‘Australian exceptionalism’ in judicial review

Michael Taggart∗

It is a privilege to give this lecture in honour of a great Australian public lawyer. My topic is ‘Australian exceptionalism’ in judicial review. The phrase ‘Australian exceptionalism’ is most often used these days in relation to Australia’s stand with the United States in the war against terror and the Australian government’s attitude to international human rights law. Australia is exceptional also in being now the only English-speaking democracy without a judici ally enforceable bill of rights at the federal level. Although not unrelated, here I want to explore whether the part of Australian public law that deals with judicial review of administrative action is also “exceptional”. I will identify the features that are commonly said to set Australia apart from other common law jurisdictions and justify Australia taking a different path in the elaboration of the principles of judicial review of administrative action.

This is a very large and complex topic and in the compass of a public lecture I will have to skip quickly and selectively over the terrain; no doubt, this will entail a degree of superficiality and caricature. Of necessity I will have to assume you have some familiarity with Australian administrative law.

I approach this task as a common law comparativist from a small place with an interest in the intellectual history and development of Anglo-Commonwealth administrative law. I acknowledge at the outset that the idea of a nation’s jurisprudence in any area of law being exceptional is problematic because it

∗ Alexander Turner Professor of Law, Faculty of Law, University of Auckland, New Zealand. <mb.taggart@auckland.ac.nz> A shortened version of this paper was delivered as the 10th annual Geoffrey Sawer lecture at Australian National University on 9 November 2007. I thank Kim Rubinstein and the Centre for International and Public Law at ANU for inviting me. As far as I know any Australian administrative law, it is due to what I have learnt from the writings of a large number of Australian legal scholars, too many to name. This is an occasion, however, to record long-standing intellectual debts to Mark Aronson, Peter Bayne, Enid Campbell, Peter Cane, Robin Creyke, Matthew Groves, John McMillan, Dennis Pearce and Cheryl Saunders. That does not mean any of them will necessarily agree with what I say here. It would be truly exceptional if they did.


3 To some extent I am treading ground well covered by Peter Cane: see “The Making of Australian Administrative Law”(2003) 24 Australia Bar Review 114, republished in Peter Cane (ed.), Centenary Essays for the High Court of Australia (LexisNexis Butterworths, Australia, 2004) 314. I have to admit I chose my lecture topic in ignorance of this piece – which also explains the omission of the institutional Festschrift from Michael Taggart (ed.), An Index to Common Law Festschriften: From the beginning of the genre up to 2005 (Hart Publishing, Oxford, 2006). At the end of the piece, Peter Cane refers to ‘Australian exceptionalism’ in relation to judicial review: ibid., 133.
presupposes there is a norm elsewhere against which it can be measured, compared and judged. This is problematic for at least three reasons. First, a nation’s public law is a reflection of the distinct history and evolution of that society and this can make comparative study of public law more challenging than in relation to private law. Secondly, in former colonies such as Australia and New Zealand, if the law of the former imperial power – the United Kingdom - is taken as the norm or the comparator then this can result in a form of “recolonialization” of the legal mind and imagination. Thirdly, it might be thought to presuppose a unified and uniform common law for the Commonwealth; something that if it ever existed in the hegemonic heyday of Privy Council appeals no longer does.

The common law emanating from all the common law jurisdictions I will be looking at – Australia, the UK, New Zealand and Canada – has “persuasive” authority in the other countries. So, notwithstanding the difficulties, it seems to me useful to examine the ways Australian administrative law is out of step with some or all of these other common law countries, and to identify the “distinctive” features (perhaps even exceptional features) that are said to explain that and to make a start to see whether those explanations hold water.

I use the phrase “administrative law” in the narrow sense of “judicial review of administrative action”. As everybody knows there is far more to administrative law these days than litigation in the Courts. This is especially so in Australia, the home of the so-called “new Administrative Law” package of the 1970s – which at the federal level ushered in the Administrative Appeals Tribunal system, the office of Ombudsman, codified the grounds of review and reformed judicial review procedures in the Administrative Decision (Judicial Review) Act, established the Federal Court (which has become the dominant administrative law court in Australia), and a little later introduced freedom of information legislation. At that time Australia led the

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6 I realise this concentration on the former imperial power and selected so-called “white” settler colonies is open to the charge of ignoring the contribution of the other former colonies in Africa, the Mediterranean, West Indies and Asia. See Upendra Baxi, “Book Review” (2004) 14 Law and Politics 799, 804. All I can say is that space constraints preclude a full review of the jurisprudence of courts from around the entire common law world.


8 The freedom of information legislation was not part of the original reform package shaped by the Kerr, Ellicott and Bland Committees reports, but is sometimes seen as an inevitable consequence of those reform proposals: Lindsay Curtis, “The Vision Splendid: A Time for Re-Appraisal” in Robin Creyke & John McMillan (eds), The Kerr Vision of Australian Administrative Law (Centre for International and Public Law, ANU, Canberra, 1998) 36, 46. The establishment of the Australian Review Council was another feature of the reforms. To which picture some would add the creation of what is now called the Commonwealth Human Rights and Equal Opportunities Commission in 1981: Robin Creyke, “The Performance of Administrative Law in Protecting Rights” in Campbell, Goldsworthy & Stone, above at note 2, 101, 109 & 116-17.
common law world in its innovation in administrative law. It is worth noting that this was the work of Parliament, not “adventurous judges” in their judicial capacity.9

Some argue that this growth in mechanisms for achieving administrative justice outside the courts has rightly led the federal courts to take a restrained approach to judicial review,10 recognising what Stanley de Smith famously said in the first edition of his ground-breaking book on *Judicial Review of Administrative Action* in 1959 that “[i]n the broad context of the administrative process the role of judicial institutions is inevitably sporadic and peripheral”.11 That may well be true, even today (although I note the current editors of *de Smith* quietly dropped this statement in the 1995 edition), but it does not mean that what the judges say and do in the judicial review cases that get to court is not important. Here I will focus of necessity on a few cases decided by the High Court of Australia, because, from a comparative common law perspective, it is this court that sets the tone of the law of judicial review in Australia, and its jurisprudence will be most often looked at outside Australia. Moreover, the relatively recent recognition of a single Australian common law declared ultimately by the High Court12 may mean that the prospects for experimentalisation with the common law of judicial review at the State and Territory level is rather limited.13

So what are the distinctive features of the Australian public law landscape that might be thought singly or collectively to be distinctive or exceptional?

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9 Michael Kirby, “The AAT: Back to the Future” in John McMillan (ed.), *The AAT: Twenty Years Forward* (Australian Institute of Administrative Law, Canberra, 1996) 359, 362-63; John McMillan, *Parliament and Administrative Law* (Information & Research Services, Department of the Parliamentary Library, Canberra, Research Paper No. 13, 2000-1). The rider “in their judicial capacity” is necessary because Justices Kerr and Mason were members of the most far-sighted of the three reform committees, the Kerr Committee.

This is not to deny that enactment of the reform package was a close run thing and that there was “formidable opposition from both politicians and administrators to an enlargement of review of administrative action by the judiciary”. Sir Anthony Mason, “Judicial Review: A View from Constitutional and Other Perspectives” (2000) 28 *Federal Law Review* 331, 333 & 338.


Australia is a federation, and a comparatively recently created one. The earlier colonial constitutions with the rare exception for religious freedom in Tasmania did not entrench or protect rights or civil liberties. The federal constitution distributes legislative, executive and judicial powers between federal and state levels. The founders expressly considered adopting a Bill of Rights and consciously rejected it, and there are very few guarantees protecting individual rights in the Constitution. Attempts to amend the Constitution have seldom succeeded, and all attempts to entrench rights or liberties have failed miserably. As is well-known, in the 1990s the High Court of Australia found an implied freedom of political communication in the Constitution and implicit in the principle of representative democracy, but this generated considerable and ongoing controversy. Hilary Charlesworth has summed all this up as “the Australian reluctance about rights”.

The Constitution is generally construed as establishing a firm separation of powers between the three branches of government, much stricter than in the USA or Canada, and especially rigid in separating and protecting judicial power. On the occasion of the centenary of the High Court of Australia, Sir Anthony Mason observed that “the separation of powers has had a stronger influence on Australian


20 The point is often made that this is a gloss on the Constitution – now a very firmly established one – rather than expressly mandated. Indeed, the importance of the independence of the judiciary is deeply embedded in Diceyan constitutionalism. See generally John Allison, “The Separation of Powers in the Modern Period in England: Constitutional Principle or Customary Practice” (2002) 16 Iuris Scripta Historica 90; now up-dated in J.W.F. Allison, The English Historical Constitution: Continuity, Change and European Effects (Cambridge University Press, Cambridge, 2007) ch. 4. So the real difference between separation of powers in the UK and Australia on this score may be that the Australian courts can invalidate legislation on the basis of a strong conception of the judicial role, whereas British judges can only operate by interpretative means in the UK but have a wider but less-well-recognised role (similar to that of the Australian courts) under constitutional review sitting in the Privy Council on appeals from former colonies with capital ‘C’ Constitutions. See Allison, ibid, 101-2 & Sierait et al. v Attorney-General of Trinidad & Tobago [2007] UKPC 55. Cf. Keith Ewing, “A Bill of Rights: Lessons from the Privy Council” in W. Finnie, Chris Himsworth & Neil Walker (eds), Edinburgh Essays in Public Law (Edinburgh University Press, Edinburgh, 1991) 231.
public and administrative law, especially judicial review, than it has on English, Canadian and New Zealand administrative law". The consequence is that separation of powers (underpinned by the rule of law) plays a bifurcated role in Australian public law. On the constitutional law side, the High Court has “enthusiastically enforced … the separation of judicial power” as an implied constitutional power, striking down legislation that intrudes upon the judicial power. But when it comes to administrative law the price to be paid for that strength on the constitutional side is considerable restraint; limiting the courts to enforcing the “law” and drawing a sharp divide between law, on one side, and “policy” and “the merits”, on the other; a divide the courts say they cannot and will not cross.

The federal courts below the High Court were only created by statute in 1976, and as a consequence had no inherent supervisory jurisdiction – in other words, they had no common law powers of judicial review. This omission has been rectified in part by subsequent legislation but the law of judicial review at the federal level is an extremely dense and complex patchwork. This opacity is daunting to an outsider peering into Australian judicial review law. One result of this complexity is that there are gaps. It is, of course, different for the State courts which have inherent supervisory jurisdiction, but they are subject to appeal to and hence control by the High Court of Australia; the guardians of a single Australian common law.


26 Read Alan Robertson, “The administrative law jurisdiction of the Federal Court – Is the AD(JR) Act still important?” (2003) 24 *Australian Bar Review* 89 and ask yourself how any lawyer outside Australia can be expected to understand the Federal Court’s administrative law jurisdiction.

27 I have benefited from reading in advance of publication the excellent treatment in Peter Cane & Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, forthcoming in 2008) ch. 2. The same was true of US federal administrative law until quite recently, and is still true of State administrative laws in the USA (which, unlike at the federal level, has a common law basis). See Jack Beermann, “The Reach of Administrative Law in the United States” in Michael Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, Oxford, 1996) 171.

The bulk of the Federal Court’s judicial review caseload has in recent years concerned migration matters, and as that became unpopular with the government and the Parliament tried to turn off the tap of judicial review the High Court of Australia’s constitutionally protected original jurisdiction to grant certain prerogative writs under s. 75(v) of the Constitution came into prominence. This brought into play a highly complex and technical body of law surrounding those writs. As Peter Cane has observed, this remedial focus and technicality sat very awkwardly with the tenets of the “new Administrative Law”. Moreover, immigration and refugee law is a highly politically charged area, linked to foreign policy and the other ‘exceptionalism’ I touched on at the beginning of this lecture. It has undoubtedly skewed the High Court’s administrative law load and, I dare say, its jurisprudence, and generated a complicated and sometimes tense relationship between the branches, and even within the federal court structure itself.

Lastly, there is the conservative turn of the High Court, reflected in the appointments to that Court by the Howard government. There is no doubt it is a more conservative bench than the High Court was in the 1980s and early 1990s. But once again it depends on the comparator. There are those who say (sometimes approvingly, sometimes not) that that period was aberrational and that the High Court has just reverted to its former conservative type.

This is part of a deeper point that comparativists evoke by using the French word mentalité, which I interpret as ‘mind set’. Jeffrey Goldsworthy has summed it up as a devotion to legalism, which those outside Australia might better recognize as legal formalism. Formalism is a catch-all term: a “shorthand for a number of different ideas” including a highly technical approach to problems; the employment of formal, conceptual and logical analysis, often related to literalism and sometimes originalism; a belief that law is an inductive science of principles drawn from the cases,

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29 For details, see Cane’s excellent discussion: above at note 3, 116, 119-22 & 131-34.
30 Justice Kirby noted the rise of immigration cases as the “most distinctive phenomenon” of the High Court’s work since the mid-12990s: “Ten years in the High Court – continuity & change” (2005) 27 Australian Bar Review 4, 9.
rather the application of broad, overarching principles to particular disputes; a downplaying of the role of principle, policy, values and justice in adjudication; and in extreme forms a denial of judicial law-making. And this is often unattractively packaged at great length in what a former Chief Justice of Australia has described as that “dense, grinding style … characteristic of so [many] … High Court judgments”. It appears from the outside that formalism has hung on in Australia, even longer than in the UK, New Zealand and Canada. The reasons why are complex, but it seems from what I’ve read that the dominating influence of a few law schools, and strong bar cultures in Sydney and Melbourne have played a major part. Moreover, the towering presence of Sir Owen Dixon has cast a longer shadow over the Australian judiciary than any other jurist, and his expressed devotion to “a strict and complete legalism” is still much admired and emulated.

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40 See Andrew J. Goldsmith, “A Profile of the Federal Judiciary” in Opeskin & Wheeler, above at note 10, 365, 380-83; Harold A.J. Ford, “Recreating Australian Legal Education” in Charles Sampford & C-A. Bois (eds), Sir Zelman Cowen: A life in the law (Prospect Media Pty Ltd, St Leonards, 1997) 62 (Melbourne Law School in the 1950s and early 1960s); Francesca Dominello & Eddy Neumann, “Background of Justices” in Tony Blackshield, Michael Coper & George Williams (eds), The Oxford Companion to the High Court (Oxford University Press, Melbourne, 2001), 48, 50; various contributions to C.S. Phegan & Patricia Loughlan (eds), The Sydney centenary essays in law: a collection of essays to mark the centenary of the Faculty of Law at the University of Sydney (University of Sydney, Sydney, 1991) & Geoff Lindsay & Carol Webster (eds), No Mere Mouthpiece: Servants of All, Yet of None (LexisNexis Butterworths, Sydney, 2002)(celebrating the independent bar in New South Wales).
Enough has been said to show that there can be much debate over any one, let alone all, of these identified features. It is time to identify some of the doctrinal aspects in which Australian judicial review law might be considered out of step.

Australian common law judicial review retains the concept of jurisdictional error (including jurisdictional fact) and its corollary certiorari to quash non-jurisdictional errors of law disclosed on the face of the record.\(^{43}\) Suffice it to say here this perpetuates a complicated jurisprudence. In truth, “jurisdictional error” is a “conclusory label”\(^{44}\) that can mask the degree of judicial discretion involve and obscure the reasons for intervening or not in a particular case. In Craig’s case, the High Court refused to follow the UK and New Zealand courts in abandoning the concept of jurisdiction in favour of an error of law standard of review.\(^{45}\) To an outsider this looks rather odd in the light of the rejection of jurisdictional error in the codification of the grounds in the ADJR Act as long ago as 1977 and its replacement with simple error of law.\(^{46}\) One can assume that this statutory abolition of jurisdictional error in relation to most federal administrative decision-making has not lead to the sky falling in.

What this retention of jurisdictional error illustrates more broadly is the Australian preference to work within existing historic or doctrinal categories.\(^{47}\) Take the re-invigoration of jurisdictional fact review; on one view this gives the judges much greater ability to intervene in the administrative process … or not.\(^ {48}\) Use of the historic doctrinal façade continues to mask that judicial discretion. And, of course, this puts a premium on expert knowledge: only the cognoscenti know the score. Retention of jurisdictional error contributes, I think, to the often-Byzantine quality of much of the Australian judicial and academic analysis. Moreover, it means Australian courts are not speaking the new international language of judicial review and that sets its jurisprudence apart, and over time may create something of a ‘time warp’ effect.

There are those that point to the retention of what used to be called the old prerogative writs under s. 75(v) of the Constitution – now rebranded as “constitutional writs”\(^{49}\) -


\(^{44}\) Mark Aronson, “Jurisdictional error without the tears” in Groves & Lee, above at note 21, 330, 333, 344. Aronson thinks “error of law” is equally “conclusory”. So it is, without more: that is where deference theory comes in…. We have been in conversation about this and disagreeing for years, long may it continue.

\(^{45}\) Above at note 43.

\(^{46}\) Administrative Decision (Judicial Review) Act 1977 (C’th), ss. 5(1)(f).

\(^{47}\) This point is nicely made by Kristina Stern, “Substantive fairness in UK and Australian law” (2007) 29 Australian Bar Review 266, 267.


as requiring retention of the concept of jurisdictional error, but this seems unconvincing to me. The Constitution enshrined the remedies, not the grounds of review. Moreover, this has complicated the treatment of privative clauses, making reliance elsewhere on the landmark High Court case of so much more difficult.

Incidentally, I have long since given up trying to understand the test! This doctrine, charitably described by Sir Anthony Mason as “an Australian home-grown expedient”, does not feature in the administrative law jurisprudence of any other common law country. Ironically, in the light of what I am about to say about deference in a moment, the inspiration for the doctrine has been traced to Felix Frankfurter, a strong supporter of judicial restraint and judicial deference to administrative decision-making.

In the High Court rejected the so-called doctrine of deference, which in essence provides that where the interpretation of a statute adopted by an administrative decision-maker is within a reasonable range the Court should defer to the view of the Parliament’s expert delegate rather than impose what it thinks itself is the correct view. In rejecting deference the High Court of Australia is at odds with the Supreme Court of Canada and the US Supreme Court, but is in line with UK and New Zealand jurisprudence. Many Australians think that this stance is dictated by the Constitution, but viewed in comparative perspective that does not hold water.

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50 See Ex parte Lam, below at note 100, [76]-[77], per McHugh & Gummow JJ; Jackson, above at note 49, 27.
51 See also Aronson, above at note 44, 334-35.
52 Cane makes this point also but seems to think the historical baggage is less easily dispensed with than I do: above at note 3, 116.
57 (2000) 199 CLR 135. The case is taken to decide this even it involved jurisdictional fact rather than the interpretation of statutory text, which is more common context where issues of deference arise.
59 See, e.g., Gleeson, above at note 10, 12 (“Australian administrative law, for reasons related to our Constitution, has not taken up the North American jurisprudence of deference….”) & Cane, above at note 3, 118-19 (difference due to institutional design of separation-of-powers).
As I said, UK and New Zealand judges have taken exactly the same approach as the High Court of Australia. This approach is underpinned by three inter-related notions: (1) that there is one right answer to questions of statutory interpretation; (2) that the judges are the best qualified and placed to provide that answer; and (3) that these questions of “law” are separate and easily distinguishable from policy, discretion and fact-finding. Each of these notions is controversial, and they have largely been rejected in Canadian and United States administrative law. I am not arguing tonight that the Australian courts should adopt the doctrine of deference, my point here is simply that the Australian Constitution is not a conversation stopper. Simply citing the “memorable words” in the venerable US Supreme Court decision of *Marbury v Madison* - that “it is, emphatically, the province and duty of the judicial department to say what the law is” - is too simplistic. Like so much Australian constitutional talk it is actually grounded in a more universal common law constitutionalism, which owes much to the writings of A.V. Dicey.

I want to move on now to judicial review for unreasonableness, known for more than half a century around the common law world as *Wednesbury* unreasonableness. This

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60 See *Re Racal Communications* [1981] AC 374, 382-83, per Lord Diplock (HL); *Bulk Gas Users’ Group v Attorney-General* [1984] NZLR 129, 133, per Cooke J (CA).


ground was codified in the ADJR Act, and that may be significant – as the law in the UK, Canada and New Zealand has moved on since the 1970s. Unreasonableness used to be seen as a residual, ‘safety net’ ground of review that would catch outrageous cases not demonstrating error on any of the more specific grounds of judicial review – such as misconstruction of statute or common law, improper purpose, taking account of the irrelevant or ignoring the relevant, bad faith, etc. But amid calls for more explicit articulation of the values underlying the application of the unreasonableness doctrine, in the 1990s the UK courts developed overtly a variegated approach to the intensity of Wednesbury review. This approach became known as variable intensity unreasonableness review, and, in essence, stipulated that the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required and must be shown.

The Federal Court of Australia has steadfastly refused to recognise variable intensity unreasonableness review on the ground that it is not supported by Australian authority and trespasses on the merits. I will have something to say about the legality/merits distinction later. It seems a fair inference from the cases that the Federal Court has been scared off variable intensity unreasonableness by the prevalence of ‘rights talk’ in the UK cases and no doubt the judges are fearful of the High Court’s reaction to any enthusiasm in that direction, particularly in immigration cases.

I will come back to this reluctance about rights talk in a moment, but it is important to see that this approach is supported by a sharp distinction between questions of law – meaning the correct interpretation of statutory text and common law rules – and exercise of discretionary power. As regards the former, as I just noted, the Australian courts insist on having the last word on “correctness” (there is no deference: Marbury Lord Cooke of Thorndon (HL); Sir Stephen Sedley, “The Sound of Silence: Constitutional Law Without a Constitution” (1994) 110 Law Quarterly Review 270, 277-78.

67 Administrative Decision (Judicial Review) Act 1977 (C'nh), s. 5(2)(g).


70 The list was well-established long before Lord Greene MR unintentionally codified it in Wednesbury.


v Madison and all that). As regards discretion, the courts could not defer more, in theory at least. Within the four corners of the power the decision-maker is free to decide as she likes. Once the decision-maker has applied the right legal test, the application of that test and the weight given to the relevant factors are a matter solely for the decision-maker and the Court would not second-guess (or judge) under the guise of judicial review questions of fact, policy, weight or otherwise intrude into the merits. To use Ronald Dworkin’s analogy, discretion is the hole in the middle of the doughnut filled with policy and politics, and into which the Courts will not enter.74

The difficulty is that the line between law and discretion is unstable, and has broken down in important respects in recent years. The House of Lords endeavoured to hold this line between interpretation and discretion in Brind,75 and the High Court did likewise in Teoh,76 but in truth there is no bright line separating law and discretion. The key has been to recognize that, both in interpreting particular words in statutes and in divining the limits of broadly conferred discretionary powers, lawyers and judges are involved in exactly the same interpretative process. The earlier cases exemplified by Brind holding that words can be ambiguous, but discretions cannot be, no longer convince the courts in the UK, Canada and New Zealand. This has opened the door to the use in relation to exercises of discretionary power of re-invigorated interpretative principles favouring compliance with common law rights and compliance with international legal obligations. This trend has been hastened – but I want to stress not caused by - an increasing number of challenges to the exercise of discretionary power as inconsistent with domestic, regional and international human rights instruments. The judges in these countries, as well as in Australia, have affirmed the “principle of legality” and the centrality of the “rule of law”.77

It is obvious that administrative law to a significant degree is about protecting the individual, and it is hardly a radical idea that the greater the impact a decision has on the important interests of the individual the greater the scrutiny of the reasoning and result. Some commentators think that without a bill of rights it would be difficult in Australia to adopt the UK-style variable intensity unreasonableness review as this would infringe parliamentary sovereignty and trespass on the merits.78 But those same commentators recognise that “the human rights dimension of the case” will often be a “significant premise” in the judicial decision-making even if not overtly identified or relied upon.79 In other words, we must keep the fig leaf in place for fear of frightening those who do not know better. I think the Australian courts are mistaken in refusing to adopt variable intensity unreasonableness review. It is a pity that the doctrine got a

74 See Ronald Dworkin, Taking Rights Seriously (Harvard University Press, Cambridge, 1977) 31 (“Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction”).
75 R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.
76 Minister of Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.
79 Ibid., 89-90.
bad name in Australia because it became so quickly identified in the UK with overt human rights protection à la the European Convention of Human Rights, and within a decade led in the UK to the domestic adoption of both the Convention and the more intrusive doctrine of proportionality, which I will mention later.

What is required to make variable intensity unreasonableness review work optimally is a well-established “culture of justification”. Australia has this in place at the federal level and in some States and Territories with widely applicable statutory duties to give reasoned decisions. This has been one of the success stories of the “new Administrative Law package”. The common law has lagged behind, however. Despite the ubiquity of statutory reasons requirements in some parts of the federation, the High Court of Australia infamously in Public Service Board of New South Wales v Osmond refused to change the common law rule that reasons are not legally required of administrative decision-makers. And this despite the laudable fact that judges in Australia, quite exceptionally, had imposed on themselves a legally enforceable requirement of reasoned elaboration for more than a century. The High Court in Osmond thought the common law was past the age of child bearing in this regard, and the matter should be left in the more context-sensitive hands of politicians and legislative drafters. The Court has stuck to this line ever since, much to the chagrin of Justice Kirby, who in his earlier life as President of the New South Wales Court of Appeal was overturned in Osmond.

The common law has not stood still elsewhere in the common law world. In 1999, the Supreme Court of Canada in Baker v Canada (Minister of Citizenship &

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83 (1986) 159 CLR 656.
84 For critique, see Michael Taggart, “Osmond in the High Court of Australia: Missed Opportunity” in Taggart, above at note 10, 53; D.St L. Kelly, “The Osmond Case: Common Law and Statute” (1986) 60 Australian Law Journal 513; Ben Zipser, “Revisiting Osmond: In Search of a Duty to Give Reasons” (1998) 9 Public Law Review 3. “In other common law countries,” Justice Michael Kirby observed recently, deliberately exempting Australia from the observation, “the law has moved in recent times, with general consistency, to insist on the importance of the giving reasons for valid and just decisions, not only by judges but also administrators”: Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Palme [2003] 216 CLR 212, [64] (dissenting).
85 See Michael Taggart, “Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases” (1982-83) 33 University of Toronto Law Journal 1, 3–8; Beale v Government Insurance Office of New South Wales (1997) 48 NSWR 430, 441 (Meagher J) (common law duty on judge and statutory duty on administrators “essentially serve the same purpose”).
Immigration\(^{88}\) recognised a generally applicable common law duty to give reasons on administrative decision-makers, refusing to follow Osmond. Although the English and New Zealand courts have yet to go as far as the Supreme Court of Canada in recognising a generally applicable common law duty to give reasons on administrative decision-makers, they have recognized an increasing number of exceptions to the rule, and it seems only a matter of time before the exceptions swallow the hoary old rule that reasons need not be given.\(^{89}\) This process has been accelerated by the adoption of statutory bills of rights in the UK and New Zealand,\(^{90}\) but it is important to note that the change is not dependent on doing so: the failure of administrative law in this regard to live up to the rhetoric of the rule of law has been commented upon since at least the 1930s.\(^{91}\) Notably, in a speech published last year Chief Justice Gleeson said it would be “dangerous for any modern government to disregard what some commentators … have come to describe as the ethos or culture of justification which pervades modern liberal democracies” and went on to say “[t]he development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life”.\(^{92}\) Osmond’s case does not sit well with that culture of justification,\(^{93}\) and perhaps the “cultural expectation” might yet be reflected in Australian common law.\(^{94}\)

I want to move now to the topic of procedural legitimate expectation. One of the most well-known, controversial and influential contributions of the High Court to Anglo-Commonwealth administrative law is the decision in Minister of Immigration and Ethnic Affairs v Teoh.\(^{95}\) In that case, the doctrine of procedural legitimate expectation was used as to give greater effect to international legal obligations in domestic Australian law. This idea has caught on in the UK and particularly in Privy Council judgments on appeals from the Carribean,\(^{96}\) and has been influential below the surface


\(^{91}\) One of the recommendations of the Donoughmore Committee (UK) in 1932 was that reasons should be given for quasi-judicial decisions: \textit{Committee on Ministers’ Powers Report} (Her Majesty’s Stationery Office, Cmnd. 4060, 1932) 76, 80 & 100. The requirement in the US \textit{Administrative Procedure Act 1946} requiring reasons was one of the most admired features across the Atlantic. See Harry Street, “Book Review” (1950) 59 \textit{Yale Law Journal} 590, 593.

\(^{92}\) Gleeson, above at note 10, 12.


\(^{96}\) \textit{Ahmed v Secretary of State for the Home Department} [1999] Imm AR 22, 36-37 (“wholly convincing”: Lord Woolf MR) & 41 (his approach “fully accord[ed]” with that in \textit{Teoh}: Hobhouse LJ); \textit{R v Uxbridge Magistrates’ Court, ex p Adimi} [2001] 3 QB 667, 686 (Simon Brown LJ) & 690-91 (Newman J)(DC); \textit{Thomas v Baptiste} [2000] 2 AC 1, 32 (PC, Trinidad & Tobago - dissent); \textit{Higgs v
in the Supreme Court of Canada;97 but so far has made little headway in New Zealand.98 Let me raise my cloven hoof and say that I was critical of Teoh from the beginning and believe there are formidable doctrinal and practical difficulties in using the doctrine of legitimate expectation to achieve the desirable end of giving greater effect to unincorporated international human rights treaties in domestic law.99

As is well known, the High Court in Re Minister for Immigration and Multicultural Affairs, ex parte Lam100 has done about as much as judges can by way of obiter dicta in a case where the point was not argued to overrule Teoh. There is much to be said about Lam and Teoh but there is nothing I can usefully add to the burgeoning indigenous literature on the topic.101 Rather I want to recall a long since forgotten episode in Australian administrative law at the dawn of the reception of procedural legitimate expectation, which seems surprisingly relevant in the light of a recent High Court decision.

Minister of National Security [2000] 2 AC 228, 241 (PC, The Bahamas); Fisher v Minister of Public Safety (No. 2) [2000] 1 AC 434, 446-47 & 454 (PC, The Bahamas); Lewis v Attorney-General of Jamaica [2001] 2 AC 50, 83-5 & cf. 88-89 (PC, Jamaica); Naidike v Attorney-General of Trinidad & Tobago [2004] UKPC 49, [72]-[77], per Baroness Hale. The Privy Council has not yet applied the Teoh approach as ratio in any case, but it appears to be slouching towards doing so.


In the late 1970s, Chief Justice Barwick objected to the doctrine of procedural legitimate expectation. In a series of cases Sir Garfield Barwick opposed the extension of natural justice to immigrants via the doctrine of procedural legitimate expectation on the ground that the phrase “legitimate expectation” was either oxymoronic or meant no more than legal right. For him, the “legitimate” part of the couplet could only mean something sourced in positive law, in other words something “lawful”, and so coupling this with expectation was just a confusing way of referring to a legal right: *ergo* natural justice attached only to the interference with legal rights rather than expectations: so immigrants lost out.\(^{102}\) This view carried the day in *Salemi’s* case by virtue of the Chief Justice’s casting vote,\(^{103}\) but was shortly thereafter rejected by the rest of the court in *Heatley’s* case,\(^{104}\) over the Chief Justice’s case continuing dissent, and the doctrine found a secure place in Australian law.\(^{105}\) Importantly outside Australia, the Privy Council in an influential case on appeal from Hong Kong called *Shiu*\(^ {106}\) also rejected Chief Justice Barwick’s stance, and it disappeared from view.

But something eerily reminiscent of Sir Garfield Barwick’s repudiated notion that procedural fairness depends upon pre-existing right sourced in positive law has resurfaced in *Griffith University v Tang*.\(^ {107}\) *Tang* has been subject to relentless critique, including by some in this audience.\(^ {108}\) Ms Tang was in the midst of doctoral study at Griffith University when she was kicked out of the programme and the University for allegedly fabricating research results. She alleged that the University’s disciplinary procedures had not been followed and that as a consequence she had been denied procedural fairness.\(^ {109}\) Her legal advisors brought judicial review under the Queensland equivalent of the federal *ADJR Act*.\(^ {110}\) The University defended on the

\(^{102}\) *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 404. See also *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461.

\(^{103}\) On the casting vote see Michael Coper, “Tied vote” in Blackshield, Coper & Williams, above at note 40, 671.

\(^{104}\) *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487.

\(^{105}\) For a nice thumbnail sketch of a topic upon which much has been written, see Robin Creyke, “Legitimate expectation” in Blackshield, Coper & Williams, above at note 40, 431. For chapter and verse, see Ian Holloway, *Natural Justice and the High Court of Australia: A study in common law constitutionalism* (Ashgate Publishing, Aldershot, 2002). The reason for the temporal qualification is that there has been significant grumbling about the doctrine on the High Court over the years (see Creyke, idem) and this has re-surfacd in the recent case of *Ex parte Lam*, above at note 100, esp. [140]-[141], per Callinan J.

\(^{106}\) *Attorney-General for Hong Kong v Shiu* [1983] 2 AC 629, 636.

\(^{107}\) (2005) 221 CLR 99.


\(^{109}\) She had other claims too – errors of law, deciding on no evidence and improper exercise of power (*Tang*, above at note 107, [53] & [116]) – but the procedural ones seemed strongest.

\(^{110}\) There is some significance in the fact that she relied on s. 4(a) of the *Judicial Review Act* (Queensland) rather than s. 4(b), but that need not detain us.
ground that the decision was not made “under an enactment”: the State courts found that it was. The High Court gave special leave and reversed the courts below, dismissing her ‘statutory’ judicial review action.

Her action failed because the University’s discipline procedures were set out in “soft law” policy rather than in statute or delegated legislation and consequently the relevant decisions had not been made “under an enactment”. The High Court said two criteria had to be satisfied for a decision to be made “under an enactment”: the decision had to be expressly or impliedly authorised by the enactment, and the decision itself had to confer, alter or otherwise affect rights or obligations. Ms Tang failed to establish the second limb. Any expectation that she might have had that the University would follow its own disciplinary code did not create substantive rights “under the general law” nor did it arise under an enactment, but rather under the “soft law” policy.

This seems to me a great leap backwards at least to Sir Garfield Barwick in Salemi. In essence, a “right” sourced in positive law (that is, either the general law or statute) becomes the trigger for the availability of statutory review under the ADJR Act and its State equivalents. I am aware that Mark Aronson has argued, contrary to what many other commentators and I have just said, that this “right affection” requirement was not intended to be taken literally and that it will not apply to statutory decision-making but only in non-statutory decision-making settings. He may be right: but I am not so sure – at any rate, why should it be so unclear.

But if I am right then the High Court’s “superadding” to the ADJR Act a requirement that rights be affected under the State equivalent to the ADJR Act is reminiscent of another much earlier “wrong turn” in the twentieth century history of Anglo-Australasian administrative law. I am referring to the dictum of the Australian-born judge Lord Justice Atkin in the Electricity Commissioners case. He was taken to say that before natural justice could apply and one could get the prerogative remedy of certiorari to quash for breach of natural justice the decision-maker had to act quasi-judicially. It took forty years to root this heresy out of administrative law, let us hope that the “super-added” requirement of rights affection is repudiated more quickly in Australia. Fortunately, as far as the rest of the common law world is concerned, this regression seems peculiarly indigenous to Australia.

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111 I find Mark Aronson’s analysis on this issue compelling and adopt it: Aronson, above at note 108.
112 Tang, above at note 107, [89], per Gummow, Callinan & Heydon JJ.
113 Ibid., [91].
114 Ibid., [92]; [20], per Gleeson CJ.
115 Above at note 102. And perhaps in more ways than one: Barwick CJ was clearly in the ultra vires camp. See above at note 43 & accompanying text, and Holloway, above at note 105, 254-56
116 Aronson, above at note 108, 14.
117 A.B. Schofield, Dictionary of Legal Biography 1845-1945 (Barry Rose Law Publishers Ltd, Chichester, 1998) 17 & Geoffrey Lewis, Lord Atkin (Butterworths, London, 1983) 1-3. His father, Robert Travers Atkin was a Member of the Queensland Legislative Assembly.
118 R v Electricity Commissioners; Ex parte London Electricity Joint Committee (1920) Ltd [1924] 1 KB 171. The misunderstanding is explained by Lord Reid in Ridge v Baldwin [1964] AC 40, 72 & 74-76 (HL). Sir Anthony Mason has described this “famous judgment” as “the centre piece” of administrative law in the early 1960s and pointed out it was followed by the High Court of Australia in Testro Bros Pty Ltd v Tait (1963) 109 CLR 353: “Administrative Law Reform: The Vision and the Reality” (2001) 8 Australian Journal of Administrative Law 135, 135.
Furthermore, the plurality in *Tang* drew support for their approach from the constitutional imperative under Ch. III of the Commonwealth Constitution that there must exist a “matter”. Putting aside technicalities – of which, need I say, there are plenty – surely at the core of a “matter” is the notion of a real, justiciable dispute. That a majority of the High Court of Australia could think that such was absent in *Tang* is breath taking. This takes the ‘Constitutionalisation’ of Australian administrative law to a new level: and is an example of ‘Australian exceptionalism’ at work.

It beggars belief how a reform like the *ADJR Act* (and its State equivalents) which was intended “to simplify and clarify the grounds and remedies for judicial review, thereby facilitating access to the courts and enabling individuals to challenge administrative action which adversely affects [her] interests” can be interpreted to frustrate that intention in *Tang*. You now have back many of the evils these reforms were meant to eradicate!

Moreover, *Tang* was a potentially unjust decision and the majority of the Court seemed heedless of that. The case was pleaded only on ‘statutory’ judicial review. Common law judicial review and contractual issues were not pleaded. The majority slammed the door shut on ‘statutory’ judicial review to remedy alleged procedural unfairness without satisfying themselves or even advertising to whether Ms Tang would have a satisfactory remedy in private law, by way of express or implied term to act fairly or to follow misconduct procedures in any contract of matriculation with the University. Nothing was said about the availability of ‘common law’ judicial review either, nor about availability of access to the Ombudsman or any other grievance-handling body. In other words, for all we know (and for all the majority of the High Court seemed to care) Ms Tang could well fall into a legal ‘black hole’ with no legal remedy at all.

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119 *Tang*, above at note 107, [90]. See also *Ex parte Lam*, above at note 100, [76]-[77].
121 Graeme Hill thinks the “matter” issue is a “red herring”: above at note 108, 11.
123 I agree with Justice Kirby in *Tang*’s case: above at note 107, [100].
124 This point is made also by Kamvounias & Varnham, above at note 108, 10.
125 The majority avoided discussing the issue: above at note 107, [3] (Gleeson CJ), [32] (Gummow, Callinan & Heydon JJ). For a helpful speculation on why either side did not raise the contract argument see Cassimatis, above at note 108, 174-75.
126 Some of the commentaries state that complaint to the Queensland Ombudsman is an alternative remedy: see, e.g., Gangemi, above at note 108, 575-76. The plurality, however, did note the absence of a University Visitor, which in the older, ‘established’ universities exercise some role in complaint resolution: *Tang*, above at note 107, [40], per Gummow, Callinan & Heydon JJ.
127 Accord, Mantziaris & McDonald, above at note 28, 44-45. The expression ‘black hole’ is most often used these days in relation to Guantanamo Bay. See, e.g., Johan Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 *International & Comparative Law Quarterly* 1.
Of course, the hope lies with the various State court jurisdictions that retain a broad inherent supervisory jurisdiction as these are formally unaffected by super-added requirements to the plain words of the federal statute and the three mirror-image State equivalents. Several influential Australian commentators have read parts of Tang as representing the High Court judges’ likely thinking on ‘common law’ judicial review at the federal level as well. This and the fact that the High Court majority was heedless to injustice in Tang must give one pause as to how far the State courts will be allowed to do justice by way of ‘common law’ judicial review in the shadow the “single Australian common law” cast by the High Court.

Lying behind all of the case law and statutory exegesis in Tang’s case are significant policy choices, albeit largely unarticulated. Obviously, in Tang the Australian courts are struggling to draw a line between public and private power. In his insightful and highly critical essay on (inter alia) Tang’s case, Mark Aronson described the “outcome” or “result” as “entirely predictable …. because if ADJR’s restriction to statutory decision-making is to mean anything, then the odds are that it excludes coverage of government’s commercial powers so far as these are truly consensual”. Perhaps commercialisation of universities has proceeded so far in Australia that readers here were not shocked by the inference that a public University’s relationship with a doctoral student is a “commercial” one or with the equation of a university to government (so much for academic freedom!). But if one puts all that to one side, I can understand (even if I do not agree with) the proposition that contracting by government should not be colonized by judicial review if — and it is a crucial if - there are adequate protections and remedies available as a matter of private law. But to treat a public University as an essentially private body because it has simply opted to put its disciplinary code in the form of “soft law” policy rather than delegated legislative form is distinctly odd. And, as Aronson says indignantly and rightly, “to characterise Ms Tang’s “relationship with her former university as merely consensual is nothing short of breath-taking”.

Although I cannot go into the detail, Tang is simply the latest in a long line of cases where the judges have tried to exclude tendering and contract decision-making from the ambit of the ADJR Act. The most well known case outside Australia is General Newspapers Pty Ltd v Telstra Corporation, which put contracting decisions by government-owned trading entities beyond statutory judicial review and on the private law side of the line. The courts obviously thought there was more to lose than gain from doing so and that they were ill equipped to evaluate commercial decision-making against public law norms. It was a mistake, as many commentators

128 The ADJR Act (C’th) has three State/Territory counterparts: Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Queensland); Judicial Review Act 2002 (Tasmania). Victoria has a statute but it differs in some important respects from the Commonwealth model: Administrative Law Act 1978 (Vic). See Aronson, Dyer & Groves, above at note 43, 19-23. Nearly ten years ago, Lindsay Curtis started to address what he called “the comparative failure of the gospel of the new administrative law to take root” in other Australian State/Territory jurisdictions and overseas (Curtis, above at note 8, 52-53), and that remains an interesting but neglected topic.

129 Mantziaris & McDonald, above at note 28, 32-36; Aronson, above at note 108, 14-17.

130 Aronson, ibid., 12 & 22.

131 Ibid., 23.

132 (1993) 117 ALR 629 (Fed Ct).

pointed out at the time, but the courts did not listen. The courts in New Zealand went down this path as well until the Privy Council overruled them and left the door of judicial review open in cases of egregious bad dealing.135

It is common place to observe that the governmental and administrative landscape in place when the “new Administrative Law package” was enacted has been fundamentally changed by a succession of ‘-isations’ – corporatisation, privatisation, commercialisation, contractualisation, market liberalisation and so on. The Australian courts, by and large, have failed to engage with the legal implications of these phenomena.

That brings me to the High Court’s decision in Neat Domestic Pty Ltd v AWB Ltd.136 The background to that case was reform of the Wheat Marketing Board in the late 1990s and the emasculation of the Board’s role and the placing of effective power to approve of wheat exports in the hands of a private company with strong economic incentives not to approve of any other export applications. This power was temporarily taken away from the company last year in the wake of the Cole Inquiry into the ‘kick-backs’ paid to Saddam Hussein’s regime in contravention of the UN oil-for-food sanctions programme.137 But Neat Domestic arose before that drama unfolded and those extra-curial accountabilities were brought to bear. The issue in this case was whether the exercise of the company’s power to not approve of wheat export applications was subject to judicial review under the ADJR Act. Leaving to one side the technical detail, the majority of the High Court took an absolutist or binary approach to the public/private law divide. These Justices held in the particular context that the profit-maximising and self-regarding behaviour of this private corporation was totally incompatible with the existence of any public law obligations to regard the public interest, and hence refused to impose any.138 They did say they were speaking only to the peculiar facts of the case and not to the important broader question of the applicability of judicial review in wider contracted-out, corporatised or privatised contexts.139 Perhaps nothing should be read into the fact that the majority did not even cite the leading English case of Datafin140 – which has been attracted a following in State courts141 – but there is certainly a sense in which the High Court did not see

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138 Ibid., [51], [61] & [63].

139 Neat Domestic, above at note 136, [50].

140 R v Panel on Take-Overs and Mergers, ex parte Datafin plc [1987] 1 QB 815.

through the institutional form to the reality of the situation. Nor did they do so in *Tang* two years later.

The judge whose work and philosophy is most often cited in support of such a restrained approach to judicial review is Sir Gerard Brennan. A stalwart supporter of the so-called *ultra vires* basis of judicial review; Sir Gerard insisted that the ultimate justification for review lies in statute and legislative intent. Although the *ultra vires* school has slugged it out with the so-called ‘natural law’ school (championed by Sir Anthony Mason) inconclusively for twenty odd years, there is evidence in these recent cases that the *ultra vires* school is now in the ascendancy in the High Court. Intriguingly, however, Sir Gerard in several post-retirement addresses has emphasised the importance of an effective remedy in contracted out and devolved decision-making settings and has approved of and sought to justify what has been called the “functionalist” turn in the UK (and New Zealand) authorities. This approach can be seen in Chief Justice Gleeson’s and Justice Kirby’s judgments in *Neat Domestic*.

There is not time to dwell on how other common law countries are grappling with these issues – suffice to say progress is somewhat uneven - but it does seem to me that in *Neat Domestic* and *Tang* majorities in the High Court of Australia have failed to grapple with the changing nature of government. The privatisation phenomena, which is the backdrop to the structural and regulatory changes played out in *Neat Domestic*, and the move to “soft law”, exemplified in the university setting in *Tang*, are interrelated and are two of the most pervasive and important phenomena in the

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142 There is no space to refer to all the sources. See Sir Gerard Brennan, “The Purpose and Scope of Judicial Review” in Taggart, above at note 10, 18; Belinda Baker & Stephen Gageler, “Brennan, (Francis) Gerard” in Blackshield, Coper & Williams, above at note 40, 66; & the contributions to Creyke & Keyzer, above at note 63.

143 Most prominently in *Kioa v West* (1985) 159 CLR 550, 582 (Mason J) & 609 (Brennan J), but see the treatment in Holloway, above at note 105, ch. 7.

144 Gageler, above at note 63. This issue has dominated the law review literature in the Northern hemisphere over the last ten years or so. See the contributions to Christopher Forsyth (ed.), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000), that book that was meant to bring the debate to a head but simply stirred some of the protagonists on to new heights of abstraction and vituperative. Bradley Selway rightly pointed out the debate has been taken up in Australia (as it has in New Zealand) but “perhaps not with the same vigour as in England”: above at note 13, 222. See also Gageler, above at note 37. For my view of the debate, see Michael Taggart, “Ultra Vires as Distraction” in Forsyth, ibid., 427.

145 See generally Peter Cane, “Accountability and the Public/Private Distinction” in Bamforth & Leyland, above at 65, 247.

146 Sir Gerard Brennan, “The Review of Commonwealth Administrative Power: Some Current Issues” in Creyke & Keyzer, above at note 63, 9, 19-37; Sir Gerard Brennan, “The Mechanics of Responsibility in Government” (1999) 58 *Australian Journal of Public Administration* 3, 10. Sir Gerard indicated also a path through the constitutional thicket of s. 75(iii) and (v) with their unhelpful limitations to “the Commonwealth” and “officers of the Commonwealth. Cf. Gleeson, above at note 10, 7 (“Privatisation, and outsourcing of functions, have placed many activities affecting the interests of citizens outside the scope of the legislative scheme conceived of in the 1970s (cf NEAT…”).


148 Botterill, above at note 137.
last thirty years. Contrary to what many people thought, the move to privatisation and freer markets has produced more rules not less, and much more ‘soft law’. The evident failure of the High Court of Australia to see behind the form to the substance and to grapple with these fundamentally important issues - what Mark Aronson famously described more than a decade ago as “the phenomena of mixed administration” - is not just disappointing, it is dismaying.

I want to say something now about proportionality. I mentioned earlier, the development of variable intensity unreasonableness review and suggested that it is not a radical idea, and deserves more serious consideration than it has yet received from Australian courts. In the UK, however, variable intensity unreasonableness of the 1990s quickly slid into proportionality review. In a nutshell, proportionality requires that the administrative action must be rationally connected to stated objectives and impair right(s) no more than is reasonably necessary in order to accomplish those objectives. To cut a long story short, in the UK proportionality has eclipsed variable intensity unreasonableness as a result of the incorporation of the European Convention of Human Rights (1950) by the Human Rights Act 1998 and the European Court of Human Rights’ holding that application of what an English court thought was more intense unreasonableness review (but actually was not) did not satisfy the requirement of an adequate remedy for the violation of the Convention.

Proportionality in administrative law is ‘a bridge too far’ for Australian courts and commentators. There is almost no support for it in Australia. I have much sympathy with this stance for two reasons. First, by definition, proportionality review is much closer to merits review than variable intensity unreasonableness review.

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149 The literature is elephantine, see the summation and references in Michael Taggart, “The Nature and Function of the State” in Peter Cane & Mark Tushnet (eds), The Oxford Handbook of Legal Studies (Oxford University Press, Oxford, 2003) 101.
151 Mark Aronson, “A Public Lawyer’s Responses to Privatisation and Outsourcing” in Taggart, above at note 27, 40, 53.
152 R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532.
154 Smith & Grady v United Kingdom (1997) 29 EHRR 493, [137]-[139] (ECtHR). The decision was delivered on 27 September 1999. The HRA was passed in 1998 and came into force on 2 October 2000. In the earlier case of Soering v UK (1989) 11 EHRR 439 the European Court of Human Rights held Wednesbury review satisfied art. 13.
156 Daly’s case, above at note 152, [27], per Lord Steyn. This point was well made earlier by David Feldman, “Proportionality and the Human Rights Act 1998” in Evelyn Ellis (ed.), The Principle of
notwithstanding British denials. Secondly, the proportionality methodology is best powered by a list of enumerated rights otherwise it loses much of its much-admired analytic and structuring qualities. It applies in the UK, Canada and New Zealand in the context of bills or charters of rights, as it will inevitably in those Australian jurisdictions with statutory bills of rights. No doubt, over time there may well be spill over effects to the common law.

Proportionality is correctly seen as originating in continental European law, and has come into UK administrative law on the tidal wave of ‘Europeanisation’. Australian commentators have rightly pointed out the different conceptions of constitutionalism in general and of administrative law in particular in continental Europe. Obviously, the constitutional driver of European integration is absent in Australia, New Zealand and Canada. Even in New Zealand, which has a statutory Bill of Rights, and in Canada, with its entrenched Charter of Rights, neither country’s administrative law has yet adopted proportionality review by name outside the rights area. In those countries, as seems to be the case in Australia, at best a lack of proportionality is accepted as an incident of Wednesbury unreasonableness.

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162 Mason, above at note 9, 342.


165 See \textit{Wolf v Minister of Immigration} [2004] NZAR 414.

166 Australian Broadcasting Tribunal \textit{v Bond} (1990) 170 CLR 321, 367, per Deane J; \textit{Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation} (1990) 96 ALR 153, 168, per Gummow J (Fed Ct); Margaret Allars, \textit{Introduction to Australian Administrative Law} (Butterworths, Sydney, 1990) para. 5.10; Isaac \textit{v Minister of Consumer Affairs} [1990] 2 NZLR 606, 636, per Tipping J (HC); \textit{The Institute of Chartered Accountants of New Zealand v Bevan} [2003] 1 NZLR 154 (CA);
Australian judicial review is in the mainstream here. This is not exceptionalism, in the sense I am using the term here.

The same thing might be said about the much-discussed doctrine of substantive legitimate expectation, recognized by the English Court of Appeal in Coughlan’s case. This is a highly controversial issue in every common law jurisdiction. Once again it is seen as an idea coming from European administrative law. It has never taken hold in Australia, and the High Court poured more cold water on it in Ex parte Lam. The Supreme Court of Canada has rejected it also. The New Zealand appellate courts have yet to decide. It raises a question of legal principle and policy. It appears that in this respect English law that is “exceptional” and out of step, and Australia and Canada represent the ‘norm’. But in rejecting substantive legitimate expectation doctrine the Canadian court has not fallen back on their Constitution, and the New Zealand courts when they finally decide do not have a written Constitution to fall back on, they will evaluate the law, principle and policy in the time-honoured way. What is wrong, in my view, with some of the Australian responses to substantive legitimate expectations (and many of the other issues discussed here) is the claim of ‘exceptionalism’ – that is, that there is something about

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*Wolf v Minister of Immigration* [2004] NZAR 414 (HC); *Waikatere City Council v Lovelock* [1997] 2 NZLR 385, 408, per Thomas J (CA).


168 I am not going to consider the doctrine of substantive unfairness due to space constraints. The UK and New Zealand recognise it, and Canada and Australia do not. In the Australian context, compare Cameron Stewart, “The doctrine of substantive unfairness and the review of substantive legitimate expectations” in Groves & Lee, above at note 21, 280 (against adoption) with Stern, above at note 47 (in favour).

169 See *Attorney-General (NSW) v Quinn*, above at 61; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 (Full Fed. Ct); *Daihatsu Australia Pty Ltd v Deputy Commissioner of Taxation* (2000) 46 ATR 129 (Fed. Ct); *Ex parte Lam*, above at note 100, [73] & [76]. See also Spiegelman, above at note 13.

170 *Mount-Sinai Hospital Center v Quebec (Minister of Health & Social Services)* [2001] 2 SCR 281 (SCC). Although in that case relief was given on a more technical ground that had the effect of preventing the Minister from going back on his previously stated position, and it has been argued that the Supreme Court adopted the UK approach in all but name. See Geneviève Cartier, “A ‘Mullanian’ Approach to the Doctrine of Legitimate Expectations: Real Questions and Promising Answers” in Grant Huscroft & Michael Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, Toronto, 2006) 185.

171 *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (CA); *Attorney-General v Steelfort Engineering Co Ltd* (1999) 1 NZCC 61,130 (CA). For the tangled law at High Court level, see: *Tay v Attorney-General* [1992] 2 NZLR 693; *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747 (HC); *Lumber Specialities Ltd v Hodgson* [2000] 2 NZLR 347, [125]-[139], per Hammond J (HC); *Challis v Destination Marlborough Trust Board Inc* [2003] 2 NZLR 107 (HC)(the Court of Appeal refused leave to appeal: CA 37/03, 8 December 2003); *Staunton Ltd v Chief Executive Ministry of Fisheries* [2004] NZAR 68 (HC); *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC, decided in 2003); *Ch’elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,810 (HC).

172 Of course, there is a large debate about the meaning of terms like principle and policy, and the differences between them. They cannot be pursed here.
the Australian Constitution or separation of powers that answers the question without more. The late Justice Brad Selway said that the Commonwealth Constitution has made much, if not all, of the legal developments in judicial review elsewhere “fundamentally irrelevant to Australian judges and lawyers” with “the happy consequence”, as he put it, that these developments can be ignored.173

Bearing fully in mind the ever-present danger of recolonisation, that I mentioned at the outset of the lecture, and the manifest importance of what Sir Anthony Mason has called “The Australianisation of our Law”,174 there is a tinge of jingoism in the grounding of administrative law in the Constitution.175

A similar sort of argument stopper is the legality/merits dichotomy, which often stops the argument at the point it should begin. In Attorney-General (NSW) v Quinn,176 Brennan J said “the duty and jurisdiction of the court” does not go beyond declaring and enforcing “the law which determines the limits and governs the exercise of the repository’s powers”. He went on to say that “the court has no jurisdiction to simply cure administrative injustice or error” and “to the extent that [the merits] can be distinguished from legality, [they] are for the repository of the relevant power and, subject to political control, for that repository alone”. This statement, more than any other, is said to encapsulate modern Australian administrative law.177 But note that Sir Gerard Brennan said to the extent that one can distinguish between law and merits. Here is the rub: there is no bright-line distinction, they overlap and where the line is drawn involves normative commitments and judicial discretion.178 There is nothing new in this. Chief Justice Spigelman admitted the boundary between legality and merits review is rather “porous and ill-defined” but went on to assert that protection of substantive legitimate expectations would “obliterate” the distinction altogether.179 The present Chief Justice of Australia put the same point in a different way. He said “[t]he difference [between legality and the merits] is not always clear-cut; but neither is the difference between night and day. Twilight does not invalidate the distinction

173 Selway, above at note 13, 235 & 237. I rather like Sir Anthony Mason’s comment that “the Constitution seems to play a similar role in Australian administrative law to that dark cloud that constantly hovers over the head of Joe Btfsplk in the American comic strip ‘Li’l Abner’”: above at note 100.


175 See Gummow, above at note 42.

176 (1990) 170 CLR 1, 35-36. See also Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, 272 per Brennan CJ, Toohey, McHugh & Gummow JJ. There is no space to refer to all the sources. See generally the contributions to his Festschrift: Creyke & Keyzer, above at note 63.


179 Spigelman, above at note 13, 733.
between night and day; and Wednesbury unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action.”

As with so much administrative law debate, the fig leaf is adjusted and the least dangerous branch continues to operate as if the various dichotomies — appeal/review, legality/merits, process/substance, discretion/law, law/policy, fact/law — actually decide particular cases. In reality, as insiders know, room remains for the values and preferences of individual judges to play a part in the identification, application, and evolution of administrative law principles and techniques in the infinite range of decision-making settings. Reciting these mantras – perhaps even shibboleths – diverts attention from the manipulable nature of the doctrines as applied.

As Mark Aronson, Bruce Dyer and Matthew Groves point out, “most judicial review judgments are long on the specific rules, but short to a fault on the guiding principles”. They go on to point out that “[t]his might well be a distinguishing feature of Australia’s markedly incrementalist judicial methodology”. It does not have to be that way. One of the most distinctive aspects of comparative administrative law research in recent years has been the search for universally applicable or general principles of administrative law. Of necessity these overarching principles have been at a reasonably high level of abstraction. This process has been most evident in Europe where much effort has gone into discovering shared general principles in administrative law across the ever-expanding European Union. But this process is also evident in domestic common law systems – the well known overlapping principles articulated by Sir Robin Cooke of reasonableness, fairness and legality come readily to mind, as does the similarly inspired trichotomy articulated by Lord Diplock of illegality, irrationality and procedural impropriety. More recently still, UK judges are identifying the overarching rationale of judicial review as the control of abuse of power.

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180 Murray Gleeson, “Judicial legitimacy” (2000) 20 Australian Bar Review 4, 11. See also Mason, above at note 122, 139 (“The difference between merits review and judicial review, though perhaps not as great as some people think, is nevertheless significant”) & Pat Keane, “Judicial Power and the Limits of Judicial Control” in Cane, above at note 3, 295 (“…while the line may not always be a bright one, it is there”).

181 See Aronson, Dyer & Groves, above at note 43, 164.


185 Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410 (HL).

186 See generally Sir Stephen Sedley, Freedom, Law and Justice (Hamlyn Lectures, Sweet & Maxwell, London, 1999) ch. 2. This has the advantage (or disadvantage, depending on one’s point of view) of slipping over the public/private divide.
This has been called “top down” reasoning, and many in Australia seem fearful of it and think it foreign to the common law tradition. They believe such high level values have to be filtered through particular grounds of review in order to provide certainty, to constrain judicial discretion and so as not to rustle the fig leaves. But surely there is value in both approaches. It would be a pity if the “top-downers” and the “bottom-uppers” never connected. One advantage of the top-down approach is that it prevents judges losing sight of what the courts are there for, and getting disoriented and lost in the dense woods of doctrinal and conceptual analysis.

‘Exceptionalism’, self-proclaimed or otherwise, can slide into isolationalism. In law, as in other aspects of life, isolationism can have many disadvantages: including insularity, in-breeding masquerading as purity, an alternation between resignation at being misunderstood by the rest of the world and an over-compensating superiority or smugness; none of this is likely to win friends or influence people. I recall a speech given by Madam Justice Claire L’Heureux-Dubé of the Supreme Court of Canada at a conference in 1996 to honour Chief Justice Rehnquist of the US Supreme Court. She chided the US Supreme Court for its insularity and refusal to look to how courts in other liberal democracies resolved similar or identical issues. She pointed out that as a result the Rehnquist Court was less influential internationally than its predecessors. Probably coincidentally, a decade later the US Supreme Court is starting to look at law made elsewhere: but many voices are raised in protest. The peculiarity of societal and constitutional evolution in America is said to make such comparisons illegitimate. There is an echo of that around the distinctiveness of Australian judicial review law, and the modern emphasis on its Constitutional roots. Of course, the High Court is much more open, and eager to gain

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187 Ex parte Lam, above at note 100, [72], per McHugh & Gummow JJ; Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd [1994] 2 NZLR 641, 654 (McKay J) & 654 (Fisher J). See also Gummow, above at note 42, 176-77.
188 See Brennan, above at note 142, 34.
190 It does seem bizarre to me that some Australian judges can declare that administrative law is not about “good administration” and that the Constitution positively prohibits them from allowing any such idea to influence the development of judicial review. Ex parte Lam, above at note 100, [32], per Gleeson CJ. Note that Sir Anthony Mason preferred “good administration ‘to “administrative efficiency” because it “clearly takes account of the impact of the decision on the interests of individuals”: “Reflections on the Development of Australian Administrative law” in Crekye & McMillan, above at note 8, 122, 123.
191 Michael Ignatieff, “Introduction: American Exceptionalism and Human Rights” in Ignatieff, above at note 1, 1, 3-4, & 8-11
192 For a very articulation that Australian administrative law will not be as influential around the common law world because of its distinctive features, see Sir Anthony Mason’s contribution to the Festschrift celebrating the centenary of the founding of the High Court of Australia: above at note 21.
193 See Frank Michelman, “Integrity-Anxiety?” in Ignatieff, above at note 1, 240. Otto thinks exceptionalism is “a claim to singular superiority or uniqueness” that transcends simple isolationalism: above at note 1, 219-20.
195 Ibid., 27 & 37.
inspiration from overseas courts than the US Supreme Court; I am certainly not denying that or the desirability of that. Nevertheless, I detect a reverberation of this strand of exceptionalism. It would be a great pity for administrative lawyers throughout the common law world if Australian exceptionalism became isolationism, and I venture to think it would not be a good thing in the longer term for Australian administrative law either.

197 See generally Bruce Topperwein, “‘Foreign precedents’ in Blackshield, Coper & Williams, above at note 40, 280. But note the study by Brian Opeskin showing that there has been less citation of overseas authority in constitutional law than in other areas: “Australian Constitutional Law in a Global Era” in Robert French, Geoffrey Lindell & Cheryl Saunders (eds), Reflections on the Australian Constitution (The Federation Press, Annandale, 2003) 171.