

A FOURTH BRANCH OF GOVERNMENT?

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The title of this Conference 'Integrity in Administrative Law Making' recalls the statement by Professor Bruce Ackerman in an article published in 2000 that 'a top priority for drafters of modern *Constitutions*' should be 'the credible construction of a separate "integrity branch"'. This would check what he saw as the 'corrosive tendencies' of corruption in the conduct of the bureaucracy and the use of 'slush funds' available to elected politicians.¹

Professor Ackerman began his career, leading to the position of Sterling Professor at Yale, as law clerk to Judge Friendly and then to Justice Harlan. Judge Friendly's biographer records that while he regarded Ackerman as the clerk who had come up with the most ideas he particularly averred that he did not use any of them; the biographer writes, 'He did, of course, but he may have made this remark because of Ackerman's unusual number of ideas and his unquenchable enthusiasm for them'.²

In fairness to Professor Ackerman, in the Harvard Law Review article he was advocating to those drawing up new Constitutions in other countries the provision of an 'integrity branch'. He was not saying that it already was to be found in the United States *Constitution*. Rather, the contrary.

However, the influence of Professor Ackerman's thinking may be seen in the proposal made by Chief Justice Spigelman in an address in 2004,³ that 'an integrity branch of government' would provide a broader context for the development of the case law on judicial review.

Let me say immediately that in this notion, whether it is distilled from the text and structure of the *Constitution*, or is introduced at the State level by changes to the more fluid *Constitutions* of the States, I see little utility and some occasion for confusion.

In part, at least, Professor Ackerman's dissatisfaction with the State of the Union may be a reaction to the operation of the *Chevron*⁴ doctrine. This requires deference by the judicial branch to the construction given by federal agencies and regulatory authorities in cases of competing statutory construction. In *Enfield City Corporation v Development Assessment Commission*⁵ the High Court rejected any such doctrine and, to that end, quoted remarks of Brennan J in *Attorney-General (NSW) v Quin*⁶ to which further reference will be made below.

Further, however, in Australia it may seem curious that the oversight of the federal bureaucracy by those appointed by the executive under the Ombudsman, privacy legislation and the like, take place within the one branch of government that was

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established by Ch II of the *Constitution*. It may appear that the emergence of the modern regulatory state and of the bureaucracy to run it only serves to demonstrate that the tripartite division of powers, sourced 250 years ago in the Enlightenment, today provides an inadequate constitutional structure.

But in the study of the law it is well to remember, as Lord Simonds LC said in *Chapman v Chapman*,⁷ that it is even possible that we are not wiser than our ancestors.

Further, at the federal level the tripartite structure is reflected in the text and structure of the *Constitution*. Whatever body be created to oversee the conduct of the bureaucracy, it will be manned by officers of the Commonwealth and thus constrained by s 75(v) of the *Constitution*. At the State level, somewhat the same position to that of the original jurisdiction of the High Court is assured to the Supreme Court by the *Constitution*, at least since *Kirk v Industrial Court of New South Wales*.⁸

With these reflections in mind, I begin by asking how it was in Australia that the term 'administrative law' entered legal discourse. The long and complex history of industrial relations, particularly at the federal level after the enactment of the *Conciliation and Arbitration Act 1904* (Cth), saw the courts enter upon a new and unique field of judicial review. But the considerable body of case law upon s 75(v) of the *Constitution* which was built up tended, in the law schools and among practitioners, to be the province purely of 'industrial' lawyers. An appreciation of the full significance of s 75(v) in the scheme of the *Constitution* and public law generally was delayed for a century, until *Plaintiff S157/2002 v The Commonwealth*.⁹

Instead, the subject 'administrative law' was developed in Australian law schools in the second half of the twentieth century with heavy reliance upon an emergent body of English case law. Lord Goddard CJ, of all people, was put forward as an enlightened figure for his decision in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*¹⁰ respecting the scope of *certiorari*. With more cogency, Lord Greene MR was considered a significant figure for the *Wednesbury* decision.¹¹ Lord Atkin was praised for his dissent in *Liversidge v Anderson*¹² but not for his remarks in the *Electricity Commissioners* case,¹³ which seemed to require an express obligation to follow a judicial type procedure before *certiorari* would quash the decision of a public body. But Lord Atkin's speech in *Liversidge* retains considerable significance for its approach to the reading of statutes which confer power exercisable upon satisfaction of a specified criterion.

What the English cases had in common was a reaction, particularly in the post-war period, to the growing power of the executive in a modern regulatory state. Significant rights and obligations of citizens and corporations were sourced in discretionary powers conferred by statute and in delegated legislation. What also distinguished the English cases was their place in a system with no rigid constitution, let alone a federal constitution, but rather 'an unadorned Diceyan precept of parliamentary sovereignty'.¹⁴ Hence the emphasis upon 'the common law'.

However, for too long, in Australian law schools insufficient attention was paid to the consideration that, at least at the federal level, public administration essentially concerns the execution and maintenance of the *Constitution* and the laws of the Commonwealth. Section 61 places this within the executive branch. It is the superintendence, within the constitutional structure, of this executive activity which generates what we may call administrative law. But administrative law, so understood, is a subset of constitutional law.

As noted above, an important means for that superintendence is provided by s 75(v) of the *Constitution*. The phrase 'an officer of the Commonwealth' has a very broad meaning and is not restricted to Ministers and members of the Commonwealth Public Service.¹⁵ As late

as 1979, Barwick CJ referred to the term 'prohibition', used as a constitutional expression in s 75(v), as importing the law appertaining to the grant of prohibition by the Court of King's Bench.¹⁶ But, as explained at length in *Re Refugee Tribunal; Ex parte Aala*,¹⁷ prohibition goes against officers of the Commonwealth in circumstances not contemplated by the King's Bench and the preferred term is 'constitutional writs' rather than 'prerogative writs'.

It is misleading to speak in Australia of the common law as if it occupied a parallel universe to the *Constitution*. My colleague Justice Gaudron observed from time to time that, in approaching legal issues in this country, the starting point must be the *Constitution* itself. I am of the same mind. What we now recognise as the one common law of Australia¹⁸ (which includes canons of statutory construction) is informed by and must develop consistency with the *Constitution*.¹⁹

The very terms of the *Constitution* provide in significant respects for the oversight of each of the three branches of government by the other two. First, the review and audit by law of the receipt and expenditure of money on account of the Commonwealth is required by s 97 of the *Constitution*, and audit requirements had a lengthy provenance in the Australian colonies. Secondly, s 49 of the *Constitution* assumes the adoption by both chambers of the legislature of the committee system. It is the operation of this system which today most strongly manifests the function of the legislature as the inquisition of the nation.²⁰ Thirdly, s 28 of the *Constitution* provides the executive with the power of dissolution of the House before the end of its current three year term. And, in the special circumstances of s 57, the Governor-General may dissolve both Houses simultaneously. Finally, the power of appointment of federal judges is vested in the executive by s 72(i) of the *Constitution*, while that of removal 'on the ground of proved misbehaviour or incapacity' is vested in the executive but is exercisable only upon an address by both Houses of the Parliament.

Most significantly for present purposes, it is the scheme of Ch III which has been taken to embody the doctrine of *Marbury v Madison*.²¹ This carries with it more than the determination of the constitutional competence of legislative and executive activity. The point was made by Brennan J in a frequently cited passage in *Attorney-General (NSW) v Quin*:²²

The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. In *Victoria v The Commonwealth and Hayden*,²³ Gibbs J said that the duty of the courts extends to pronouncing on the validity of executive action when challenged on the ground that it exceeds constitutional power, *but the duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law.* (emphasis added)

However, it is not s 75(v) alone which provides for review of administrative action. As is well known, the Parliament moved in the 1970s to establish a legislative structure for judicial review by the Federal Court and administrative review on the merits by a non-judicial body, the Administrative Review Tribunal. Taken together, these innovations may be seen as creating, within the Australian constitutional framework, an integrity branch in the sense used by Professor Ackerman. But the functions of these bodies were not investigative and inquisitorial but were conferred by other legislation such as the *Australian Crime Commission Act 2002* (Cth). Who then is to oversee the activities of such inquisitorial bodies? The answer, not provided explicitly in Professor Ackerman's scheme, must be the judicial branch.

We have tended to appreciate insufficiently the significance of the legislative measures for judicial review made by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*) and for 'merits' review under the *Administrative Appeal Tribunal Act 1975* (Cth)

(the AAT Act). The absence in many common law countries of such legislation must be borne in mind when reading, for example, Canadian and English judicial decisions.

The federal legislative scheme has exercised some gravitational pull upon State and Territory legislatures. Thus, the Supreme Court of Queensland under the *Judicial Review Act 1991* (Qld) exercises a jurisdiction comparable to that of the Federal Court under the *ADJR Act*. In *Griffith University v Tang*,²⁴ the issue was the familiar (if not easy) one of the application of the expression 'decision of an administrative character ... made under an enactment'. Again, it was the availability of judicial review under the Queensland statute in respect of parole board decisions which in *Wotton v Queensland*²⁵ assisted the case for validity of the legislation in question.

The legislation in Tasmania (the *Judicial Review Act 2000* (Tas)) and the Australian Capital Territory (the *Administrative Decisions (Judicial Review) Act 1989* (ACT)), is closely modeled on the *ADJR Act*. However, the Victorian statute, the *Administrative Law Act 1978* (Vic), is best described as *sui generis*.

But it is of the greatest significance that from its commencement on 1 October 1980, the *ADJR Act* has contained in Schedule 1 an ever expanding list of classes of decision to which the statute does not apply. At last count there were 46 entries in Schedule 1. Two more are contained in Sched 1, Item 1, to the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). This is a swift legislative response to the deficiencies in administration of public moneys disclosed in *Williams v The Commonwealth*.²⁶

There also is a persistent temptation to enact laws which create particular review regimes outside the framework of the *ADJR Act*. Revenue law matters are perhaps the best known instance. One more may be mentioned. A State access regime for the regulation of third party access to gas pipelines was authorised by federal law to confer functions on the Australian Competition and Consumer Commission (the ACCC), with 'review' by the Australian Competition Tribunal. But it was held in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission*²⁷ that the review function conferred upon the Tribunal did not use the term 'unreasonable' in the *Wednesbury* sense; rather, the term encompassed failure by the ACCC in the exercise of a discretion; the failure being inferred from the 'plain injustice' of the result. The analogy was with the well-known passage in *House v The King*.²⁸

In the last 20 years the most significant addition to Schedule 1 of the *ADJR Act* has been the exclusion of migration decisions and the enactment of privative clauses in respect of those decisions. The result was to throw plaintiffs back to reliance upon s 75(v) of the *Constitution* and to burden the work of the High Court in its original jurisdiction, with the denial of a power of remitter to any other court exercising federal jurisdiction. Further, at the State level there is a long history of legislative insulation of 'specialist' tribunals from superintendence by the Supreme Courts (with an avenue of appeal to the High Court under s 73(iii) of the *Constitution*) in exercise of the jurisdiction inherited, in particular, from the Court of King's Bench.

Added to this state of affairs has been the appreciation, since 1986 and the final abolition of Privy Council appeals by s 11 of the *Australia Act 1986* (Cth), of two important but related matters. The first is the recognition of an Australian common law within our constitutional structure. The second is the paramount importance both of s 73 of the *Constitution*, stating the entrenched appellate jurisdiction of the High Court at the apex of what is an integrated court system, and of the original jurisdiction conferred by s 75(v).

Two developments in the constitutional case law which have followed, of significance for administrative law, should be noted.

The actual decision in *Plaintiff s157/2002 v The Commonwealth*²⁹ was that on its proper construction, the privative clause in s 474(1) of the *Migration Act 1958* (Cth) did not protect from review under s 75(v) of the *Constitution* decisions which involved jurisdictional error. But in the joint reasons of five Justices, it was emphasised that the jurisdiction of the High Court to grant relief under s 75(v) for jurisdictional error by an officer of the Commonwealth cannot be removed by the Parliament.³⁰ Their Honours added:³¹

The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the *Constitution* of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court.

However, their Honours also emphasised that the privative clause in s 474(1) validly prevented the issue by the High Court of *certiorari* for non-jurisdictional error of law on the face of the record.³²

This state of affairs presents an important question. Which of the range of grounds of review listed in s 5 of the *ADJR Act* (and its State analogues) answer the description of 'jurisdictional error' and so attract s 75(v) of the *Constitution*? The answer probably is that not all of those grounds in s 5 involve 'jurisdictional error'. The identification of those grounds which do so remains for elucidation as the case law accumulates.

The *ADJR Act* was drawn with an eye to discarding the technicalities attending the notion of jurisdictional error. It has been said by some commentators that the upshot in Australia has been a reversion to notions of jurisdictional error which have been superseded elsewhere. That may be so, but two points are to be made. The first is that the legislature, particularly in migration cases, has denied to plaintiffs any other avenue of statutory judicial review beyond that entrenched by s 75(v). The second is that although this jurisdiction is posited upon jurisdictional error, the result does manifest the entrenchment in a rigid constitution of significant judicial remedies for administrative decision making which has gone awry.

In addition, even in those States, like South Australia,³³ which have retained the jurisdiction of the Supreme Court with respect to prohibition, *mandamus*, *certiorari*, habeas corpus, declaration and injunction, the legislative insulation of the decision making by statutory tribunals is of limited effectiveness. This is the consequence of *Kirk v Industrial Court of New South Wales*.³⁴ The actual decision was that the erroneous construction of s 15 of the *Occupational Health and Safety Act 1983* (NSW) and failure by the Industrial Court to comply with the rules of evidence in a criminal prosecution were jurisdictional errors and errors of law on the face of the record, requiring the grant of relief in the nature of *certiorari* to quash the conviction and sentences.

As to privative clauses, the joint reasons in *Kirk* of six Justices stated:³⁵

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.

They added.³⁶

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'.³⁷ And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.

Most recently, in *Public Service Association of SA Incorporated v Industrial Relations Commission (SA)*,³⁸ the High Court affirmed that the reasoning in *Kirk* was not limited to the availability of *certiorari* for those species of jurisdictional error which the High Court earlier had identified in *Public Service Assn (SA) v Federated Clerks' Union*.³⁹ The upshot of these decisions is that notwithstanding what in some respects is the fluid nature of State constitutional arrangements, a State 'integrity branch' would not be immune from judicial oversight.

There is a final point to be made. It concerns the dichotomy often assumed in administrative law analysis between private and public power. However, there are contemporary issues respecting the distinction between curial supervision of the exercise of public or governmental power and such supervision of private decision making. The latter is exemplified by the arbitration process.

The current legislation in the Australian States with respect to domestic commercial arbitrations⁴⁰ requires that an award be in writing and state reasons.⁴¹ In addition to, and in advance of, statutory procedures for a limited measure of curial review, the Court of King's Bench exercised a jurisdiction to set aside arbitral awards for errors of law apparent on their face.⁴² This jurisdiction of the King's Bench would have passed to the Supreme Courts of the States. However, the scheme of the current legislation is to deny the jurisdiction of the Supreme Courts to set aside an award for error of law (or fact) on the face of the award. Nevertheless, this is subject to a new statutory jurisdiction of the Supreme Court, by leave, to determine an 'appeal' confined to questions of law.⁴³ Without that provision for an 'appeal', *Kirk* may have presented a serious question of the validity of the removal of the old jurisdiction.

There is a further point to be made here. The outcome of an arbitration may be said to manifest the consensual submission to that procedure, and to be purely a matter of private right and obligation. However, the utility of an arbitral award lies in the avenue provided for its enforcement by curial remedy. While the decision of the arbitrator is not an exercise of public power, the enforcement of the award requires the exercise of the judicial power. This tends to be overlooked by those who extol the virtue of privately achieved dispute resolution.

May a law, State or federal, which requires that the courts enforce an award upon a consensual submission to arbitration which on its face manifests an error of law, be said to oblige the court to act in a fashion repugnant in a fundamental degree to the judicial process?⁴⁴ To that extent would the law be invalid?⁴⁵

What conclusions for the application in Australia of Professor Ackerman's proposal for an integrity branch of government follow from the foregoing? It remains open to the Federal and State legislatures to create by statute organisations and bodies to oversee good governance and investigate corruption and malpractice. But those entities and their members cannot be placed by the enabling legislation in islands of power where they are immune from supervision and restraint by the judicial branch of government. That is the significance for present purposes of *Plaintiff S157* and *Kirk*, and a further application of the general propositions in the passage from *Quin* set out earlier in this paper.

Endnotes

- 1 Bruce Ackerman, 'The New Separation of Powers (2000) 113 *Harvard Law Review* 642, 694.
- 2 David M Dorsen, *Henry Friendly, Greatest Judge of His Era* (Harvard University Press, 2012) 109-110.
- 3 Given on 29 April 2004 to the Australian Institute of Administrative Law.
- 4 *After Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).
- 5 (2000) 199 CLR 135 at 151-154 [39]-[44]; [2000] HCA 5.
- 6 (1990) 170 CLR 1, 35; [1990] HCA 21.
- 7 [1954] AC 429, 444.
- 8 (2010) 239 CLR 531; [2010] HCA 1.
- 9 (2003) 211 CLR 476; [2003] HCA 2.
- 10 [1951] 1 KB 711; affd. [1952] 1 KB 338.
- 11 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
- 12 [1942] AC 206, 243-245; cf *Plaintiff M70/2011 v Minister for Immigration and Citizenship (The Malaysian Declaration Case)* (2011) 244 CLR 144, 194 [109]; [2011] HCA 32.
- 13 *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1924] 1 KB 171.
- 14 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66]; [2003] HCA 67.
- 15 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 140 [161]; [2000] HCA 57.
- 16 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 201; [1979] HCA 6.
- 17 (2000) 204 CLR 82, 92-93 [19]-[22]; [2000] HCA 57.
- 18 *Lipohar v The Queen* (1999) 200 CLR 485, 505-510 [43]-[59]; [1999] HCA 65.
- 19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 526; [1997] HCA 25.
- 20 See *Egan v Willis* (1998) 195 CLR 424, [42]; [1998] HCA 71.
- 21 (1803) 1 Cranch 137, 177 [5 US 87 at 111].
- 22 (1990) 170 CLR 1, 35; [1990] HCA 21. See further, the joint reasons of the whole Court in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 355-356; [2010] HCA 4.
- 23 (1975) 134 CLR 338, 380; [1975] HCA 52.
- 24 (2005) 221 CLR 99; [2005] HCA 7.
- 25 (2012) 86 ALJR 246; 285 ALR 1; [2012] HCA 2.
- 26 (2012) 86 ALJR 713; 288 ALR 410; [2012] HCA 23.
- 27 (2007) 233 CLR 229; [2007] HCA 44.
- 28 (1936) 55 CLR 499, 505; [1936] HCA 40.
- 29 (2003) 211 CLR 476; [2003] HCA 2.
- 30 (2003) 211 CLR 476, 512 [98].
- 31 (2003) 211 CLR 476, 514 [104].
- 32 (2003) 211 CLR 476, 507 [81].
- 33 *Supreme Court Act 1935* (SA), s 17(2); *Supreme Court Civil Rules 2006* (SA), Rules 199, 200.
- 34 (2010) 239 CLR 531; [2010] HCA 1.
- 35 (2010) 239 CLR 531, 580-581 [98].
- 36 (2010) 239 CLR 531, 581 [99].
- 37 (1957) 70 *Harvard Law Review* 953, 963.
- 38 (2012) 86 ALJR 862; 289 ALR 1; [2012] HCA 25.
- 39 (1991) 173 CLR 132; [1991] HCA 33.
- 40 Which exclude arbitrations to which the *International Arbitration Act 1974* (Cth) applies.
- 41 See, for example, *Commercial Arbitration Act 2011* (SA), s 31; *Commercial Arbitration Act 2010* (NSW), s 31.
- 42 *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257, 260-261, per Lord Diplock.
- 43 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 263 [26]-[27]; [2011] HCA 37.
- 44 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352-354 [49]-[54], 363 [87], 366-367 [97], 379 [140]; [2009] HCA 49.
- 45 cf *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 262 [21]-[23].