] C.f. Brennan J in *Quin*.
[338] See *Totani*.
[339] See *IFTC*, *Kirk*.

FUTURE CIVILITY

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 repect amongst the three branches as envisaged by Justice Fullagar in 1951 may well be a good place to start.

mrllk
19 July 2011.