Rationalising mercy? The statutorification of the prerogative of mercy and its amenability to judicial review

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Over 100 years ago, in the case of *Horwitz v Connor*[1] (*Horwitz*), the High Court purported to say that 'no Court has jurisdiction to review the discretion of the Governor in Council in the exercise [of the prerogative of mercy]'.[2] While that comment has been subsequently explained to be obiter, lower Australian courts have felt constrained to follow it, including as recently as 2020, where it was cited as either persuasive or binding by the Queensland Court of Appeal, the Full Court of the Federal Court and a single judge decision in the Victorian Supreme Court.[3] There are a number of aspects of that case, and its legacy, that warrant particular scrutiny; and this article will come to them in due course. At this juncture what is relevant to note is that the High Court's understanding of the non-reviewability of the prerogative of mercy was rooted in common law conceptions inherited from England.[4] In the last century, however, the English common law has developed considerably, such that at least most prerogative powers are now considered amenable to review, even those engaging considerations of high policy, such as the prerogative power to prorogue Parliament, and certainly those affecting individual interests, such as the prerogative of mercy. So too have there been important developments, including statutory developments, in Australia. Yet *Horwitz* has held firm, and the prerogative of mercy remains — on the current state of the law — unreviewable.

In this article, I tease out two related anomalies in the Australian law on this subject. The first of those relates to what I will call the statutorification of the prerogative of mercy — that is, the development of, and judicial consideration of, a statutory architecture of powers surrounding the prerogative of mercy. I will suggest that, despite the increasingly sophisticated 'modern approach'[5] to statutory interpretation that is now orthodox in Australia, the case law considering these statutory provisions has been impoverished by conclusory statements about the non-reviewability of the *common law* mercy powers and reductive analogies between those and the statutory mercy powers.

The second anomaly this article seeks to expose is the contradistinction by which the Australian law as to the reviewability of the prerogative of mercy has stagnated in 1908 while the common law of England (and other common law countries) has moved on, such that it is now widely accepted that exercise of the prerogative of mercy *is* reviewable, albeit perhaps on a more limited basis, and with a greater sensitivity to executive discretion, than other public law powers. While Australian courts have been made aware of at least some

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1 (1908) 6 CLR 38 (*Horwitz*).

2 Ibid 40.

3 *Holzinger v Attorney-General (Qld)* (2020) 5 QR 314 (*Holzinger*); *Attorney-General (Cth) v Ogawa* (2020) 281 FCR 1 (*Ogawa*); *Zhong v Attorney General (Vic)* [2020] VSC 302 (*Zhong*).

4 *Von Einem v Griffin* (1988) 72 SASR 110, 126 (Lander J) (*Von Einem*).

5 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 634–5 (Brennan CJ; Dawson, Toohey and Gummow JJ).

of these authorities they have, for the most part, chosen not to follow them. The rationale for that reluctance has been the idea that judicial review of the prerogative would embroil the courts in consideration of matters of high policy and politics that are the proper, and exclusive, domain of the executive. I want to point to evidence to the contrary, again with reference to the Australian case law considering the statutory adjuncts to the prerogative. In some of these cases courts have either accepted, or assumed, the reviewability of the statutory prerogative powers and have gone on to engage in the exercise of judicial review. The reasoning in those cases shows courts to be perfectly capable of engaging in this task in a way that remains cognisant of the respective spheres of competence of the executive and judiciary.

Before proceeding, it is helpful to advert to the controversy over terminology in this field. Although much of the case law and commentary uses the language of 'prerogative of mercy', it has been noticed that the power typically conceived of by that name is in fact now conferred, at a federal level at least, by s 61 of the *Constitution*. Accordingly, a Full Court of the Federal Court has said that it is 'preferable' to describe the power as 'an exercise of the Constitutional executive power under s 61 of the *Constitution*'.[6] Similar looseness of terminology has infected discussions of the statutory powers, which are sometimes called 'statutory prerogative' powers[7] — something of a contradiction in terms. To cut through this terminological confusion, and to ensure consistency, this article will use the term 'common law mercy powers' to refer to what was historically the prerogative and will use the term 'statutory mercy powers' to refer to the more modern statutory innovations in this area.

The nature and scope of the power(s)

The essence of the common law and statutory mercy powers are that they allow, through various processes, for the conditional or unconditional pardon of a person or an alleviation of their sentence.[8] It has been said that, whenever one is faced with the challenge of ascertaining the scope of a prerogative power, 'the proper approach is a historical one' whereby one asks, 'how was it used in former times and how has it been used in modern times?'[9] For that reason, it is helpful[10] to start with an overview of the common law origins of the prerogative of mercy, its transformation to a constitutional footing in s 61 of the *Constitution*, and its encrustation with various statutory adjuncts. This overview will be necessarily brief, as the focus of this article is on the *reviewability* of the power rather than its content or scope.

6 *Ogawa* (n 3) 15 [64], [68].
7 *Eastman v Attorney-General (ACT)* (2007) 210 FLR 440, 453 [52] (Lander J) (*Eastman*).
8 *R v Milnes and Green* (1983) 33 SASR 211, 216–17 (Cox J). A more extensive survey of the nature and scope of common law and statutory mercy powers can be found in J R Murphy, F Gerry QC, R Tisdale and J Kretzenbacher, 'An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing' (2021) 46(3) *Monash University Law Review* 252.
9 *Burmah Oil Co v Lord Advocate* [1965] AC 75, 101 (Lord Reid).
10 Cf *Ogawa* (n 3) 15 [67]–[68].

Common law history

The prerogative of mercy can be traced back to Ancient Athens[11] or even earlier, to the Code of Hammurabi (approximately 1754 BCE) or the amnesties of the Han dynasty in China (starting approximately 202 BCE).[12] In the Middle Ages, the pardon power was available for persons who killed in self-defence[13] and, later, was exercised increasingly often in the 18th century in England, by which time half of all death sentences were commuted to transportation.[14] Perhaps as many as one-third of the convicts on the First Fleet were recipients of the prerogative.[15]

In the Australian colonies, such as New South Wales, hundreds of conditional and unconditional pardons were granted each year.[16] In 1872, the Victorian Premier and Attorney-General described the Governor's pardon as 'in every day practice'.[17] On federation, by virtue of s 61 of the *Australian Constitution*,[18] the prerogative was vested in the Governor-General of Australia and in the governors of each state, on advice of the Executive Council.[19]

Statutory adjuncts and encrustations

In the 'age of statutes',[20] the prerogative has not remained immune from statutory attention. These developments have been variously described as 'a statutory accretion to the prerogative power to pardon';[21] 'a statutory adjunct to a prerogative of mercy';[22] 'ancillary to the prerogative power';[23] or a statutorily 'control[led]' exercise of the prerogative power.[24] Their exercise has been said to be 'similar in nature to [the] prerogative discretion'[25] and

11 CD Greentree, 'Retaining the Royal Prerogative of Mercy in New South Wales' (2019) 42(4) *University of New South Wales Law Journal* 1328, 1334.

12 D Tait, 'Pardons in Perspective: The Role of Forgiveness in Criminal Justice' (2000) 13(3) *Federal Sentencing Reporter* 134, 134.

13 CH Rolph, *The Queen's Pardon* (Cassell, 1978) 19. See also *R v Secretary for the Home Department; Ex parte Bentley* [1994] QB 349, 357 (Watkins and Neill LJJ and Tuckey J); S Grupp, 'Some Historical Aspects of the Pardon in England' (1963) 7 *American Journal of Legal History* 51, 60.

14 L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1948) vol 1, 151–9, 163–4. See also D Hay, 'Property, Authority and the Criminal Law' in D Hay, P Linebaugh and EP Thompson, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Allen Lane, 1975) 17, 34.

15 GD Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Federation Press, 2002) 5.

16 JJ Spigelman, 'The Macquarie Bicentennial: A Reappraisal of the Bigge Reports' (The Annual History Lecture, History Council of New South Wales, 4 September 2009) 12 <https://historycouncilnsw.org.au/wp-content/uploads/2013/01/2009-AHL-Spigelman.pdf>.

17 Sir J Martin, quoted in JM Bennett, 'The Royal Prerogative of Mercy: Putting in the Boots' (2007) 81(1) *Australian Law Journal* 35, 37.

18 See *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437–9 (Isaacs J).

19 *In re an Arbitration Between The Standard Insurance Co Ltd and Macfarlan* [1940] VLR 74, 82 (Gavan Duffy J).

20 *Buck v Comcare* (1996) 66 FCR 359, 365 (Finn J). Credit for coining the phrase 'age of statutes' is usually attributed to Guido Calabresi. See G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

21 *Pepper v Attorney-General (Qld); Re Fritz* [1995] 2 Qd R 580, 589 (Mackenzie J).

22 *Martens v Commonwealth* (2009) 174 FCR 114, 120 [23] (Logan J).

23 *Von Einem* (n 4) 129.

24 *L v South Australia* (2017) 129 SASR 180, 210 [116] (Kourakis CJ).

25 Ibid.

might be described as a statutory 'substitute' or 'alternative' to the prerogative.[26] Broadly speaking, there are two categories of statutory descendants of the common law mercy powers: statutory analogues to the prerogative of mercy; and statutory referral and opinion powers.

Statutory analogues to the prerogative of mercy

In many Australian jurisdictions,[27] the prerogative has been supplemented by analogous statutory powers.[28] These statutory powers range from limited powers to remit monetary penalties and property forfeitures[29] to more robust powers to order the discharge of an offender from a term of imprisonment.[30] In their most powerful iteration, the statutory analogues include a pardon power.[31]

As the legislation often makes clear,[32] statutory analogues to the prerogative are designed to run 'parallel'[33] with the prerogative, without limiting its operation in any way. As long ago as 1949, Dixon J noted that courts construing statutory provisions 'affect[ing]' the 'Prerogative … power to remit sentences' 'should be careful to maintain' the distinct roles of the courts and the Crown in the administration of sentences.[34] There is thus an 'extremely strong' presumption of statutory interpretation that preserves prerogative powers from statutory encroachment absent 'clear and unambiguous provision'.[35]

Notwithstanding this presumption of statutory interpretation, there are jurisdictions where it is arguable that the entire mercy powers are now statutory. In the Northern Territory, the prerogative is reposed in the Administrator of the Northern Territory and derives from ss 31 and 32 of the *Northern Territory (Self-Government) Act 1978* (Cth), whereby the Administrator

26 *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ).

27 New South Wales, Queensland and South Australia do not appear to have any sort of statutory remissions powers, although some Queensland prisoners may still be eligible for a remission under the repealed statutory remission power. See *Corrective Services Act 2006* (Qld) s 401. Note that state and territory law on remissions applies to federal offenders held in state or territory prisons. See *Crimes Act 1914* (Cth) s 19AA(1). Furthermore, federal offenders sentenced before 1 July 1990 may be eligible for remission under *Commonwealth Prisoners Act 1967* (Cth) s 19 (now repealed).

28 This analysis does not cover statutory powers that are not analogous to the prerogative of mercy but do involve some interference with a sentence — for example, the power to release a prisoner shortly before the completion of their sentence: *Corrective Services Act 2006* (Qld) s 110; *Prisons Act 1981* (WA) s 31.

29 See, for example, *Crimes (Sentence Administration) Act 2005* (ACT) s 313(b), (c); *Sentencing Act 1997* (Tas) s 98; *Sentencing Act 1991* (Vic) s 108; *Sentencing Act 1995* (WA) s 139.

30 *Crimes (Sentence Administration) Act 2005* (ACT) s 313(a); *Sentencing Act 1995* (NT) s 114(2); *Corrective Services Act 2006* (Qld) s 75 (note that while s 75 has been repealed it remains applicable to certain prisoners by virtue of s 401); *Corrections Act 1997* (Tas) ss 86, 87; *Corrections Regulations 2018* (Tas) regs 25, 26; *Corrections Act 1986* (Vic) s 58E; *Corrections Regulations 2019* (Vic) reg 100.

31 See, for example, *Crimes (Sentence Administration) Act 2005* (ACT) s 314.

32 *Crimes (Sentence Administration Act) 2005* (ACT) s 314A; *Corrective Services Act 2006* (Qld) s 346(1); *Sentencing Act 1997* (Tas) s 97; *Corrections Act 1997* (Tas) s 89; *Sentencing Act 1991* (Vic) s 106; *Sentencing Act 1995* (WA) s 317.

33 A Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 13 [1.25].

34 *Flynn v The King* (1949) 79 CLR 1, 7–8 (Dixon J).

35 *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ). See also J Goldring, 'The Impact of Statutes on the Royal Prerogative: Australian Attitudes to the Rule in *Attorney-General v De Keyser's Royal Hotel*' (1974) 48 *Australian Law Journal* 434.

assumed certain prerogative powers of the Crown.[36] Accordingly, it is most accurate to describe the prerogative of mercy in the Northern Territory as 'a statutory prerogative',[37] the statute in question being the Northern Territory (Self-Government) Act. This is the way that the prerogative-style power has been described in the Australian Capital Territory (ACT).[38] Arguably, Queensland has a statutory prerogative as well, in s 36 of the *Constitution of Queensland 2001* (Qld).

Statutory referral and opinion powers

In addition to the statutory analogues to the prerogative discussed above, additional statutory powers operate in conjunction with, or as an 'adjunct'[39] or 'supplement'[40] or 'substitute'[41] or 'alternative'[42] to, the prerogative of mercy.[43] The general effect of these provisions is to create mechanisms for the involvement of state and territory courts in the consideration of mercy petitions in two distinct ways: by a 'reference power' and an 'opinion power'.[44] An example of these related powers, which will be discussed later in this article, is that contained in s 672A of the *Queensland Criminal Code*, which provides:

> Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may —
>
> a. refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted;
>
> b. if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly.

36 Earlier in the Northern Territory's history the prerogative of mercy was understood to be only exercisable by the Governor-General of Australia. See Northern Territory, *Parliamentary Debates*, Assembly, 19 September 1978 (Questions without notice). Of course, the Commonwealth itself assumed these powers from the British Crown pursuant to s 61 of the *Australian Constitution*. See *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437–9 (Isaacs J).

37 This description was used in *Eastman* (n 7) 453 [52].

38 Ibid.

39 *Martens v Commonwealth* (2009) 174 FCR 114, 120 [23] (Logan J).

40 M Hinton and D Caruso, 'The Institution of Mercy' in T Gray, M Hinton and D Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519, 520.

41 *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ).

42 Ibid.

43 For a discussion of the historical origins of these provisions, see C Castles, 'Executive References to a Court of Criminal Appeal' (1960) 34(6) *Australian Law Journal* 163, 163–4.

44 The distinction between 'reference' and 'opinion' powers is gratefully adopted from Hinton and Caruso (n 40) 521. For an early and insightful discussion of the distinction see *R v Gunn (No 1)* (1943) SR (NSW) 23, 25 (Jordan CJ; Davidson J agreeing).

All Australian states and territories, except for the ACT,[45] have some statutory version of the reference power[46] and the opinion power.[47] Persons convicted of federal offences in state courts are also eligible for these procedures, as s 68(2) of the *Judiciary Act 1903* (Cth) applies the state legislation by analogy to federal convictions and thus allows the federal Attorney-General, or other relevant Minister,[48] to refer a matter to a state court or seek an opinion from a state court.[49]

Conclusion

The above analysis has implications for the reviewability of refusals of mercy petitions. This is because a refusal of a petition for mercy may constitute a refusal to exercise the statutory mercy powers *and* a refusal to exercise the common law mercy powers.[50] Against that background, it can now be suggested, some Australian judgments have tended to elide the statutory and non-statutory powers and considerations related to their reviewability.

Reviewability of statutory mercy powers

This article now turns to what I have called the first anomaly in the Australian case law on the reviewability of the prerogative of mercy. That anomaly can be neatly summarised in two propositions. First, nearly all the judgments purporting to pronounce upon the reviewability of the *common law* prerogative of mercy have in fact been primarily concerned with *statutory* powers. Secondly, even insofar as those cases squarely confront the reviewability of the statutory powers, they do so in a way that is at odds with the modern approach to statutory interpretation — that is, with little consideration of text, context and purpose. Instead, they purport to deploy conclusory statements about the non-reviewability of common law mercy powers as applying by necessary analogy.

To substantiate this claimed anomaly I will consider three cases: the early case of *Horwitz* and the recent cases of *Holzinger v Attorney-General (Qld)*[51] (*Holzinger*) in the Queensland Court of Appeal and *Attorney-General (Cth) v Ogawa*[52] (*Ogawa*) in the Full Court of the Federal Court.

45 The ACT has a different 'inquiry' scheme that is not contingent upon the receipt of a petition for mercy. See *Crimes Act 1900* (ACT) pt 20.

46 *Crimes (Appeal and Review) Act 2001* (NSW) s 77(1)(a), (b); *Criminal Code* (NT) ss 431(a), 433A; *Criminal Code 1899* (Qld) s 672A(a); *Criminal Procedure Act 1921* (SA) s 173(1)(a), (2); *Criminal Code Act 1924* (Tas) s 419(b); *Criminal Procedure Act 2009* (Vic) s 327(1)(a); *Sentencing Act 1995* (WA) s 140(1)(a).

47 *Crimes (Appeal and Review) Act 2001* (NSW) s 77(1)(c); *Criminal Code* (NT) s 431(b); *Criminal Code 1899* (Qld) s 672A(b); *Criminal Procedure Act 1921* (SA) s 173(1)(b); *Criminal Code Act 1924* (Tas) s 419(b); *Criminal Procedure Act 2009* (Vic) s 327(1)(a); *Sentencing Act 1995* (WA) s 140(1)(b).

48 See *Martens v Commonwealth* (2009) 174 FCR 114, 123 [35] (Logan J).

49 Ibid 118–9 [15]–[19] (Logan J); *R v Martens (No 2)* [2011] 1 Qd R 575, 598 [85]–[86], 600 [92], [94] (Chesterman JA; Muir JA agreeing); *Yasmin v Attorney-General (Cth)* (2015) 236 FCR 169, 172–4 [4]–[12] (*Yasmin*); *Jasmin v The Queen* (2017) 51 WAR 505, 529 [96] (Buss P), 549–50 [227]–[228] (Mazza and Mitchell JJA). Cf *R v Martens* [2010] 1 Qd R 564, 567 [14]–[15] (Logan J); *Nudd v Minister for Home Affairs* (2011) 122 ALD 529, 532 [10] (the Court).

50 As to the characterisation of a single refusal as multiple decisions, see *Martens v Commonwealth* (2009) 174 FCR 114, 116–17 [4] (Logan J).

51 *Holzinger* (n 3).

52 *Ogawa* (n 3).

Horwitz v Connor

The foundational case on the reviewability of statutory mercy powers is *Horwitz*.[53] Mr Horwitz had been convicted and sentenced in the Supreme Court of Victoria and was serving a total effective six-year sentence of imprisonment in the Geelong jail. Mr Horwitz had directed the writ of habeas corpus to the Inspector-General of Penal Establishments of Victoria alleging that he was entitled to a remission of his sentence, and thus release from prison, based on his interpretation of regulations establishing the eligibility criteria for sentence remissions. The regulations apparently established certain criteria which, if met, meant that a remission 'shall be lawful'.[54] At the return of the writ in the Full Court of the Supreme Court of Victoria, Mr Horwitz appears to have argued that 'shall' meant 'must',[55] and thus that, having met the criteria, there was a duty on the Governor to remit his sentence. The Full Court of the Supreme Court of Victoria apparently rejected that interpretation of the regulations.[56] On an application for special leave to appeal to the High Court, the Court discussed the wording of the regulations with counsel in argument.[57] Ultimately, it appears that the High Court agreed that the regulations did not confer any *duty* on the Governor to grant a remission but instead conferred a 'power' that was 'discretion[ary]'.[58] The High Court accordingly dismissed the application for special leave, saying:

> The power given to the Governor in Council by sec. 540 of the *Crimes Act 1890* is a discretionary power to make regulations, and further, 'to mitigate or remit the term of punishment accordingly,' that is, in accordance with the regulations. The Governor in Council has power to remit the term of imprisonment of the applicant. He has not done so. The most that might be asked for here would be a mandamus to the Governor in Council to consider the matter. But a mandamus to the Governor in Council will not lie, and no Court has jurisdiction to review the discretion of the Governor in Council in the exercise. The application will be refused.[59]

It can immediately be noted that the one-paragraph judgment says considerably more than was necessary to dismiss the application for special leave. It comments on mandamus even though mandamus was never sought (the Governor was not even a party to the proceedings). It also talks categorically about an inability of any court to review the prerogative of mercy,

53 *Horwitz* (n 1).
54 Ibid 40 (Higgins J, quoting the regulations).
55 That 'shall' can sometimes mean 'must' is explained in *Julius v Lord Bishop of Oxford* [1880] 5 AC 214, which was relied upon by Mr Horwitz in argument. See *Horwitz* (n 1) 39 (argument).
56 The Full Court of the Supreme Court of Victoria's decision of 3 April 1908 is unreported. However, it clearly turned on the proper interpretation of the regulations. See the summary of the decision at *Horwitz* (n 1) 39.
57 Ibid 39 (argument).
58 Ibid 40 (Griffith CJ, for the Court).
59 Ibid.

even though, in truth, the case turned upon a statutorily directed exercise of a remission power. It is thus appropriate to state the following limits on the persuasive authority of that judgment:

- it was a short, ex tempore judgment that does not expose its reasoning;[60]
- it is of no precedential value, being a dismissal of special leave;[61]
- even if it were of precedential value, the comments about the reviewability of the prerogative power, and the unavailability of mandamus to compel consideration of an application for the remission of sentence, were obiter dicta as no such review had been sought;[62]
- even if it were of precedential value, its ratio would be no more than that the particular regulations at issue created a discretion, not a duty (and corresponding entitlement). In this regard, the courts have repeatedly emphasised that questions of statutory interpretation directed to determining the reviewability of a statutory power must be conducted by close analysis of the *particular provision at issue*, and that there is limited utility in referring to interstate provisions;[63]
- finally, the judgment was decided at a time when it was thought that prerogative powers could not be amenable to judicial review,[64] and thus it is hardly surprising that the Court did not stray long to consider whether adjacent statutory powers might be amenable to review.

Holzinger v Attorney-General (Qld)

Over a century after *Horwitz*, the applicant in *Holzinger* applied for judicial review of a decision of the Attorney-General not to refer his case to the Queensland Court of Appeal under s 672A of the *Queensland Criminal Code* reproduced earlier in this article.[65] The proposed grounds of review were a denial of procedural fairness, failure to take into account a relevant consideration, unreasonableness, and no evidence.[66] The Court of Appeal denied that the statutory power was amenable to review.[67] Significant to that holding was the conclusion that the statutory provision at issue was 'a power to commence litigation',[68] not a

60 *Ogawa* (n 3) 16 [73] (the Court).
61 As to the precedential status of refusals of special leave to appeal see *Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) 360; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 133 [112] (Kiefel and Keane JJ); cf G Lindell (ed), *The Mason Papers: Selected Articles and Speeches* (Federation Press, Sydney, 2007) 31–2. As to the lack of precedential value of *Horwitz*, see *Ogawa* (n 3) 16 [73]. Although it should be noted that *Horwitz* was cited with approval in *R v Toohey; Ex parte Northern Land Council* (1985) 151 CLR 170, 261 (Aickin J); *L v South Australia* (n 24) 208 [109] (Kourakis CJ).
62 WMC Gummow, 'Administrative Law and the Criminal Justice System' (2008) 31 *Australian Bar Review* 137, 141 ('No exercise of the prerogative of mercy was involved'). See also *Ogawa* (n 3) 16–7 [73].
63 See, for example, *Yasmin* (n 49) 180 [47] (the Court).
64 *Von Einem* (n 4) 126 (Lander J).
65 *Holzinger* (n 3) (the Court).
66 Ibid 329–31 [37].
67 Ibid 353 [121].
68 Ibid 331 [40].

power of an administrative character,[69] a power that affected rights[70] or a power that required the provision of reasons;[71] and it was one that required the balancing of competing policy objectives.[72]

For present purposes, what is interesting about the reasoning in that case is that it proceeded almost exclusively by analogy with the non-reviewability of the common law prerogative powers. The Court went on to say that 'the exercise of the prerogative of mercy may involve a consideration of matters that are not justiciable because they are only relevant to a pure act of mercy or because they involve policy with respect to public demands or expectations'.[73] Thus, in respect of the Attorney-General's recommendation to the Governor, the Court held this 'cannot rationally be constrained by any statutory or common law criteria'.[74]

These characteristics of the common law prerogative of mercy dominated, and decided, the Court's conclusion that the statutory referral power was not amenable to judicial review, with the Court emphasising the 'linkage' between the referral power and the common law prerogative power.[75] The Court also drew an analogy between the referral power and the power to present an ex officio indictment, which had also previously been held to be non-reviewable as a result of it having 'something of the nature of a prerogative power'.[76]

What is unusual about the decision is that, like *Horwitz*, while it purports to make statements about the scope, purpose and (absence of) limits of a statutory power, it engages in almost no discussion of the text, context and purpose of the statute. The Court was, of course, well aware of the legislative precursors to s 672A from the United Kingdom (UK) and New South Wales, which precursor provisions made clear that the power was conferred for a very particular purpose — namely, to provide an avenue for the executive to refer matters to the courts where those matters were deemed 'too complex' or 'too difficult' to be determined by the executive.[77] The conferral of a power with a clear purpose suggests that, applying the ordinary principles of statutory interpretation, the power might at least be limited by reference to its purpose. However, no such possibility was entertained or explored in *Holzinger*.

The take-away from *Holzinger*, then, is that courts considering the reviewability of statutory adjuncts to the prerogative appear, respectfully, often appear to be overly distracted by historical statements as to the non-reviewability of the prerogative and fail to apply the orthodox principles of the modern approach to statutory interpretation with its focus on 'the statutory text, context and purpose'.[78]

69 Ibid 334 [52].
70 Ibid 334 [52]–[53].
71 Ibid 337 [61].
72 Ibid 337 [62].
73 Ibid 324 [18].
74 Ibid.
75 Ibid 325 [19]. See also 325 [22].
76 *Barton v The Queen* (1980) 147 CLR 75, 110 (Wilson J).
77 Second Reading Speech to the Criminal Appeal Bill 1911 (NSW) in Legislative Assembly of NSW, *Parliamentary Debates*, 5 July 1911, 1294–5, quoted in *Holzinger* (n 3) 328 [34] (the Court).
78 *Comcare v Martin* (2016) 258 CLR 467, 479 [42] (the Court).

This anomalous approach is also evident in the Full Court of the Federal Court's decision in *Ogawa* — a decision also concerning s 672A of the *Queensland Criminal Code* as picked up and applied by the *Judiciary Act 1901* (Cth). In *Ogawa*, in relation to the statutory mercy power, the Court felt compelled to follow *Holzinger* because the Full Court was not convinced that decision was plainly wrong.[79] Accordingly, the Court said that, on the authority of *Holzinger*, a statutory referral power was not reviewable on grounds of procedural unfairness; inflexible application of policy; unreasonableness; failure to take account of a relevant consideration; and no evidence.[80] It is notable that, again, there was little discussion of the text, context and purpose of the statutory referral power; rather, the case was decided on the application of precedent.

Moving then to the common law mercy power, the Full Court observed 'although it is unnecessary to determine the matter, we doubt whether it is correct to state that the exercise of the Constitutional executive power to grant or refuse a pardon to a petitioner is totally immune from judicial review'.[81] The Court continued, 'A recognition of the fact that there may well be some aspects of the decision-making power to grant or refuse mercy which are essentially political or non-justiciable, does not necessarily carry the consequence that any legal error manifest in that decision-making process should remain immune from judicial scrutiny'.[82]

Importantly, however, the Full Court did go on to consider whether the primary judge was incorrect that the Attorney-General's decision not to recommend mercy was vitiated by a material misunderstanding of the statutory test.[83] The Court concluded that any error was not material. The Court explicitly left this open as a potential ground of review of the exercise of the prerogative and also suggested that 'a denial of procedural fairness' would take the matter outside of 'the decision making freedom entrusted to the Attorney-General'.[84]

The tension that one sees in *Ogawa*, then, is that the Court at the same time concluded that the statutory referral power was largely unreviewable while noting, in obiter, that the common law prerogative *would* be amenable to review on certain bases. This, it is suggested, is an example of the tail wagging the dog. The very reason the Queensland Court of Appeal concluded that the statutory referral power was unreviewable was because of its 'linkage' to the common law mercy power,[85] which the Queensland Court of Appeal considered to be clearly unreviewable.[86] The Full Federal Court felt constrained to accept that conclusion, despite, in the next breath, doubting the very foundation of it — that is, suggesting that the common law prerogative *would* be amenable to review.

79 *Ogawa* (n 3) 19 [81] (the Court).
80 Ibid 19 [84].
81 Ibid 16 [73].
82 Ibid 17 [75].
83 Ibid 18 [77]–[79].
84 Ibid 18 [79].
85 *Holzinger* (n 3) 325 [19]. See also 325 [22].
86 Ibid 324 [18].

Conclusion as to the first anomaly

What these three cases reveal is an approach to questions of the reviewability of statutory powers that pays insufficient regard to the text, context and purpose of such powers. Instead, one sees the reductive equation of the statutory powers with the common law prerogative of mercy, combined with conclusory statements as to the prerogative's non-reviewability (and thus the non-reviewability of the statutory powers). This is what I call the first anomaly in the Australian case law on the reviewability of the prerogative of mercy and its related statutory powers. I want to turn now to the second, related, anomaly.

Stagnation of Australian law on reviewability of the common law mercy powers

The second anomaly is the fact that Australian law on the reviewability of the common law prerogative of mercy has stagnated since the 1908 decision of *Horwitz*, while the English common law on which that decision was based has moved on. Indeed, the law in the UK and other common law jurisdictions is now such that the prerogative of mercy is clearly amenable to judicial review. I will first briefly describe the divergent paths of Australian and other common law countries in this regard before turning to why I think the divergence is unjustified, even in light of matters arising from the Australian case law.

The origins of the Australian position

As has been explained, the origins of the Australian orthodoxy that the prerogative of mercy is not amenable to judicial review is the decision in *Horwitz*, where it was said that 'no Court has jurisdiction to review the discretion of the Governor in Council in the exercise [of the prerogative of mercy]'.[87] Although no case law is cited for that proposition, subsequent courts have recognised that it was informed by English common law relating to the non-reviewability of the prerogative powers.[88]

Despite the limits of the decision in *Horwitz* identified earlier in this article, *Horwitz* has been regularly applied for the proposition that the prerogative of mercy is not amenable to judicial review in Australia. That adherence to obiter remarks in a one paragraph, ex tempore judgment is particularly puzzling in light of the considered development of the law in the UK, to which I will now turn.[89]

Developments in United Kingdom (and Privy Council)

Judicial opinions as to the reviewability of the prerogative have developed considerably over the last half-century in the UK. As will be seen in the summary of the authorities below, it was initially thought that the prerogative of mercy was unreviewable, but it is now largely accepted that it may be reviewed in certain circumstances.

87 *Horwitz* (n 1) 40 (Griffith CJ, for the Court).
88 *Von Einem* (n 4) 126 (Lander J).
89 This comparative discussion is conducted while remaining cognisant of the importance of domestic constitutional context. See *Ogawa* (n 3) 16–7 [73] (the Court).

In 1971, in *Hanratty v Lord Butler*[90] (*Hanratty*), it was forcefully said that the prerogative of mercy was 'outside the competence of the courts' and that 'the law will not inquire into the manner in which the prerogative is exercised'.[91] Five years later those views were affirmed in *De Freitas v Benny*[92] (*De Freitas*), where it was said that, under English common law, the prerogative of mercy was 'a matter which lies solely in the discretion of the sovereign'. It was further asserted that '[m]ercy is not the subject of legal rights. It begins where legal rights end'.[93] It was thus determined that the exercise of the prerogative could not be subject to judicial review.

In *Council of Civil Service Unions v Minister for Civil Service*[94] (*CCSU*), although it was acknowledged that prerogative powers may be subject to judicial review, Lord Roskill doubted that the prerogative of mercy was one such power, writing:

> Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as … the prerogative of mercy … are not, I think, susceptible of judicial review because their very nature and subject matter are such as not to be amenable to the judicial process.[95]

A contrary view was expressed in *R v Secretary of State for the Home Department; Ex parte Bentley*[96] (*Bentley*), where the UK Court of Appeal clarified that the full unconditional pardon was not justiciable but the failure to consider other forms of pardon was an error of process that *was* reviewable.[97] The Court wrote, 'we conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process'. Importantly, the Court of Appeal reached this decision by explicitly distinguishing *Hanratty*, *De Freitas* and *CCSU*.

However, the reviewability of the prerogative was again doubted just a few years later in a Privy Council case from the Bahamas, *Reckley v Minister for Public Safety and Immigration [No 2]*.[98] There it was held that the process of the prerogative of mercy under the Constitution of the Bahamas was not justiciable. It was remarked, '[o]f its very nature the minister's discretion, if exercised in favour of the condemned man, would involve a departure from the law. Such a decision was taken as an act of mercy or of grace'.[99] *Bentley* was distinguished and the Privy Council resoundingly endorsed *De Freitas*. It appeared that the reviewability of the prerogative had finally been settled, in the negative.

90 (1971) 115 SJ 386 (Lord Denning MR).
91 Ibid.
92 [1976] AC 239, 247 (Lord Diplock for the Board of the Privy Council).
93 Ibid.
94 [1985] AC 374 (Lord Roskill).
95 Ibid 418.
96 [1994] QB 349.
97 Ibid 363.
98 [1996] 1 AC 527
99 Ibid 541.

That apparent consensus was exploded shortly thereafter in 2001, in the Privy Council case of *Lewis v Attorney-General of Jamaica*,[100] where the Privy Council concluded that '[t]he procedures followed in the process of considering a man's petition are … open to judicial review'.[101] (That decision was followed by the Caribbean Court of Justice in *Attorney General v Boyce*.)[102]

The following year, 2002, the High Court in England concluded in *R (B) v Secretary of State for the Home Department*[103] that the decision of the Secretary of State on whether to recommend remission of a prisoner's sentence is amenable to review.[104] The Court noted, however, that the justiciability calculus may be different where 'high policy' considerations are involved.[105]

A number of other common law jurisdictions appear to have become more receptive to the reviewability of the common law prerogative, including Canada,[106] New Zealand,[107] South Africa,[108] India,[109] Singapore[110] and Hong Kong.[111] All of this confirms the observations of the Federal Court of Australia that, in Australia as overseas, 'the clear trend of authority is towards some degree of judicial supervision of, at least, the process by which the mercy prerogative is exercised'.[112]

Claims of incompetence, disproven

Against those developments, Australian courts, with a few exceptions,[113] have dug in their heels in insisting on the non-reviewability of the prerogative of mercy (and related statutory powers). Apart from citing *Horwitz* as requiring such a result, the courts have also explained this conclusion as to non-reviewability as being based on the prerogative and related statutory powers involving considerations outside of the court's sphere of competence, and thus as paradigmatically non-justiciable. So, for example, in *Holzinger* the Court said that the power is 'to bestow an act of mercy irrespective of any legal considerations and to rectify a miscarriage of justice of a kind that a court is not equipped to deal with'.[114]

100 [2001] 2 AC 50, 75–80.
101 Ibid 79.
102 [2006] CCJ 3. See also *Attorney-General v Joseph* [2006] CCJ 1 (AJ) [132].
103 [2002] EWHC 587 (Keene LJ).
104 Ibid [22], [55].
105 Ibid [13]–[23].
106 *Thatcher v Attorney-General* [1997] 1 FC 289 (Can); *Black v Chretien* (2001) 54 OR (3d) 215 [55]; *Hinse v Canada* [2015] 2 SCR 621.
107 *XY v Attorney-General* [2016] NZAR 875, 883 [31].
108 *Minister of Justice v Chonco* (2010) 1 SACR 325 (CC) [30]; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4. See also GN Barrie, 'Judicial Review of the Royal Prerogative' (1994) 111 *South African Law Journal* 788; BC Naude, 'The Pardoning Power as a Duty of Justice' (2002) 15 *South African Journal of Criminal Justice* 159.
109 *Epuru Sudhakar v Government of Andhra Pradesh* (Supreme Court of India, 11 October 2006).
110 *Yong Vui Kong v Attorney General* [2011] SGCA 9.
111 *Ch'ng Poh v Chief Executive of Hong Kong Special Administrative Region* [2003] KKLRD 496 [31]–[32].
112 *Yasmin* (n 49) 189–90 [88] (the Court). Two common law countries resisting the trend towards reviewability of the prerogative are Swaziland and Malaysia. See *Nkosi v Attorney-General* [2004] SZHC 79 (June 17, 2004); *Juraimi bin Husin v Lembaga Pengampuanan Negeri Pahang* [2001] 3 MLJ 458.
113 *Yasmin* (n 49) 181–94 [53]–[102] (the Court).
114 *Holzinger* (n 3) 324 [17] (the Court).

However, a close analysis of the case law reveals it to disprove this very proposition. A number of Australian courts, it turns out, have engaged in judicial review of the prerogative and related statutory powers and have shown themselves to be institutionally capable of doing so while remaining sensitive to the broad nature of the decisional freedom that both the prerogative and statutory adjuncts confer on the executive.

There are a number of examples of courts engaging in this task. Usually, the way a court reaches this position is that, rather than determining the difficult question of whether or not the prerogative of mercy is reviewable, the court proceeds on an assumption that it is reviewable but disposes of the applicant's grounds of review on the merits.[115] A recent example of this occurred in Victoria in the 2020 decision of the Victorian Supreme Court in *Zhong v Attorney-General (Vic)*.[116]

In that case, Croucher J assumed without deciding that judicial review was available for a decision not to refer a mercy petition to the Victorian Court of Appeal under s 327(1)(a) of the *Criminal Procedure Act 2009* (Vic).[117] Croucher J considered the grounds of a misunderstanding of the law or unreasonableness[118] and engaged in an extensive consideration of, first, the proper statutory test to be read into the language of the provision;[119] and, secondly, the wide area of decisional freedom that must be acknowledged in the reasonableness inquiry due to 'the exquisitely discretionary nature of the decision'.[120]

A more consequential example is Logan J's decision in *Martens v Commonwealth*[121] (*Martens*). There the applicant sought judicial review of a decision of the Minister charged with administering the Attorney-General's Department challenging the decision not to refer his case to the Queensland Court of Appeal pursuant to s 672A of the *Queensland Criminal Code*. Logan J considered 'a ministerial decision as to whether to engage that statutory adjunct [to the prerogative of mercy] as amenable to judicial review'.[122] Logan J considered, and rejected, a ground alleging that the decision had been made by an officer other than that upon whom the power had been conferred.[123] Logan J considered, and upheld, a ground expressed as a failure to take into account a relevant consideration[124] or, alternatively, a misunderstanding of the statutory test.[125]

While Logan J's decision in *Martens* was criticised by the Queensland Court of Appeal in *Holzinger*, that criticism was on the threshold question of reviewability, not Logan J's subsequent careful examination of the grounds. For present purposes, the important point to take away from *Martens* is its consequences. Logan J's ruling required a reconsideration of the referral power in light of all relevant considerations and in light of the proper statutory test.

115 In addition to those discussed in the text see *Von Einem* (n 4) 138–52 (Lander J); *Eastman* (n 7) 459–63 [81]–[102] (Lander J).
116 [2020] VSC 302 (Croucher J).
117 Ibid [116]–[117].
118 Ibid [123]–[124].
119 Ibid [126]–[142].
120 Ibid [146].
121 (2009) 174 FCR 114 (Logan J).
122 Ibid 120 [23].
123 Ibid 125 [40].
124 Ibid 128 [51], 138 [78].
125 Ibid 135 [66], 138 [78].

When that reconsideration was engaged in, the relevant Minister came to a different conclusion and decided to refer the case to the Queensland Court of Appeal. The Queensland Court of Appeal, in turn, quashed Mr Martens' convictions and set aside his sentence of imprisonment on the basis that the conviction was unreasonable and could not be supported on the evidence.[126]

Martens, then, is an example of a petition for mercy, and the exercise of statutory powers related to it, that only worked as it was intended to work because the petitioner was able to seek judicial review of a decision in that process that was infected by jurisdictional error. It might be thought that this, then, is not an example of courts unjustifiably trespassing into the domain of the executive but instead is a routine example of courts supervising the administration of a statutory scheme to ensure that it operates in the way Parliament intended it to operate.

Conclusion

Keeping to the theme of the conference out of which this article was born — 'Administrative law on the edge' — the most edgy question I had originally tasked myself with answering was that of the reviewability of the prerogative of mercy. Consideration of the case law revealed, however, that the key to the reviewability of the prerogative in fact lay in the case law considering the adjacent statutory powers.[127] Ultimately, if the subject matter rather than the source of a power is what makes it amenable to review[128] then consideration of the prerogative-adjacent statutory powers will provide indications of the reviewability of the prerogative.[129] I have suggested that the case law on the statutory powers, albeit out of keeping with the modern approach to statutory interpretation, has nevertheless identified some outer limits to the prerogative-related powers and has shown those limits capable of being judicially enforced.

126 *R v Martens* [2011] 1 Qd R 575.

127 The interrelated questions of reviewability was acknowledged in *Von Einem* (n 4) (Lander J).

128 *Council of Civil Services Unions v Minister for Civil Service* [1985] AC 374, 407 (Lord Scarman): 'The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.'

129 *Ogawa* (n 3) 20 [86].