4TH NATIONAL LECTURE ON ADMINISTRATIVE LAW

DEMOCRACY, PARTICIPATION AND ADMINISTRATIVE LAW

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The Athenian poet-dramatist Aeschylus is regarded, as you know, as the Western World's first great tragedian. There were, perhaps, other great tragedians before him, but he was the first who was so exceptional that sufficient copies were made of his work for it to survive.

Aeschylus was a very interesting man. Notwithstanding the many honours which he won from the Athenians for his tragedies, the achievement of which he was most proud was his participation in the Athenian victory over the Persians at Marathon in 490 B.C. We know this from his own epitaph.

At Marathon, he, and about 22,000 other citizen soldiers of the new democracy, prevented the invasion and destruction of Athens by the mercenary armies of Darius the Great.

The remarkable thing about the battle of Marathon is that it was fought by a democracy that was only two decades old, but it was a fully-fledged democracy nonetheless.

We know that was the case because, before Marathon, Athenian aristocrats who died in battle were commemorated by life-size stone statues and boastful verses celebrating their individual prowess as warriors. After Marathon, each Athenian who died in the battle was mentioned on a stone slab only by his given name and his membership of one of the ten Athenian tribes: there was no way of telling whether they were aristocrats or artisans or peasants; the class divisions which characterised the period of the Peisistratid tyranny had lost their legal force and, it would seem, much of their social cachet.

Offices of state were filled by lot among all Athenian citizens, and the people exercised power directly through their assembly.

Aeschylus was also an extraordinarily sophisticated thinker, deeply committed to the nascent Athenian democracy. He defended it on the field of battle and he mused upon its foundation and its nature in his plays.

His greatest plays were probably the trilogy known as the *Oresteia*.[1]

The first two parts of the *Oresteia* touch upon the futility of violence and revenge in an heroic or aristocratic age, that is, the age when a small number of armed men dominated primitive farming communities.

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In the first play, Agamemnon sacrificed his daughter Iphigenia to the gods before sailing to Troy, to ensure fair winds. In the second play, Agamemnon's wife, Clytemnestra, Iphigenia's mother, murdered Agamemnon in his bath on his return from Troy.

Orestes, the son of Agamemnon and Clytemnestra, in conformity with the natural requirements of filial piety, killed Clytemnestra in revenge for Agamemnon's death. Clytemnestra's ghost, together with the Furies, demands Orestes' death in retaliation for the crime of matricide.

Orestes claimed that he was obliged by the claims of natural piety to avenge his father. Grey-eyed Athena, the Goddess of Wisdom, as well as the patron deity of Athens, heard his plea. The third part of the trilogy shows how the futility of the cycle of violence and vengeance is avoided by the trial ordained by Athena.

Hegel thought that the conflict represented in this play was the foundation of Western civilization: on one side, the Furies speaking for a primitive natural law of vendetta and blood feud which demands that the matricide be avenged; on the other side, Orestes and Apollo call for 'justice' in human terms. They appeal to Athena to decide the conflict. And she, in her wisdom, institutes the trial.

Before the trial there was a seemingly insoluble dilemma arising from the circumstance that each side's position was right in terms of the absolute claims of nature.

Aeschylus was suggesting that the civic institution of the adjudicative function, and, specifically, jury trial, is the mechanism whereby a democratic community can resolve dilemmas insoluble by aristocracy or tyranny, save by violence, which, of course, never solves anything.

Aeschylus's story of the invention of the trial is an allegory of the foundation of the Athenian participatory democracy: 'Aeschylus offers this unprecedented means of resolution as a founding emblem of Athens' moral and political ethos, the rule of communal law.'[2] These 'founding emblem[s] of Athens' moral and political ethos' operate through the citizens themselves.[3] The primitive natural world of the blood feud and the rule of might makes right were left behind with aristocracy and tyranny.

The Athenian democracy was one in which the citizenry participated fully in all the functions of government. Just as the executive and legislative functions of the Athenian polis were performed by the participation of the entire citizenry, so was its adjudicative function. There were no judges appointed for their expertise or independence. And incidentally, in order to obviate perceived impediments to the performance of the adjudicative function, lawyers were not permitted to speak. The litigant had to speak for himself or herself directly to his or her fellow citizens.

In our courts, questions of criminal guilt are still decided by juries of citizens, the apostolic number of twelve substituting for the Athenian assembly of the whole people.

Some lawyers are, of course, jury sceptics, and are happy to emphasise perceived shortcomings; but the great justification of the jury as an instrument of adjudication lies in its appeal to democratic values and the directness of the participation of citizens chosen at random in public life. As Kennedy J of the Supreme Court of the United States, said in *Powers v Ohio*:[4]

> The jury … invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government.

The pure participatory democracy of classical Athens endured for barely a century. During the subsequent twenty-five hundred years we have seen nothing like that level of participation. For most of the time there was little democracy to speak of and when it emerged, our populations had seemingly become too large and our lives too complicated to allow popular participation, save in the representative form of the jury, and then only in the most serious of litigious matters.

In those law systems where the judiciary is not elected, the performance of the balance of the adjudicative function of the state is significantly removed from meaningful participation by the citizenry.

And more immediately for Australians, as for many other modern liberal democracies, the adjudicative function of the state is performed by judges appointed by the executive government. Our Constitution as we have interpreted it, demands a strict separation of the judicial function from the other functions of government.[5] These arrangements serve values of expertise and independence but not democratic participation. For some liberal commentators, such as Laurence Tribe: 'The whole *point* of an independent judiciary is to be 'antidemocratic'…'[6]

In 2002, from the other end of the spectrum, Robert Bork, the eminent conservative commentator, wrote that 'it would have been unthinkable until recently that so many areas of our national life would be controlled by judges'.[7]

For those of us who have been the beneficiaries of the welfare state, the level of involvement of judges in the life of our nation appears to be a wholesome response of the rule of law to the development of the welfare state, a growing consciousness of environmental issues and a general concern about human rights.

In response to these developments, statute law has come to permeate the economic and social life of the nation. And with the expansion in legislative activity, there has grown a large administrative apparatus. In response, the body of law which we today refer to as administrative law was called into existence.

The last sixty years has been a great era in which to live in a Western liberal democracy. Many of those in this room who are over fifty years of age have been the first generation of their family to attend university. All of us have enjoyed opportunities, in terms of security and prosperity and quality of life, of which our parents and grandparents would not have dreamed.

Insofar as it is true to say that 'many areas of our nation and life (are) controlled by judges', that comment reflects the necessary and wholesome role of the judiciary as the ultimate guarantor of the legislative promises of democracy and the welfare state to its people.

That having been said, it is timely to note that there is now a shift back, in the discourse of the political theorists, to a focus on participatory democracy; in for example the book of essays published in 2008 by the American Political Science Association: 'The Age of Direct Citizen Participation'.[8]

I suggest, in the context of democracy, participation and administrative law, that the concerns, expressed particularly by academic lawyers in Australia, that the scope of judicial review has been unduly narrowed by judicial decisions are unwarranted.[9] Indeed, in one important area, privative clauses, the scope of judicial review has been expanded. The limits which are recognised by the courts on the scope of judicial review are consistent with its historical function; and there are good reasons, both practical and theoretical, in terms of democratic values for retaining those limitations.

Public law and private law or something else?

In 2001, Sir Anthony Mason acknowledged that in the Anglo-Australian development of administrative law, the distinction between public law and private law is crucial for the availability of judicial review.[10] But in what sense are we speaking of public law and private law?

Sir Anthony referred to *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc*,[11] where it was held that a decision of the Panel on Take-overs and Mergers in the United Kingdom was subject to judicial review because it operated as part of the governmental framework for the regulation of those activities in the City of London. Because that body was able to exercise a range of statutory powers, including a power to impose penalties, it was held to be under a duty to exercise its public power judicially. That decision can usefully be contrasted with the decision in *Reg v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan*[12] where the proceedings of the Jockey Club were held not to involve the exercise of public power.

Sir Anthony went on to say:[13]

> I have always thought that it is difficult to formulate a brightline distinction between public law and private law. That is why I do not regard the reasoning in *Datafin* as particularly convincing. On the other hand, there is much to be said for the view that bodies exercising public or regulatory powers should be subject to judicial review. What we should be endeavouring to determine is what bodies beyond those presently subject to judicial review should be exposed to judicial review and on what grounds.

It is administrative decision-making of the kind which is apt to create or alter or enforce rights, as distinct from the mere exercise by public agencies of rights available alike to public agencies and private persons, which is the characteristic of the exercise of public power amenable to judicial review.

Although this is an area where 'brightline distinctions' are indeed rare, the distinction between a decision by a public agency to alter or enforce the rights enjoyed by others and a decision by a public agency to exercise rights enjoyed by it in common with others is sufficiently stable to be of practical utility. This distinction fixes upon the difference between the exercise of sovereign authority, ie the power to change or enforce the rights of others, and the exercise of rights enjoyed by subjects and public agencies alike. I suggest that this distinction is of long-standing in the common law.

In Chapter 45 of *Magna Carta*, King John promised: 'We will appoint as justices, constables, sheriffs or other officials, only men that know the law of the realm and are minded to keep it well.'

The promise in Ch 45 of *Magna Carta* was made, in part at least, to give specific content to the earlier promise in the Charter whereby John recognised the fundamental nature of his role as sovereign as the guarantor, if not the source, of justice in his realm. In Chapter 40 of *Magna Carta*, he promised: 'To no one will we sell, to no one deny or delay right or justice.' The doing of right and justice was the obligation of the King.

At this time there was a nascent judiciary which was as directly connected to the sovereign as were the King's executive assistants. Ralph Turner observed in his book, 'The English Judiciary in the Age of Glanville and Bracton':[14] 'The judges recognised the monarch as the source of justice, and they often marked cases *loquendum cum rege* [to be discussed with the King].'

And while the 'royal justices were unashamedly the King's servants' they were also self-consciously a professional judiciary.[15] As Turner says:[16]

> The roots of 'due process' lie in the twelfth and thirteenth centuries, planted there by professional royal servants whose energies made the *curia regis* a court for complaints of all freeman, creating a common law for all England.

No distinction was drawn in the 13th century between the judicial and administrative organs of royal government in terms of their obligations to enforce and obey the law. The point is that, even at this early time, the doing of justice through executive and judicial agents was conceived as the obligation of the sovereign.

From the beginning of a recognisable common law, there was an expectation of legal integrity in decision-making by royal servants, including the judiciary. The streams of executive and judicial power shared a common origin in the sovereign authority of the King. In time, the legal integrity of a decision-maker by the executive agents of the sovereign came to be enforced under the common law by the judicial arm of government. But the root from which these two branches stemmed was the sovereign power to make or alter or enforce laws.

In attempting to identify the evolution of judicial review as the history of an idea, I acknowledge the risk that my view is distorted by foundational myths that are, in truth, creatures of the Zeitgeist. By way of justification I refer to the observation of the great German scholar, Burckhardt, in a letter written in 1859:[17] 'Even a half-false historical perspective is worth much more than none at all.'

Even a blurred view of whence we have come may help us to gauge whither we are heading.

Broadly speaking, agencies of the executive government make two kinds of decisions: those of a governmental character (the original example of which is the exercise of the prerogative), the distinguishing feature of which is the capacity to affect rights, on the one hand; and, on the other hand, those which involve the exercise of rights which the agency holds and exercises, albeit on behalf of the community, as an equal participant in the life of the community.

In 1700 in *Groenvelt v Burwell*,[18] Sir John Holt CJ was speaking only of the first kind of decision-making when he said that 'no court can be intended exempt from the superintendency of the King in this Court … [so] it is a consequence of every inferior jurisdiction of record, that their proceedings be removable into this Court, to … see whether they keep themselves within the limit of their jurisdiction.'

It is the power to create or alter or enforce rights that is characteristic of the inferior jurisdictions to which Sir John Holt referred as being under the supervision of the King's Bench. We can now say confidently that it is a characteristic feature of the judicial function to say what the rights and duties of subjects shall be in controversies involving other functionaries of the state; and to ensure that functionaries who exercise the sovereign power will do so in accordance with the law. Anything contrary to the essence of justice in terms of fairness and reasonableness would not be worthy of the sovereign authority which is the source of authority.[19]

It was the capacity of decisions to alter the rights of the governed which was the characteristic feature of what I am calling the exercise of sovereign power by the agents of the Crown. What is special about the exercise of sovereign power is that it is apt to affect what the rights of subjects are. A robber baron (or, later, a railway baron) might infringe the

rights of others by his actions and thereby do wrong but he could not negate the rights of others by his decision to do wrong.

When Marshall CJ in *Marbury v Madison* said that '[i]t is emphatically the province and duty of the Judicial Department to say what the law is,'[20] his Honour was making the point that the enforcement of the law against executive governments (and even legislators where a written constitution limits their powers) is inherent in the very concept of judicial power in the common law tradition.

As judicial review of administrative action became one of the characteristic functions of the judiciary as an arm of government, it was routinely concerned with the effect of decision-makers, judicial or executive, upon the rights of the governed. The important point to be made here is that the judiciary did not require a grant of statutory authority to rule upon the legality of the acts of inferior courts or administrative tribunals because the necessary authority was as much a natural or ordinary incident of judicial power as the authority to interpret a statute to construe a contract or a will. This authority may be contrasted with the authority of a superior court to hear and determine appeals from a lower court which has always been the creature of statute.

Privative clause

This discussion has ramifications for the efficacy of privative clauses at both state and federal levels: may I mention them now.

It is fair to say that, in judicial discussion of the extent to which the function of the superior courts to supervise the legality of the exercise of administrative power may be limited by the legislature, it had not been suggested, until *Kirk v Industrial Relations Commission of New South Wales*,[21] that the principles of jurisdictional error on which judicial review of administrative action proceeds are themselves so integral to and inseparable appurtenances of judicial power that Chapter III of the Commonwealth Constitution may invalidate legislative attempts to limit their operation.[22]

In *Kirk*, their Honours said:[23]

> In *Nat Bell Liquors* [[1922] 2 AC 128 at 162], Lord Sumner said that the jurisdiction to grant certiorari could be contracted or expanded by the legislature: contracted by taking away certiorari 'explicitly and unmistakably' or limiting its availability; expanded by restoring the remedy 'to its pristine rigour by restoring to the record a full statement of the evidence'. The provisions of s 69 of the *Supreme Court Act* are a species of the latter kind of legislative step. But legislation restricting the availability of the remedy is more common.
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> As noted earlier in these reasons, s 179(1) of the IR Act provides that a decision of the Industrial Court, however constituted, 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'. The provisions made by s 179 are expressly extended (by s 179(5)) 'to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise'.
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> Finality or privative provisions have been a prominent feature in the Australian legal landscape for many years. The existence and operation of provisions of that kind are important in considering whether the decisions of particular inferior courts or tribunals are intended to be final. They thus bear directly upon the second of the premises that underpin the decision in *Craig* (that finality of decision is a virtue). The operation of a privative provision is, however, affected by constitutional considerations. More particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decisions of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework for the Australian judicial system.

Their Honours went on to mention the implications of the Commonwealth Constitution:[24]

In considering Commonwealth legislation, account must be taken of the two fundamental constitutional considerations pointed out in *Plaintiff S157/2002 v The Commonwealth* [(2003) 211 CLR 476 at 512 [98]]:

> 'First, the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.'

The aspect of the decision in *Kirk,* which is of particular interest for present purposes, is the proposition that the supervisory jurisdiction of the Supreme Courts of the States is an essential part of what is guaranteed by s 73 of the Commonwealth Constitution. So far as the text is concerned, this provision consists relevantly of the statement that:

> The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the (Commonwealth) Parliament prescribes, to hear and determine appeals from all judgments … of … the Supreme Court of any State.

Their Honours said:[25]

> In considering State legislation, it is necessary to take account of the requirement of Ch III of the *Constitution* that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.
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> At federation, each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England. It followed that each had 'a general power to issue the writ [of certiorari] to any inferior Court' in the State. Victoria and South Australia, intervening, pointed out that statutory privative provisions had been enacted by colonial legislatures seeking to cut down the availability of certiorari. But in *Colonial Bank of Australasia v Willan,* the Privy Council said of such provisions that:
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> > 'It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. *There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.'
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> That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.
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> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, 'with such exceptions and subject to such regulations as the Parliament prescribes', s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the 'Federal Supreme Court' in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.
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> There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles

> that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.
> [Footnotes omitted].

This reasoning suggests that a combination of the concept of jurisdictional error – expanded to encompass decisions unfairly or unreasonably made – and the developing jurisprudence in relation to Ch III of the Constitution will trump a privative clause.[26] We are left with interesting questions as to the extent to which this will be so.

In this regard, the Court in *Kirk* did not give the privative clause its quietus. Their Honours said:[27]

> This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

The scope of judicial review

The abiding concern of judicial review as it was developed in the common law has been with administrative decisions which affect the rights of subjects. Judicial review has not been concerned with decisions whereby rights which are enjoyed by all persons equally are exercised by an agent of the Crown against another person. I propose to return to discuss that point after discussing the further point. It is that concern, and not a wider concern with the quality of decision-making by public authorities generally, which also informs the scope of review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the *AD(JR) Act'*) and its State analogues.

The AD(JR) Act and its analogues

The obvious focus for discussion at this point is the High Court's decision in *Tang* and the academic criticism which that decision provoked.

In *Griffith University v Tang ('Tang')*,[28] the High Court was concerned with the ambit of judicial review available under the *Judicial Review Act 1991* (Qld), the state analogue of the *AD(JR) Act*. The question was whether the University's decision to exclude a student from the PhD candidature program was 'a decision made under an enactment' and so subject to judicial review.

The decision to exclude the student was made by committees to whom decision-making powers were delegated by the Council of the University under the *Griffith University Act 1988* (Qld). The High Court held that the decision took effect under the entitlement of the University under the general law to cease its voluntary association with the student. That decision was not expressly or impliedly required or authorised by the *Griffith University Act* and it did not create or alter legal rights in a way which derived its force from that Act.

In *Tang*, Gummow, Callinan and Heydon JJ said: [29]

> The decisions of which the respondent complains were authorised, albeit not required, by the University Act. The Committees involved depended for their existence and powers upon the delegation by the Council of the University under ss 6 and 11 of the University Act. But that does not mean that

> the decisions of which the respondent complains were 'made under' the University Act in the sense required to make them reviewable under the Review Act. The decisions did not affect legal rights and obligations. They had no impact upon matters to which the University Act gave legal force and effect. The respondent enjoyed no relevant legal rights and the University had no obligations under the University Act with respect to the course of action the latter adopted towards the former.

The point which the joint judgment makes here is not about the immediate source of the decision-making power, but that the exercise of the University's decision-making power was not apt to create or alter – as opposed merely to exercise – rights.

In referring to the ADJR's description of reviewable decisions as decisions 'of an administrative character … made under an enactment', Gummow, Callinan and Heydon JJ said:[30]

> There is a line of authority in the Federal Court, beginning with the judgment of Lockhart and Morling JJ in *Chittick v Ackland* and including the judgments of Kiefel J and Lehane J in *Australian National University v Lewins,* which assists in fixing the proper construction of the phrase 'decision of an administrative character made … under an enactment'. As noted earlier in these reasons, the presence in the definition in the AD(JR) Act of the words '(whether in the exercise of a discretion or not …)' indicates that the decision be either required or authorised by the enactment. *Mayer* shows that this requirement or authority may appear sufficiently as a matter of necessary implication. However, whilst this requirement or authority is a necessary condition for the operation of the definition, it is not, by itself, sufficient.
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> The decision so required or authorised must be 'of an administrative character'. This element of the definition casts some light on the force to be given by the phrase '*under* an enactment'. What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?
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> The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins*, does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?
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> If the decision derives its capacity to bind from contract or some other private law source, then the decision is not 'made under' the enactment in question. Thus, in *Lewins*, a decision not to promote to Reader a member of the staff of the Australian National University was not 'made under' the *Australian National University Act* 1991 (Cth) (the ANU Act). Lehane J explained:
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> > 'In this case, the relevant statutory power (in s 6(2)(k) of the ANU Act) is simply one 'to employ staff'. Obviously that, taken together with the general power to contract, empowers the University to enter into contracts of employment, to make consensual variations of employment contracts and to enter into new contracts with existing employees. But I cannot see how it is possible to construe a mere power to employ staff as enabling the University unilaterally to vary its contracts with its employees or to impose on them, without their consent, conditions which legally bind them – except, of course, to the extent that contracts of employment may themselves empower the University to make determinations which will be binding on the employees concerned'.
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> [Footnotes omitted].

The decision in *Tang* attracted a considerable volume of academic criticism. Mantziaris and McDonald in an article in the *Public Law Review* criticised this reasoning as 'circular … for it offers no independent justification for identifying decisions subject to jurisdiction'.[31]

But surely the point of this passage from the joint judgment is as clear as it is fundamental. It is that the statutory requirement that the decision be of an administrative character serves to exclude from the scope of review under the *AD(JR) Act* decisions of a legislative or judicial character, these being the other kinds of decision which involve the exercise of public power, in the sense of altering the rights and liabilities of the governed.

Some academic criticism of the decision in *Tang* was couched in unusually strong language. For example, Professor Michael Taggart commented:[32]

> It beggars belief how a reform like the *AD(JR) Act 1977* (and its state equivalents) which was intended 'to simplify and clarify the grounds and [the] remedies for judicial review, thereby facilitating access to the courts and enabling the individual to challenge administrative action which adversely affected his interests' can be interpreted to frustrate that intention in *Tang*. You now have back many of the evils these reforms were meant to eradicate!

A disturbing feature of much of the academic criticism of *Tang*, apart from its tone, is that it fails to acknowledge the simple, indisputable fact, that when the Commonwealth and State Parliaments came to enact the legislation they chose, advisedly, to depart from the recommendations of the Kerr Committee that the legislation should authorise judicial review on legal grounds 'of decisions, including inappropriate cases reports and recommendations, of Ministers, public servants, administrative tribunals …'

As Gummow, Callinan and Heydon JJ pointed out, the manner in which Parliament chose to implement the Kerr Committee's recommendations by 'the adoption … of the phrase 'a decision of an administrative character made … under an enactment' directed attention away from the identity of the decision-makers, the Ministers and public servants referred to by the Kerr Committee, and to the source of the power of the decision makers.'[33]

There can be no doubt that the choices of the Commonwealth and State Parliaments were made deliberately. And it is also indisputably true that these legislatures have had ample opportunity, since the 1997 beginning of the sequence of Federal Court decisions which the High Court approved in *Tang*, to amend the legislation if they were so disposed.

The line advisedly drawn by the legislatures of the States and Commonwealth fixes upon the source of the power to affect rights rather than the identity of the decision-maker. That line acknowledges that some decisions by public authorities involve the exercise of the same powers that are available to private persons. Where a public authority is exercising rights it enjoys with other persons under the general law, it has long been recognised by the highest authority that the conduct of the body is not described as conduct *under* the statute which gave it legal personality and capacity.[34]

I should refer to some other aspects of the academic criticism of the decision in *Tang*.

Mantziaris and McDonald suggest that Gleeson CJ 'stood alone' within the majority in *Tang* by focusing upon the decision as the termination by the University of the 'voluntary association' between the University and Ms Tang; and that his Honour's conclusion that the University's decision 'took legal force and effect from *any* relevant source of law' was 'a mystery'.[35]

These authors contend that: 'There is no general law applicable to voluntary non-contractual and non-corporate associations in the sense that a decision to enter or exit from such an association can be said to change or modify the *legal* rights or obligations of the parties to it.'[36] They also assert that, on the approach taken by the majority, 'there was *no source of capacity* for the university to exclude a student.'[37]

There are a number of problems with these criticisms. The first of these problems is that it is abundantly clear from the passage cited from the joint judgment that Gleeson CJ was not alone in focusing upon the decision as one involving the termination of a voluntary association.

Secondly, there was nothing 'mysterious' in the approach of Gleeson CJ. The case tendered by the parties for the decision of the Courts was one in which the decision of the University

to cease its association with Ms Tang was based upon the exercise by the University of the same rights of association which any individual enjoys: the University's decision to cease its association with Ms Tang did not alter the legal basis of their association: the University simply exercised its liberty, untrammelled by contractual restraint, to cease its voluntary association with Ms Tang.

With reference to this aspect of *Tang*, Professor Aronson commented: [38]

> *Tang's* result was 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. *Tang's* fault, though, was in failing to see the realities of public power behind a consensual, non-statutory facade. Consensual power should not be subject to judicial review, not because it is non-statutory, but because it is not public … The characterisation of Ms Tang's relationship with her former university as merely consensual is nothing short of breath-taking.

On the contrary, the characterisation of Ms Tang's relationship with the University was inevitable having regard to the ground on which the parties chose to fight the case. In this regard, Ms Tang herself asserted the absence of any contract between herself and the University; and she was unable to point to any statutory entitlement to maintain the relationship between herself and the University.

Any association of persons, whether voluntary or contractual, is an exercise of legal personality: the choice of one legal person to associate or disassociate from another is an exercise of the legal capacity enjoyed by all legal persons. As the High Court said in *Lange v Australian Broadcasting Commission*:[39] 'Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law'.' To proceed upon an assumption of freedom of choice and association is not to postulate a legal void; it is merely to recognise fundamental principles of the common law.

There is nothing at all odd about speaking of the bonds of voluntary association between persons as merely consensual. That is the view which the common law has taken of voluntary associations. In *Cameron v Hogan*,[40] Rich, Dixon, Evatt and McTiernan JJ said:

> … [E]xcept to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of its rules has been committed, cannot maintain any action directly founded upon that complaint … There are … reasons which justify the statement that, at common law as well as in equity, no actionable breach of contract was committed by an unauthorized resolution expelling a member of a voluntary association, or by the failure on the part of its officers to observe the rules regulating its affairs, unless the members enjoyed under them some civil right of a proprietary nature … Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract.

It has never been a stretch of legal language to speak of liberty of association as a right. As McHugh J said in *York v The Queen*:[41]

> The common law's conception of liberty is not limited to 'liberty in a negative sense', that is, 'the absence of interference by others'. It extends to a conception of liberty in a 'positive' sense, which is 'exemplified by the condition of citizenship in a free society a condition under which each is properly safeguarded by the law against the predations of others'. [Footnotes omitted].

Nor is it inaccurate in this context to speak of 'rights' as synonymous with 'interests'.

Mantziaris and McDonald argue that 'if the rights/obligations test … in *Tang* is taken literally, its application would deny procedural fairness protection to interests currently protected under the principle in *Kioa v West* (1985) 159 CLR 550.'[42] They also assert that the decision in *Tang* leaves a gap in the scope of judicial review provided by the *AD(JR) Act* in that a

person whose interests are affected by a decision to make or withhold a government grant would have standing to challenge the decision, but the decision would not be susceptible to review under the *AD(JR) Act* because a government grant does not give rise to rights enforceable by the grantor against the government.[43]

With great respect, these criticisms reflect a failure to attend closely to what is actually said in the judgments. *Tang* cannot sensibly be read as denying that governmental decisions, which are apt to create or to prevent the creation of rights or obligations in respect of 'liberty, reputation, status, immigration and welfare eligibility or familial interests', are susceptible of review under the *AD(JR) Act*. That this is so is abundantly apparent from the following passage in the reasons of Gummow, Callinan and Heydon JJ: [44]

> … [T]his construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise … Affection of rights or obligations derived from the general law or statute will suffice.

In the academic criticisms of the decision in *Tang*, what is remarkable is the absence of a compelling explanation of how the phrase 'under an enactment' can be read otherwise than as suggested by the Federal Court jurisprudence without at the same time depriving it of effect as a limit upon the scope of the Act. As Gleeson CJ observed in *Tang*, clearly correctly with respect, '[t]he legislation does not provide for review of all decisions of an administrative character made in pursuance of any power or authority which has its foundation in a statute.'[45]

Public power and judicial review

The 'rights alteration or affection' test in *Tang* is consistent with the basis of judicial review as it evolved at common law.

It was not the case under the common law, that the exercise by a person of rights, enjoyed by that person, is reviewable simply because, on one view, the person exercising the right could be described in some sense as a public body.

Lord Atkin, in his classic statement of the role of the common law in supervising administrative decision-making in *R v Electricity Commissioners*,[46] described the agencies susceptible to judicial review as 'any body of persons having legal authority to determine questions affecting the rights of subjects …'

As this passage suggests, the law relating to judicial review of administrative decision-making did not develop by reference to a concern to scrutinise the reasons which led an agent of the Crown to exercise rights enjoyed by all subjects of the Crown: the exercise of rights shared by all was not an exercise of the sovereign power to alter or enforce rights.

If a public authority infringes the rights or harms the interests of a subject, for example, by negligently failing to repair a gas main, the issue is whether the failure to repair the main was negligent, not whether the decision-making processes of the authority conformed to the grounds of judicial review. The case is no different from one in which a privately owned gas supplier negligently damages a customer. The quality of the decision-making process which led to the negligent act or omission is irrelevant to the vindication of the interests of the victim. The only question in each case is whether the defendant is liable for negligently causing harm to the plaintiff.[47] And that question falls to be answered by reference to rights and liabilities which do not depend on the authority's decisions.

It has long been a characteristic of the common law which distinguished it from other systems that, generally speaking, agencies of the State stand on the same footing as subjects so far as their rights are concerned. The line of judicial authority, which includes the famous judgment of Lord Camden LCJ in *Entick v Carrington*,[48] and the more recent manifestation in *Plenty v Dillon*,[49] establishes that the subject stands equal before the courts with the agents of the Crown.[50] It is this proposition which Dicey celebrated as one of the cardinal tenets of the rule of law.[51]

Considerations of public accountability and equality before the law do not require that the mere exercise by agencies of the community of rights enjoyed by such agencies on behalf of the community should be subject to judicial review. To the extent that the exercise of statutory functions may expose agencies of the community to liabilities because the rights of others have been infringed, the usual remedies will be available against them.

In a mixed economy and a liberal democracy the community, represented by agencies of the Crown, has rights too. A governmental agency enjoys the same rights under the general law as other persons (the substantive right to legal professional privilege in advice tendered to the executive government is an important example).[52] That is no less so because the agencies of the Crown are politically accountable to the community.

Public power and outsourcing

Conversely, it is no answer to a claim to review a decision that does create or alter rights of others that the decision-maker can plausibly be described as a private body.[53] A point to be made here is that, because public power attracts judicial review because rights are being created or altered rather than merely exercised, judicial review may reach outsourced administrative decisions.

Nothing in *Tang*, or in what I have said about the evolution of the common law, warrants the concern expressed by some academics that the important purposes served by judicial review can be frustrated merely by the outsourcing of decision-making functions to privately owned organisations.

If a private company is empowered by statute to affect the rights of subjects, the exercise of that power will be a decision made under an enactment. To the extent that it is a decision which serves to execute the will of the sovereign Parliament, it may arguably be described as a decision of an administrative character; but even if it does not fall within the scope of the *AD(JR) Act*, it would nevertheless be amenable to judicial review under the common law.

In relation to the 'outsourcing' of executive functions by the Commonwealth Parliament, we may take as an example the case of a statute which creates and empowers a corporation to act in a particular field, and directs it to act independently of control by the Commonwealth executive.

It may be suggested that a decision by such a corporation adverse to a citizen would be subject to review under s 75(iii) or (v) of the Constitution; but it is, I think, doubtful whether the action of the hypothetical corporation would be an exercise of, or refusal to exercise, Commonwealth executive authority. No doubt the High Court would be astute not to allow 'colourable evasion' of s 75(iii) and (v) of the Constitution; but s 75(iii) and (v) do not deny to the Parliament the power to make a law imposing powers and duties on a person other than an officer of the Commonwealth.

It seems unlikely that ss 1 and 61 of the Constitution will be interpreted as denying the Commonwealth Parliament the power to authorise an agency other than the executive government to execute and maintain the laws of the Commonwealth.[54] That being so, the

better answer to the problem of unfair or unreasonable decision-making by private concerns to whom the power has been outsourced is that the exercise of public power by an 'outside' agency is subject to judicial control simply by reason of the appreciation that judicial power extends to the supervision of the exercise of power to alter or affect or enforce rights of the subject, whoever the executive agent of the parliament may be.[55] The control of the exercise of such power is a characteristic function of the judicial power.

Democratic values

A close focus on the scope of judicial review under the *AD(JR) Act* is apt to obscure the importance of other underpinnings of the values of fairness and reasonableness in administrative decision-making. While the institution of judicial review is the ultimate guarantor of rationality and fairness in administrative decision-making, it is not alone in the field. These are other institutional guarantees of rule of law values in relation to administrative decision-making. These may afford more inclusionary and democratic ways to ensure the integrity of governmental decision-making.

The integrity and quality of administrative decision-making is also guaranteed by systems of internal merits review and external merits review by tribunals, and by review by ombudsmen and other non-judicial agencies charged to oversee administrative decision-making. And, last but not least, we are served by a professional civil service whose members are drawn from and representative of the people it serves. These are all important elements in what Spigelman CJ called the 'Integrity Branch of Government' in his lecture in this series in 2004. They are institutional and cultural features of liberal democracy in the age of the welfare state which were not part of the milieu in which our administrative law developed, before the welfare state. They should not be forgotten.

As Professor McMillan said recently:[56]

> The discussion of government accountability in judicial speeches usually dwells on the tension between the judiciary, on the one hand, and parliament and the executive on the other. A related tendency in legal articles or conferences that discuss good decision-making is to assume that it equates with the grounds for judicial review. Generally, there is an untoward focus in legal scholarship on the accountability role of courts. This can present an unrealistic comparison of judicial and non-judicial oversight. An example is that few if any of the large number of articles criticise the High Court ruling in *Griffith University v Tang* that a decision of the University to dismiss Miss Tang as a PhD candidate was not reviewable under the *Judicial Review Act 1991* (Qld), mention that ombudsman offices in Australia can investigate complaints against universities, and do so frequently.

It is perhaps worth saying too that the legality/merits dichotomy, so crucial to our understanding of the legitimate scope of judicial review, serves democratic values.

In *Chevron USA v Natural Resources Defence Council Inc ('Chevron')*,[57] it was held by the United States Supreme Court that Federal Courts will defer to an agency's legal interpretation of its statutory charter so long as that interpretation reflects a reasonable appreciation of the intent of the Congress.

The *Chevron* doctrine of statutory interpretation has been rightly said by Professor Aronson to be anathema to the High Court.[58] In Australia, the proposition that 'it is emphatically the province and duty of the Judicial Department to say what the law is'[59] is understood to carry with it the corollary that each statute has only one permissible meaning and that is the meaning discerned by the court: the sovereign authority which makes and administers the law cannot speak with a forked tongue.[60]

But that should not prevent recognition of the democratic values which support the maintenance of the merits/legality dichotomy which keeps judges out of the merits of administrative decision-making mentioned by Stevens J in his opinion in *Chevron*:[61]

> … policy arguments are more properly addressed to legislators or administrators, not to judges.
>
> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies …
>
> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones …

These observations by Stevens J in *Chevron* remind us that we must put alongside the principles of fairness and rationality which are deployed in the judicial review of administrative decisions as conditions of decision-making jurisdiction, the proposition that the judges have no business second guessing the politically responsible administration on matters committed to their determination by the legislature which represents the community.

For almost as long as there have been judges recognisable as such, it has also been the case that the sovereign has acted to create and alter rights through the decisions of specialist agencies and tribunals.[62] The great value of such agencies and tribunals lies, as it always has, in their special knowledge in a particular field which enables them to address complex issues expertly, efficiently and expeditiously.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, McHugh and Gummow JJ said:[63]

> In Australia, the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems referred to above. Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the *Constitution* or otherwise, inevitably involves attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the *Constitution* is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.
>
> This demarcation is manifested in the distinction between jurisdictional and non-jurisdictional error which informs s 75(v). Selway J has accurately written of that distinction:
>
> > 'Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.'
>
> [Footnotes omitted].

Conclusions

May I conclude by repeating that there has been no retreat by the Australian judiciary from its historic role as the guarantor of fairness and reasonableness in governmental decision-making. One may accept that 'public power begets public accountability' to use the vivid phrase of Kirby J.[64] But judicial review is not the only mechanism for ensuring public accountability, much less that it is always the best available mechanism.

There is, no doubt, something to be said for the view that all the decision-making processes of agencies of executive government should be scrutinised for error, even in relation to decisions to exercise rights common to all legal persons. But that would mean that many operational functions of government would be affected by costs and delays – possibly at the behest of commercial competitors – where the decision-making processes of those competitors, who may have similar power to affect the public interest, are not subject to similar burdens in the same circumstances.

It is not self evident that the rule of law favours those who wield aggregations of private capital for private profit over agencies which act in the name of the community.

It is unlikely that rule of law values will be harmed if the judiciary is not always in the centre of the front line of the integrity arm of government. That recognition is consistent with the democratic values reflected in the distinction between merits and legality review and which favour respect for the making of policy decisions by the representative and responsible organs of government.

We must be mindful that the exclusion of judicial review from the merits of administrative decision-making is not an accidental error awaiting correction by a sufficiently robust judiciary. Judicial intrusion into the merits of administrative decision-making is not only inconsistent with the historic role of judicial review: it may also become a distraction and a diversion away from the development of more active and effective participation by civil servants and ordinary citizens in the decision-making processes of government.

Endnotes

1 Katrin Trüstedt, 'The Tragedy of Law in Shakespearean Romance' (2007) 1(2) *Law and Humanities* 167.
2 Christopher Collard, 'Introduction' in Christopher Collard (ed), *Aeschylus: Oresteia* (Oxford: Oxford University Press, 2002), p. xvi.
3 Christopher Collard, 'Introduction' in Christopher Collard (ed), *Aeschylus*: *Oresteia* (Oxford: Oxford University Press, 2002), p. xvi.
4 499 US 400 (1991) at 407.
5 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
6 Laurence Tribe, *Abortion: The Clash of Absolutes* (New York: W. W. Norton and Co. Inc., 1990), p. 80.
7 Robert Bork, 'Adversary Jurisprudence' (May 2002) 20 *The New Criterion* 4 at 18-19.
8 Nancy C. Roberts (ed), *The Age of Direct Citizen Participation* (New York: Me. E. Sharpe, 2008). See also Peter Cane, 'Participation and Constitutionalism' (2010) 38(3) *Federal Law Review* 319.
9 Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35(1) *Federal Law Review* 1; Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17(1) *Public Law Review* 22; Patty Kamvounias and Sally Varnham, 'Doctoral Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10(1) *Australian and New Zealand Journal of Law and Education* 5.
10 Sir Anthony Mason, 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) *31 AIAL Forum* 45, 54.
11 [1987] 1 QB 815.
12 [1993] 1 WLR 909.
13 Sir Anthony Mason, 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) 31 *AIAL Forum* 45, 54.

14 Ralph V Turner, *The English Judiciary in the Age of Glanville and Bracton* (Cambridge: Cambridge University Press, 1985), p.159.
15 Ralph V Turner, *The English Judiciary in the Age of Glanville and Bracton* (Cambridge: Cambridge University Press, 1985), p.1.
16 Ralph V Turner, *The English Judiciary in the Age of Glanville and Bracton* (Cambridge: Cambridge University Press, 1985), p.2.
17 Letter written to Wilhelm Visscher the Younger cited in Isaiah Berlin, *Three Critics of the Enlightenment* (New Jersey: Princeton University Press, 2000), p. 20.
18 (1700) 1 Salk 144, 81 ER 134.
19 Thus in *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [27], Gaudron and Gummow JJ (with whom Gleeson CJ agreed) referred with evident approval to Lord Selborne's statement in *Spackman v Plumstead Board of Works* (1885) 10 App Cas 229, 240, that if the decision-maker under a statutory power had done anything 'contrary to the essence of justice', then '[t]here would be no decision within the meaning of the statute'. In this way, said Gaudron and Gummow JJ, 'a breach of the rules of natural justice would go to the statutory jurisdiction of the decision-maker, and so was a ground of interference within the doctrine of jurisdictional error'.
20 (1803) 1 Cranch 137, 177.
21 (2010) 239 CLR 531.
22 Cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [4]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [42].
23 (2010) 239 CLR 531, 578-579.
24 (2010) 239 CLR 531, 579-580.
25 (2010) 239 CLR 531, 580-581.
26 *Spackman v Plumstead Board of Works* (1885) 10 App Cas 229, 240; *R v Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [27].
27 (2010) 239 CLR 531, 581.
28 (2005) 221 CLR 99.
29 (2005) 221 CLR 99, 132 [96].
30 (2005) 221 CLR 99, 128-129 [78]-[81].
31 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22.
32 Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 20.
33 (2005) 221 CLR 99, 113 [29].
34 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, 118; *Hudson v Venderheld* (1968) 118 CLR 171, 175; *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 626.
35 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 30.
36 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 30.
37 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 44.
38 Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35(1) *Federal Law Review* 1, 23.
39 (1997) 189 CLR 520, 564.
40 (1934) 51 CLR 358, 370 – 371.
41 (2005) 225 CLR 466, 473 [22].
42 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 36 – 37.
43 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 41-42.
44 (2005) 221 CLR 99, 131 [89].
45 (2005) 221 CLR 99, 107 [10].
46 [1924] 1 KB 171, 205.
47 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 343 – 347; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 39 [93]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 580 – 581 [162]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553 – 554 [6], 574 – 578 [78] – [85], 596 – 600 [146] – [154], 634 [261], 658 – 660 [310].
48 (1765) 19 St Tr 1030, 1066.
49 (1991) 171 CLR 635.
50 HW Arndt, 'The Origins of Dicey's Concept of the 'Rule of Law'' (1957) 31(3) *Australian Law Journal* 117, 119 – 120.
51 AV Dicey, *Introduction to the Study of Law of the Constitution*, (London: Macmillan, 10th ed, 1959), p. 328 – 405.
52 *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.
53 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 264, 275; *R v Panel on Takeovers and Mergers; Ex parte Datafin plc* [1987] QB 815, 838, 847.
54 *Victorian Stevedoring and General Contracting Co Ltd v Dignan* (1931) 46 CLR 73, 84.

55 Margaret Allars, 'Public Administration in Private Hands' (2005) 12(2) *Australian Journal of Administrative Law* 126.
56 John McMillan 'Re-Thinking the Separation of Powers' (2010) 38(3) *Federal Law Review* 423, 426.
57 467 US 837 (1984).
58 Mark Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12(1) *Public Law Review* 17 at 20. See *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151 – 154; *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591, 635.
59 *Marbury v Madison* (1803) 1 Cranch 137, 177.
60 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151 – 156 [39] – [50].
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62 LJ Jaffe and EG Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345.
63 (2003) 214 CLR 1, [76] - [77].
64 The Hon. Michael Kirby, 'Public Funds and Public Power Beget Public Accountability' (Paper presented at the Corporate Governance Conference, University of Canberra, 9 March 2006, available via <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_9mar06.pdf>).