LECTURE 1

THE FOUNDATIONS AND THE LIMITATIONS OF JUDICIAL REVIEW

The purpose of this series of Lectures is to address some of the contemporary issues in Administrative Law or, as I would prefer to describe it, Public Law. In this, the first of the series, I discuss the foundations and limitations of judicial review. This discussion necessarily engages with the provisions of the Australian Constitution for those provisions lie at the core of federal judicial review. In this and succeeding Lectures, it will emerge that the foundations and limitations of judicial review have a strong influence on the concepts and principles which govern judicial review.

The Lectures will not deal with Australian Administrative Law in isolation. Developments in Australia are not unrelated to what is happening in other jurisdictions. So some degree of comparison is inevitable. By the end of Lecture III it will become apparent that judicial review in Australia is not as broad-ranging as it is in other jurisdictions, most notably England. That is not to say that we have missed the boat. It may be a boat, like the HMAS Manoora en route to Nauru, on which we would be well advised not to travel. The comparison, however, should cause us to look at our own system critically.

The constitutional provisions

Justice Gummow has made the comment that:

> The subject of administrative law cannot be understood or taught without attention to its constitutional foundation.1

This statement, in itself no more than a truism, serves to highlight the significant development of Ch III constitutional jurisprudence by the High Court in more recent times.

The only provision in the Australian Constitution which deals explicitly with judicial review is s 75(v) which confers original jurisdiction on the High Court in matters —

(v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Of course, this provision is not the only constitutional source of federal jurisdiction in judicial review. Section 75(iii) confers original jurisdiction on the High Court in matters —

(iii) In which the Commonwealth, or a person suing or, being sued on behalf of the Commonwealth, is a party.

Moreover, s 76(ii) enables Parliament to make laws conferring original jurisdiction on the High Court —

(ii) In any matter arising under any laws made by the Parliament.

The purpose of including s 75(v) in the Constitution was —

> … to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.2

It has been said that s 75(v) may not add to the jurisdiction conferred by s 75(iii). This statement is based on the suggestion that it was included in the Constitution as a safeguard against the possibility that the provision in s 75(iii) would be read down by reference to decisions on Art III of the United States Constitution3 so as to make relief unavailable where the Commonwealth itself is not the real party.

The Convention Debates suggest that the framers of the Constitution were aware of this possibility and that their purpose in including s 75(v) was to overcome the defect revealed in *Marbury v Madison*, namely that the Supreme Court of the United States lacked jurisdiction to grant mandamus. If we take the view that the purpose of s 75(v) is to reinforce the vesting of federal judicial power in Ch III courts and to supplement s 75(iii) in the context of judicial review, the omission to refer in s 75(v) to certiorari, after the express reference to mandamus and prohibition, though somewhat surprising, is not as significant as has been thought. Jurisdiction to issue certiorari may exist under s 75(iii). In any event, it seems that it is inherent or implicit in the power to grant prohibition that the Court may make its power to grant a prohibition effective in the circumstances and that would include authority to grant certiorari.4 On that footing, the Court would have power in an appropriate case to issue certiorari to quash or make an order in the nature of certiorari to quash.

It follows that it may be a mistake to regard s 75(v) as the only or even the primary source of the High Court's jurisdiction by way of judicial review. In a jurisdiction with a written constitution incorporating a separation of powers in its paramount law, it is natural to assign the ultimate authority for the exercise of all curial jurisdiction to that constitution,5 and this on the basis that one accepts Sir Owen Dixon's proposition that, in Australia, the common law is the ultimate constitutional foundation.6 That proposition means that the Constitution owes its recognition in part at least to the common law, that the provisions of the Constitution are framed in the language of the common law and that, as the common law forms an important part of the context in which the Constitution operates, it is to be understood and interpreted by reference to the common law.7 At the same time, some common law principles are so fundamental and of such importance that they may assume the character of constitutional principles and require clear, even specific, expressions of legislative intention to displace them.

It is accepted that the duty and the jurisdiction of the courts is, to use the words of Marshall CJ in *Marbury v Madison*,8 "to say what the law is". That means, in administrative law, declaring and enforcing the law which determines the limits and governs the exercise of the repository's power.9 Subject to such specific provisions as are made by the Constitution and by statute with respect to the exercise of jurisdiction, the vesting of the federal judicial power in Ch III courts and its separation from the legislative and executive powers were enough to arm the High Court as the Federal Supreme Court with a jurisdiction to declare and enforce administrative law and by way of judicial review.10 The existence and exercise of this jurisdiction is a manifestation of the rule of law, a notion which is receiving increasing attention in Australia and, more particularly, England.11 According to no less an authority than Sir Owen Dixon, the Australian Constitution is an instrument framed on the assumption of the rule of law.12 The rule of law is a fundamental concept or principle which informs the interpretation of the Constitution, indeed of every constitution, so that my comments have an application to a State constitution.

Section 76(ii) enabled Parliament to enact the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) which provided for a régime of judicial review extending beyond the prerogative writs.

Section 76(ii) would enable Parliament to provide for an appeal from federal administrative decisions to the Federal Court or to a court exercising federal jurisdiction. But a court vested with such an appellate jurisdiction would necessarily be restricted to exercising functions which involved the exercise of judicial power. For it is the gloss on Ch III resulting from the decision in the *Boilermakers Case*13 that precludes a federal court from exercising non-judicial power, while a similar line of reasoning confines the vesting of federal jurisdiction under s 77(iii) to matters within federal judicial power.

The High Court's jurisdiction in judicial review, particularly s 75(v), has been described as "inherent jurisdiction". Whether that is a correct description is open to question. It may not be "inherent jurisdiction" in the sense which that term has been applied to the general jurisdiction of the Supreme Courts of the States. It is, of course, constitutional jurisdiction and to be distinguished from statutory jurisdiction, even though statutory jurisdiction is vested in the High Court by force of the operation of the provisions of the Constitution. The distinction is important because Parliament can limit the jurisdiction which it vests in federal courts and courts exercising federal jurisdiction under Ch III.

So far I have been speaking of the jurisdiction of courts, principally of the High Court and federal courts under Ch III. Except in s 75(v), Ch III does not speak in terms of remedies. Nor does it confer power to issue remedies or prescribe the grounds on which they shall issue. The constitutional provisions assume that federal courts will, in the exercise of the jurisdiction vested in them, grant such remedies as are appropriate to the particular jurisdiction and to the case in hand. Neither s 75(iii) nor s 75(v) is a source of substantive rights, except in so far as the grant of jurisdiction necessarily recognises the principles of general law according to which the jurisdiction to grant the remedies is exercised.14

The “prerogative” or “constitutional” writs

We have called the writs of mandamus, prohibition and certiorari prerogative writs, in common with other writs offering remedies in the field of public law. For almost a century we have applied the same description to the writs referred to in s 75(v), notwithstanding that writs issued in the exercise of the s 75(v) jurisdiction provide relief in situations unknown in England, notably in situations where a statutory provision is *ultra vires* the Constitution. Because these writs issue in circumstances in which a writ did not issue in England, it is now thought appropriate to call them “constitutional” writs. There is no reason to cavil at the new description so long as we recognise that the name change in itself does not herald any change in the character and availability of the relevant writ. We know from *Ex parte Aala* that the scope of prohibition in s 75(v) is not confined to the notion of jurisdictional error which prevailed in 1901 or to the grounds on which the prerogative writ issues in England. We know also from *Ex parte Aala* that the grounds on which the remedy issues change over time. The same comment applies to other constitutional remedies.

In suggesting that s 75(v) does no more than supplement s 75(iii) , I acknowledge that, although federal judges have been held to be “officers of the Commonwealth” within s 75(v), federal courts may not fall within the descriptions in s 75(iii) of “the Commonwealth” or “a person being sued on behalf of the Commonwealth”.15 It is, however, necessary to recall that, although federal courts are independent in the judicial sense of that word, they are a branch or institution of the polity and are, in international law, regarded as the State or as an agency of the State.

The statutory *ultra vires*/common law controversy

For some time there has been an on-going controversy about the source of the principles which the courts apply in the exercise of judicial review. This controversy is often called a controversy about the foundations of judicial review. There have been those, like myself, who have regarded the principles of judicial review as a common law creation. There have been others, like Sir Gerard Brennan, following the view of Sir William Wade, who have seen judicial review as having a statutory and — even ultimately — a constitutional basis. In England, where the controversy has generated much academic discussion, an entire book of learned essays has been dedicated to the topic.16

Earlier I had not thought that much turned on the outcome of the controversy. Adherents of the common law view concede that the availability and the scope of judicial review depend upon the legislative intention as expressed in the relevant statute. Subject to such limitations as may arise from the Australian Constitution — and I speak here of federal judicial review — Parliament may, as we know from recent experience in connection with the *Migration Act 1958* (Cth), curtail judicial review, so long as it does not impair the High Court’s constitutional jurisdiction. On the other hand, adherents of the statutory view acknowledge that the courts attribute to the statute an intention that the decision-maker, in whom the power to decide is reposed by the statute, is to exercise its power in conformity with the law, including the common law. The difference between the two views has been encapsulated in two propositions. The first, the common law proposition, is:

> Unless Parliament clearly intends otherwise, the common law will require decision-makers to apply the principles of good administration as developed by the Judges in making their decisions.17

The second, the statutory *ultra vires* proposition, is:

> Unless Parliament clearly indicates otherwise, it is presumed to intend that decision-makers must apply the principles of good administration drawn from the common law as developed by the Judges in making their decisions.18

As you can see, the difference between the two propositions is theoretical.

Adherents of the statutory view proceed on a fictional presumption that Parliament intends that the courts will correct any error of law made by the decision-maker. This approach was succinctly stated by Lord Browne-Wilkinson in these terms:

> Parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision *ultra vires*.19

Since then the House of Lords has affirmed the view that the *ultra vires* doctrine is "the central principle of administrative law"20 and is "the juristic basis of judicial review".21

The fictional presumption has been applied in many situations in England where, on ordinary principles of statutory construction, it would not be possible to derive the legislative intention attributed by the presumption to the legislature. Indeed, in England the presumption has been carried to the point that privative clauses are virtually ineffective. The justification for carrying the presumption so far has been expressed by Lord Steyn in this way:

> The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable … A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the traditions and principles of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.22

This assumption applies even in the absence of ambiguity, though it will be displaced by clear and specific language to the contrary. The requirement for specific language is important; general words are not sufficient to displace the presumption.

This is an enterprising exercise in judicial gymnastics. You begin by affirming the *ultra vires* doctrine as the central pillar of administrative law. You then apply not a *presumption* but an *assumption* that the common law is intended to apply. Note that Sir Owen Dixon, when speaking of the rule of law, referred to it as an *assumption* on which the Constitution was based. Lord Steyn's assumption, which is divorced from ordinary principles of statutory interpretation, has such strong prima facie force that it is only displaced by clear and specific provision to the contrary. By this route his Lordship arrives at the result which the common law advocates propound. One must ask — why go to all this trouble? Perhaps it is because judges think that it is important for political purposes that politicians should think that judges believe that judicial review lies within the gift of the statute and it is not a creation of the common law or the judges. That, it seems to me, is the reason for these judicial gymnastics.

Recently, in England there has been an emphasis on the importance of the rule of law and the principle of legality.23 That emphasis was present in *R v Secretary of State for the Home Department; ex parte Pierson*,24 a recent decision of the House of Lords. It would, however, be a mistake to see this development as a movement away from the *ultra vires* doctrine. What the new emphasis suggests is that the principle of legal certainty and the rule of law could support the availability of judicial review in cases where the decision-maker does not purport to have acted pursuant to statutory authority. Further, the two elements supplement the *ultra vires* doctrine and could conceivably perhaps in the fullness of time displace it as the preferred basis of judicial review. At this time, however, in England at least, the doctrine is the accepted juristic basis of judicial review of decisions purportedly made under statutory authority.

Main objections to the *ultra vires* doctrine

It would take too much time in this paper to review in detail all the objections which have been made to the *ultra vires* doctrine. It is sufficient to mention the more important points. First, the doctrine provides no explanation for judicial review of prerogative power. Judicial review of prerogative power has been accepted in England25 though it remains to be accepted authoritatively in Australia. In *R v Toohey; ex parte Northern Land Council*,26 Mason J said that there was much to support the view that an exercise of prerogative power is reviewable. And in *Ex parte Aala*, Gaudron and Gummow JJ said that if an element of executive power incorporated a requirement for natural justice, prohibition would lie to enforce observance of the Constitution itself.27 Their Honours' citation28 of passages from *Minister for Arts, Heritage and Environment v Peko Wallsend Ltd*29 also suggests that exercises of common law or prerogative power by the executive will be reviewable.

Review of the prerogative in England has been based by the Court of Appeal30 on the rule of law, following the approach adopted by the New Zealand Court of Appeal.31 There is no reason why a similar development should not take place in Australia, given the emphasis which the High Court has placed on Marshall CJ's statement in *Marbury v Madison.* That statement itself reflects the rule of law principle.32

Nor does the *ultra vires* doctrine provide a basis for review in other cases where the power exercised does not purport to be statutory. In England, decisions made by a variety of bodies not exercising statutory powers have been subjected to judicial review on the broad and rather imprecise basis that the body is exercising "public power". These bodies include the Panel on Takeovers and Mergers33 and sporting bodies.34 Here the question will be on what grounds is review to take place? There is a need for the courts to apply principles analogous to judicial review principles to the bodies concerned, so far as it is appropriate to apply them.

There is also the historical objection namely that the grounds of review, particularly the duty of procedural fairness, have been judicially created. The strength of the historical objection has been clouded by the debate over the celebrated statement by Byles J in *Cooper v Wandsworth Board of Works*35 that —

> … although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

This Delphic utterance is said to support either statutory implication or common law creation, depending upon the eye of the beholder.

What is incontrovertible is that the grounds of judicial review have been developed by the judges. Any recognition by statute of the grounds of review has followed judicial development of them and in that judicial development there has been no statutory contribution. The most that can be said is that Parliament is taken to withhold from the decision-maker the power to act in contravention of the principles of law enshrined in the grounds of review.36 As already stated, to attribute that view to legislative intent is simply an exercise in fiction, there being no basis in fact for asserting that the legislators applied their minds to the question (which, I think, Lord Steyn implicitly accepts) and no basis in law for reading the statutory language as evincing such an intent.

There is, of course, no fundamental objection to legal fictions if they are necessary to achieve a necessary or desirable outcome. They should, however, be avoided if there is another acceptable legal basis for reaching that outcome.37

The High Court's approach to the *ultra vires*/common law controversy

Conflicting views were expressed in the High Court in a series of cases culminating in *Annetts v McCann*,38 in which a majority of the Court adopted the common law theory, at any rate in relation to the common law duty of fairness. It would, however, be a serious mistake to think that *Annetts v McCann* is the end of the line. In *Ex parte Aala*, Hayne J adverted to the possibility that the correctness of the common law theory remains an open question.39 In the same case, Gaudron and Gummow JJ went further and referred40 to Brennan J's exposition in *Kioa v West*41 of implied statutory authority for exercising a statutory power with procedural fairness and noted that it was consistent with the proposition stated by Brennan CJ in *Kruger v Commonwealth*42 that —

> … when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.

Their Honours went on to say that this reasoning should be accepted with respect to the remedy of prohibition provided for in s 75(v) of the Constitution and remarked:

> It represents the development of legal thought which began in before federation and accommodates s 75(v) to that development.

Subsequently, in *Ex parte Miah*,43 McHugh J appears to have proceeded on the basis that the common law view applies. On the other hand, Gleeson CJ and Hayne J cited44 the well-known passage in the judgment of Brennan J in *Kioa v West*,45 which, in the context of procedural fairness, emphasises that the starting point is the construction of the statute reposing the discretionary power in the decision-maker.

Also noted is another statement made by Brennan J in *Annetts v McCann*.46 His Honour said:

> Thus the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice. The common law confers no jurisdiction to review an exercise of power by a repository when the power has been exercised, or is to be exercised in conformity with the statute which creates and confers the power.47

Whether the current strand of thinking favouring a statutory basis for judicial review owes anything to the linkage between judicial review of administrative action and the constitutional jurisdiction and duty of the courts of which Marshall CJ wrote in *Marbury v Madison*, is not entirely clear.

It is, however, material to refer to the point, that there is a distinction between conferring jurisdiction and the concomitant obligation to exercise it (which will include the grant of appropriate remedies) and the principles according to which remedy and relief is granted. There is no necessary connection between Marshall CJ's constitutional imperative and the source of the principles which have been formulated by the courts in shaping the grounds of review of administrative action, except that it is the function of the courts to declare and enforce the law, which includes the principles of administrative law.

In *Enfield City Corporation*,48 the High Court was at pains to point out that, in Australia, the merits of administrative action are for the decision-maker alone and that this principle stems not from any doctrine of deference "but from basic principles of administrative law respecting the exercise of discretionary powers". The significant reference in this passage is to the principles of "administrative law".

The current strand of thinking is unquestionably related to the doctrine of parliamentary supremacy. That doctrine is unrelated to Marshall CJ's constitutional imperative. That imperative is related to the Constitution, its separation of powers, judicial power and the rule of law. The rule of law, it must be emphasised, stands at a different pole from parliamentary supremacy. The rule of law imposes constitutional limits on parliamentary supremacy49 and restricts the exercise of power of decision-makers by reference to legal concepts and principles. In any event, the common law theory is not inconsistent with parliamentary supremacy, although the theory does not concede as much to the statute as the *ultra vires* doctrine.

Another perspective on the controversy is that the conflict between the theories can be seen as reflection of a disagreement between those who wish to emphasise legislative supremacy and those who wish to protect fundamental or individual rights.

I conclude the discussion on this point with the comment that the starting point may be important. If the statute is the starting point, it may be easier to conclude that there is no intent to subject the decision-maker to the common law principles than to conclude that there is a clear intent to displace or curtail an established duty, whether it be to accord procedural fairness or to abide by the substantive principles of administrative law governing the making of decisions. No doubt the presumptive fiction that the decision-maker is intended to abide by the principles of administrative law will bridge the gap. But there may remain residual misgivings about this approach in that it could facilitate legislative erosion of the grounds of review. If Australian courts give the presumption the robust application it has been given or if Australian courts adopt Lord Steyn's assumption with its consequential requirement for clear and specific displacement of the assumption, the misgivings will evaporate.

The concept of judicial power as a source of limitation of judicial review

The distinction between judicial review and merits review is a central feature of Australian administrative law. The existence in Australia of a dual system of review of administrative decisions is to some extent cumbersome. Professor Cane has suggested that judicial review should extend to merits review and that, to the extent that the constitutional separation of powers and the concept of judicial power stand as an obstacle to that outcome, the concept of judicial power is unrealistic and should be reformulated.50 That the separation of powers and the concept of judicial power, as developed by the High Court, represent an obstacle to the attainment of Professor Cane's goal is unquestionable. I have expressed my views elsewhere51 and will not repeat them.

Nevertheless it is necessary to make the point that the expression "merits review" is not notable for its precision and that it may convey various shades of meaning to the discerning observer. For present purposes, however, we can take it that merits review means review of a decision by a court or tribunal which is empowered to substitute its view of the correct or preferable decision for the decision under review. There may well be administrative decisions which turn on issues, the determination of which would be appropriate to the exercise of judicial power. On the other hand, there are other administrative decisions which turn on contentious questions of policy in which the decision-maker finds it necessary to formulate or evaluate policy. High Court decisions of long standing are solidly against the view that such decisions involve the exercise of judicial power. So there is no way in which, consistently with the Australian Constitution, federal courts could be given a "merits review" function in relation to decisions of that kind, so long as the decision in the *Boilermakers Case*52 holds its ground.

The reasoning in the *Boilermakers Case*, both in the High Court and the Privy Council, is by no means compelling. The incompatibility test favoured by Williams J in the High Court but rejected by the Privy Council has much to commend it. Were it to be accepted, a court could perform administrative as well as judicial functions, so long as the administrative functions are compatible with the Court's judicial functions and the exercise of federal judicial power. In that event, the troublesome distinction between judicial and non-judicial power would not be as important as it presently is. The distinction would, of course, continue to have importance in that federal judicial power is vested by s 71 in Ch III courts and cannot be exercised by any other body.

Boilermakers seems, however, to be set in concrete. Its authority has been accepted in a number of cases over a long period of time. Moreover, the current importance attached to the necessity of maintaining public confidence in the administration of justice, as exemplified in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*53 and *Kable v Director of Public Prosecutions*,54 provides another reason for supporting *Boilermakers*. Indeed, that very consideration, in all probability, covertly played a part in the adoption of the *Boilermakers* doctrine. Participation in the unruly world of industrial arbitration and labour relations was thought likely to damage public confidence in the courts, not least by Sir Owen Dixon. In any event, it is questionable whether giving the courts a merits review jurisdiction is a desirable development, quite apart from the aspect of public confidence in the judiciary.

We are left then with the borderline uncertainties arising from our inability to offer a brightline definition of judicial power. These uncertainties are, to some extent, alleviated by the "chameleon" principle according to which the character of the function will be influenced by the character of the body in which it is vested. Even if a functional rather than a purely conceptual approach were adapted to the classification of functions, these uncertainties would not entirely disappear.

As things stand, despite the lack of clear definition of judicial power, the results are reasonably workable — core judicial functions are protected and extensive tribunal jurisdiction is permitted subject to court supervision and court enforcement where necessary.

The concept of the rule of law as a source of justification and as a source of limitation of judicial review

Already I have discussed the rule of law as a justification for the application of common law principles in the judicial review of administrative decisions. The corollary of this proposition is that the rule of law provides no authority for judicial review of administrative decisions that extends beyond review for conformity with the requirements of the law. As things presently stand, that means that the rule of law provides justification for review for disconformity with the requirements of statute and common law. These requirements are not static. Statute law, for example, could be amended to provide that the decision-maker reaches the correct or preferable decision, subject to considerations of judicial power. In that event, whether review on the basis of the correct or preferable decision would involve an exercise of judicial power depends upon considerations which have already been discussed, that is, on the content of the decision. For example, does it involve policy issues? There is, of course, an element of unreality in this. Courts which are not Ch III courts have been given functions which involve consideration of policy issues.

The exclusion of judicial review by privative clauses

At common law it was considered that the legislature could validly, by means of a privative or ouster clause, curtail the availability of judicial review. Such clauses were construed by reference to the presumption that the legislature did not intend to deprive the citizen of access to the courts, except to the extent expressly stated or necessarily implied. If, however, the intention was clear, the clause would exclude review for errors of any kind. The decision was then immune from review. In cases where the intention was not clear, the *Hickman* principle might apply.55

The common law approach had its origins in a non-constitutional milieu and was necessarily subject to constitutional imperatives and limitations. It is now well settled that such a clause cannot oust the jurisdiction of the High Court to review decisions and orders which exceed constitutional limits or the jurisdiction conferred on the High Court by s 75(iii) and (v).56 There is, however, no actual decision in which a privative clause has been held invalid on the ground of contravention of s 75(v). Nor can such a privative clause preclude the High Court from reviewing decisions which involve the refusal by Commonwealth officers to discharge "imperative duties" or go beyond "inviolable limitations or restraints".57 But it has been accepted that Commonwealth legislation can: (i) protect against "a mere defect or irregularity which does not deprive the tribunal of power to make the award or order"; or (ii) provide that a decision is valid despite "some procedural defect which would otherwise result in invalidity".58 It would be a mistake to conclude that the operation of a privative clause is confined to procedural errors.59

In *Darling Casino v NSW Casino Control Authority*,60 Gaudron and Gummow JJ expressed the view that there is —

> … no constitutional reason … why a privative clause might not protect against [non-constitutional and non-jurisdictional] errors … by, within the limits of the relevant legislative powers, operating to alter the substantive law to ensure that the impugned decision or conduct or refusal or failure to exercise power is in fact valid and lawful.61

It is, of course, necessary to distinguish the position of the Federal Court from that of the High Court. The jurisdiction of the Federal Court, unlike the High Court, lies within the gift of statute. Relevantly the Federal Court exercises jurisdiction in matters arising under a law of the Parliament within the meaning of s 76(ii) of the Constitution and a "matter" may consist of something less than the entire controversy or claim in issue between the parties. It was against this background that a majority of the High Court in *Minister for Immigration & Multicultural Affairs v Thiyagarajah*62 said that the consequence of the decision in *Abebe v Commonwealth*63 was to —

> … deny any general proposition that proceedings for judicial review at least under a structure provided by a law of the Commonwealth for which s 76(ii) applies to provide federal jurisdiction for that review necessarily involve[s] the giving of effect to the whole of the legal rights and duties of the parties.64

The potential and actual difference between the jurisdictions of the High Court and the Federal Court has enabled the government, as a matter of deliberate legislative policy, to bring about a situation in which applications for relief under s 75(v), on grounds not available in the Federal Court, are made to the High Court. This imposes an unreasonable, indeed an oppressive, burden on the High Court, in relation to many matters which are unworthy of its attention.

Abebe and Eshetu,65 you will recall, involved the provisions in the amended Migration Act which drastically curtailed the available grounds of review in the Federal Court. It is to be hoped that when exercises of this kind are undertaken they will be better drafted.

The *Hickman* principle

The principle which underlies the operation of privative clauses as well as the operation of the *Hickman* principle itself has been expressed in this way:

> It is … impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition.66

Although there have been suggestions that the *Hickman* principle has a constitutional basis or that its genesis owes something to the presence of s 75(v),67 the principle owes nothing to the Constitution or s 75(v).

The *Hickman* principle, as stated by Sir Owen Dixon, was an endeavour to reconcile the requirements of the substantive provisions of a statute imposing limits upon the exercise of the discretionary power given to the decision-maker with a privative clause apparently intended to exclude jurisdictional review. It is therefore a principle of statutory construction and it applies to State as well as federal legislation.68 The effect of a privative clause, when the *Hickman* principle is applied to it, was expressed in the explanatory memorandum relating to the 1998 amendments to the *Migration Act 1958* (Cth) in connection with judicial review. The memorandum stated:

> A privative clause is a provision which, although on its face purports to oust all judicial review, in operation, by altering the substantive law, limits review by the courts to certain grounds."

The *Hickman* principle mandates a particular approach to a question of construction. To the extent to which the principle requires that the courts ascertain, by the ordinary processes of statutory interpretation, the scope of the jurisdiction and powers of the statutory body and the legal consequences of any departure from the relevant statutory requirements, there can be no quarrel with the principle. The availability of judicial review necessarily depends upon what the statute has to say, expressly and impliedly, about these matters. So the statute may provide, expressly or impliedly, that a failure to comply with statutory requirements does not result in invalidity.69 If the statute so provides, judicial review will not be available for non-compliance which falls within the provision ensuring that the statutory body's decision will have a valid operation.

The case, however, for treating a privative clause which takes the form of an ouster clause, that is, a clause which excludes or restricts access to the courts by way of judicial review, as evincing a legislative affirmation of validity has less to commend it. No encouragement should be given to attempts to restrict access to the courts for the determination of rights by converting provisions restricting access into provisions having substantive validity. If the legislature intends to treat non-compliance with its prescribed requirements as not resulting in invalidity, it should be encouraged to say so without achieving that result indirectly through the operation of an ouster clause. The efficacy of the legislative process will be enhanced if statutory provisions are expressed in a way that captures their intended operation.

The *Hickman* principle protects a decision not exhibiting jurisdictional error on its face from invalidation if: (i) it was a bona fide attempt to exercise the power; (ii) it relates to the subject matter of the legislation; and (iii) it is reasonably capable of reference to the power given to the body. In conformity with the authorities, a further proviso should also be added, namely that the decision does not violate any statutory requirement which is regarded as imperative or inviolable.

The *Hickman* provisos are complicated and their operation is far from clear. The qualification relating to a decision not exhibiting jurisdictional error on its face, which was formulated long before *Anisminic Ltd v Foreign Compensation*70 and *Craig v South Australia*71 were decided and at a time when the distinction between errors going to the existence of jurisdiction and errors in the exercise of jurisdiction was in vogue, is now of uncertain operation. As that distinction no longer has its former significance in relation to judicial review of tribunal decisions, it is by no means clear how the qualification is intended to operate. The proviso was intended to operate by reference to jurisdiction in its narrow sense. If it now operates by reference to the broad concept of jurisdiction in the sense of authority or power to decide, the area of operation of the *Hickman* principle is confined considerably.

According to *Craig*, if an administrative tribunal —

> … 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.72

These are errors which are jurisdictional errors.

This list of jurisdictional errors is not exhaustive.73 Not all these errors would necessarily reflect jurisdictional error "on the face" of the decision, whatever these words may mean.

Because the *Hickman* principle does not, in my view, have a constitutional origin, I have not found it necessary to discuss its relationship with s 75(v). In cases to which the *Hickman* principle applies to validate the challenged exercise of power by the decision-maker, no relief under s 75(v) would be available. Conversely, if *Hickman* does not apply, then relief will be available so long as the conditions relevant to relief are made out. Only if there is a dissonance between the concept of "jurisdictional error" in the context of decisions of administrative tribunals and the concept of "jurisdictional error" for which relief under s 75(v) issues could a situation arise in which the application of the *Hickman* principle collides with that provision of the Constitution.74

The provisos were discussed in *O'Toole v Charles David Pty Ltd*,[75] *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[76] and *Darling Casino Ltd v NSW Casino Control Authority*,[77] but the discussion in those cases has not provided much in the way of illumination. A principle which depends for its application upon such an artificial and complicated formula is of doubtful utility.

The *Hickman* principle is an Australian home-grown expedient. It does not feature in the administrative law jurisprudence of any other common law jurisdiction. It is an artificial rule of construction designed to achieve a compromise which will give some effect to a privative clause but certainly not the effect which the legislature intended. One may question the propriety of a principle the effect of which is to limit access to the courts by impliedly expanding the authority and power of the decision-maker in the context of judicial review when the clause in terms goes beyond what is constitutionally permissible.

The construction given by Australian courts to privative clauses and the effect of the *Hickman* principle results in restriction of access to the courts. The Australian approach is to be compared with the English approach where the courts have taken a strong position on privative clauses. The Australian approach is also to be contrasted with that of jurisdictions where access to the courts is a guaranteed right.

My concluding comment is that it would be a mistake to make too much of this contrast. The real difference between Australia and other jurisdictions lies in the determination of Australian politicians, with the apparent backing of public opinion, to restrict access to the courts in particular areas, notably the migration area. This contagion could spread into other areas. It is a prospect which could conceivably place pressure on the rule of law. Although right of access to the courts for the determination of legal rights is a fundamental right and a central element in the rule of law, right of access to the courts presupposes the existence of a relevant legal right — or at least an arguable legal right. It would be a bleak Administrative Law landscape if, simply in order to restrict access to the courts, rights were to be eliminated or curtailed.

1 Justice Gummow, "The Permanent Legacy" (2000) 28 *Federal Law Review* 177 at 180.

2 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

3 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179 per Mason CJ; *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 at 92 per Gaudron and Gummow JJ; at 138–139 per Hayne J; see also at 137–138 per Kirby J.

4 *The Queen v Cook; ex parte Twigg* (1980) 147 CLR 15 at 31 per Aickin J; *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 at 90–91 per Gaudron and Gummow JJ (where reference is made to the powers conferred by s. 31 of the *Judiciary Act 1903* (Cth)).

5 *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82.

6 Sir Owen Dixon, *Jesting Pilate* (Melbourne, 1965) at 203 et seq; "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 ALJ 240.

7 Dixon, *ibid* at 199; *Cheatle v The Queen* (1993) 177 CLR 541 at 552.

8 1 *Cranch* 137 at 177 (1803) [5 US l87 at 111].

9 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36 per Brennan J; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152–153 per Gleeson CJ, Gummow and Hay ne JJ.

10 *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82.

11 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 per Gaudron J.

12 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

13 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

14 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 184 CLR 168 at 178 per Mason CJ; *Re Refugee Tribunal*; *ex parte Aala* (2000) 204 CLR 82 at 139.
15 See Professor L R Zines, "Constitutional Aspects of Judicial Review of Administrative Action" (1998) 1 *Constitutional Law and Policy Review* 50.
16 C Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000).
17 C Forsyth, "Heat and Light: a Plea for Reconciliation", *ibid* at 396.
18 *Ibid*.
19 *Reg v Hull University Visitor*; *ex parte Page* [1993] AC 682 at 701.
20 *Boddington v British Transport Police* [1999] 2 AC 143 at 171 per Lord Steyn.
21 *Ibid* at 164 per Lord Browne-Wilkinson.
22 *R v Secretary of State for the Home Department*; *ex parte Pierson* [1998] AC 539 at 587.
23 See P A Joseph, "The Demise of Ultra Vires — Judicial Review in the New Zealand Courts" [2001] *Public Law* 354 at 362–363.
24 [1998] AC 539 at 587–591 per Lord Steyn.
25 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Judicial review of the prerogative has been undertaken in a number of subsequent cases.
26 (1981) 151 CLR 170 at 220–221.
27 (2000) 204 CLR 82 at 101.
28 *Ibid*.
29 (1987) 15 FCR 274 at 278, 280–281, 302–303.
30 *R v Secretary of State for the Home Department*; *ex parte Bentley* [1994] QB 349.
31 *Burt v Governor-General* [1992] 3 NZLR 672 at 681.
32 *Abebe v Commonwealth* (1999) 197 CLR 510 at 560 per Gummow and Hayne JJ (though in dissent, their Honours were not in dissent on this point).
33 *Re Panel on Takeovers and Mergers*; *ex parte Datafin Pty Ltd* [1987] QB 815.
34 *R v Football Association*; *ex parte Football League* [1993] 2 All ER 833.
35 (1863) 14 CBNS 1280 at 1295 [143 ER 414 at 420].
36 M Elliot, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" [1999] *CLJ* 129.
37 For a more comprehensive discussion of the objections to the *ultra vires* doctrine, see M Aronson & B Dyer, *Judicial Review of Administrative Action* (2nd ed, LBC, 2000) at 91–94; P Craig, "Ultra Vires and the Foundations of Judicial Review" [1998] *Cambridge* LJ 63; P Craig, "Competing Models of Judicial Review" [1999] *Public Law* 428; J Jowell, "Of Vires and Vacuum: The Constitutional Context of Judicial Review" [1999] *Public Law* 448.
38 (1992) 170 CLR 596 at 598–600.
39 (2000) 75 ALJR 52 at 83.
40 *Ibid* at 60–61.
41 (1985) 159 CLR 550 at 615.
42 (1997) 190 CLR 1 at 36.
43 (2001) 75 ALJR 889 at 912.
44 *Ibid* at 896.
45 (1985) 159 CLR 550 at 614.
46 (1990) 170 CLR 596.
47 *Ibid* at 604.
48 (2000) 199 CLR 135 at 153.
49 *Cormack v Cope* (1974) 131 CLR 432 at 452 per Barwick CJ.
50 Peter Cane, "Merits Review and Judicial Review: The AAT as Trojan Horse" (2000) 28 *Federal Law Review* 213.
51 "Judicial Review: A View from Constitutional and Other Perspectives" (2000) 28 *Federal Law Review* 331.
52 *R v Kirby*; *ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
53 (1997) 189 CLR 1.
54 (1996) 189 CLR 51.
55 *R v Hickman*; *ex parte Fox and Clinton* (1945) 70 CLR 598 at 617–618.
56 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 630–631.
57 *R v Metal Trades Employers' Association*; *ex parte Amalgamated Engineering Union* (1951) 82 CLR 208 at 248.
58 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 180, 206–207.

59 But cf *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632–633 per Gaudron and Gummow JJ.

60 *Ibid* at 633.

61 Citing *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205.

62 (2000) 169 ALR 515.

63 (1999) 197 CLR 510.

64 (2000) 169 ALR at 523–524.

65 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

66 *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 per Dixon J.

67 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 240 per McHugh J.

68 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.

69 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388–391 per McHugh, Gummow, Kirby and Hayne JJ (where it was pointed out that Parliament can validly provide that a breach of the legislative rules by the decision-maker will not invalidate the official's decision and pointed out that courts have accepted that it is unlikely that it was the legislative purpose that an act done in breach of a statutory provision should be invalid if public inconvenience would result from invalidity).

70 [1969] 2 AC 147.

71 (1995) 184 CLR 163.

72 *Ibid* at 179 per *curiam*.

73 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at 21 per McHugh, Gummow and Hayne JJ. See also at 10–12 per Gaudron J.

74 But see *Darling Casino Ltd v NSW Casino Authority* (1997) 161 CLR 602 at 633 per Gaudron and Gummow JJ. See generally Professor L R Zines, "Constitutional Aspects of Judicial Review of Administration Action" (1998) 1 *Constitutional Law and Policy Review* 50 esp at 53.

75 (1991) 171 CLR 232.

76 (1995) 183 CLR 168.

77 (1997) 191 CLR 602.