

JUDICIAL REVIEW OF NON-STATUTORY EXECUTIVE ACTION: AUSTRALIA AND THE UNITED KINGDOM REUNITED?

Amanda Sapienza*

Unlike that of the United Kingdom, the Australian law on judicial review of exercises of non-statutory executive power is undeveloped. This article proposes a constitutional basis for judicial review of such power in Australia. It then argues that, despite their constitutional differences, there remain principles of common law constitutionalism that are applicable in both the United Kingdom and Australia that can provide guidance to Australian courts and lawyers as to the content of limitations on non-statutory executive action.

I INTRODUCTION

The applicability of principles of judicial review to exercises of non-statutory executive power is unclear in Australia. Whether a particular non-statutory power exists ('the constitutional question') is accepted as reviewable. But the High Court of Australia has never been required to decide whether the manner of exercise of non-statutory powers ('the administrative law question') is examinable by the courts. The Federal Court of Australia, as well as several State Supreme Courts and Courts of Appeal, have determined that there is nothing in the non-statutory source itself that shields non-statutory action from judicial review in the administrative law sense.¹ But they have done so without any elaboration on the constitutional warrant for subjecting non-statutory action to judicial review, or on the basis on which standards for lawful government decision-making (being the rules that manifest as grounds of

* PhD Candidate, University of Sydney, Sydney Law School. I am grateful for the financial assistance I receive from an Australian Government Research Training Program Stipend Scholarship. Parts of this article are based on a paper presented at the 2016 Public Law Conference, held at the University of Cambridge from 12-14 September 2016. This article, and my broader research, also benefitted from my attendance at the executive power workshop hosted by the Institute of Advanced Studies, The University of Western Australia, on 7 April 2017. I thank the organisers of and participants at both events for the excellent programs and fruitful discussions. Attendance at both events was made possible by grants from the University of Sydney Postgraduate Research Support Scheme. For their comments on earlier versions of this article, I thank Professor Margaret Allars (my supervisor), Dr Dominique Dalla Pozza and fellow student Raymond Brazil. Any errors are my own.

¹ See, eg, the cases cited at below n 61.

judicial review, and hereafter referred to as ‘judicial review standards’) are to be imposed.

Courts of the United Kingdom, on the other hand, including the House of Lords and the Supreme Court, have long accepted that the manner of exercise of non-statutory power is susceptible to judicial review and have conducted such review in a number of cases.² In these circumstances, one might expect that the British cases would provide a fertile source of assistance to Australian courts when they are called upon to conduct judicial review of non-statutory action.

However, the administrative law jurisprudence of Australia and that of the United Kingdom have been diverging since the later decades of the 20th century. The High Court of Australia, in particular, has been very cautious about transplanting English judicial review doctrines to Australian law, citing the significant constitutional differences between the two jurisdictions. When what is being reviewed is an exercise of executive power conferred by a statute, this is not necessarily a problem as the common law of Australia is very well-developed in that regard. However, when the executive action being reviewed is non-statutory action, Australian courts may find themselves in a different position.

This article demonstrates that, in the midst of seemingly intractable differences between the law of judicial review in the United Kingdom and its counterpart in Australia, there remain principles of common law constitutionalism that are applicable in both jurisdictions and these principles are capable of providing guidance to Australian courts and lawyers as to the content of limitations on non-statutory executive action. Limitations on executive action are usually derived from the language of the statute conferring the power to act, but such an approach is obviously inadequate for the task in respect of non-statutory action. The superior courts of the United Kingdom have had many more occasions than Australian courts to examine non-statutory executive action and establish its limits. This article explains how

² See, eg, *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 (27 January 2016) (*Youssef*); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453; *R v Ministry of Defence; Ex parte Smith* [1996] QB 517; *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (*GCHQ case*); *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 (*Lain*).

legitimate regard can be had to British legal developments in this area when considering judicial review of non-statutory executive action in Australia. It demonstrates the ongoing utility of the principles used in the British cases, despite differences that have appeared between the two jurisdictions in modern times, so that guidance can be sought from them when Australian courts are required to address these issues.

This article uses the terminology of ‘executive action’ when discussing action by the executive branch and judicial review of it, rather than ‘administrative action’. This is simply because the word ‘administrative’ has connotations of administration of a statutory scheme. And, indeed, most judicial review is of this kind of ‘administrative’ action. However, the focus of this article is on the exercise, by members of the executive branch of government, of power that has not been conferred by statute, or of ‘non-statutory executive power’. The descriptor ‘executive’ as opposed to ‘administrative’ captures more fully the action that I am exploring.

What is meant in this article by ‘non-statutory executive action’? For the purposes of United Kingdom analysis, it refers to an exercise of prerogative power³ and other common law powers of the Crown. In Australian terms, it is a reference to an exercise of the power of the executive branch of government that is not conferred by, or referable or incidental to, a statute. At the Commonwealth level, it is that part of the Commonwealth government’s executive power that, to use the terms of s 61 of the *Commonwealth Constitution*, ‘extends to the execution and maintenance of [the] Constitution’.⁴ In relation to the Australian States, it refers to the inherent power that State governments inherited by virtue of their colonial relationship to the government of the United Kingdom, affected by State constitutions (where applicable)⁵ and the *Commonwealth Constitution*. Non-statutory executive power generally encompasses aspects of prerogative power that are suitable to Australia’s constitutional context as a federal nation under a written

³ In my analysis, I utilise the Blackstonian sense of the prerogative being only those powers that the executive has by virtue of royal or sovereign authority and that are not shared by the sovereign’s subjects: William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1765) vol 1, 232.

⁴ *Commonwealth Constitution* s 61.

⁵ For example, the Constitution of Queensland makes explicit provision for the content of state executive power: *Constitution of Queensland 2001* (Qld) s 51.

constitution.⁶ At the Commonwealth level, it has also been held to include what academics refer to as ‘nationhood’ power, being the ‘capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’.⁷ There is also a limited power, or capacity, to enter into contracts, and perhaps do other ‘transactional’ things that legal persons can do, without statutory authority.⁸ These powers might coincide, in nature if not in source, with what has been called ‘de facto’ or ‘third source’ powers in the United Kingdom⁹ and New Zealand.¹⁰ The focus of this article, however, is on the exercise of governmental non-statutory executive powers, rather than capacities that the government shares with other bodies vested with legal personality.

By ‘common law constitutionalism’, I am referring to the constitutional system that endures in the United Kingdom. The content of constitutional rules in this system is not provided by a written document but by a collection of co-existing, interacting and possibly competing¹¹ principles and conventions that have developed over centuries through the interaction of the monarch, his or her servants, Parliament and the courts. Many of the principles and

⁶ See, eg, *Barton v Commonwealth* (1974) 131 CLR 477, 490-1 (McTiernan and Menzies JJ), 498 (Mason J), 505-6 (Jacobs J); *New South Wales v Commonwealth* (1975) 135 CLR 337, in particular at 501 (Murphy J) (*‘Seas and Submerged Lands case’*).

⁷ *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J). See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 61-3 [129]-[133] (French CJ), 91 [242] (Gummow, Crennan and Bell JJ) (*‘Pape’*).

⁸ *Williams v Commonwealth* (2012) 248 CLR 156, eg at 179-80 [4], 216-7 [83] (French CJ), 246 [188], 249-56 [192]-[209] (Hayne J), 354-5 [532], [534] (Crennan J) (*‘Williams [No 1]’*).

⁹ See, eg, Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001) 36, ch 5.

¹⁰ See, eg, BV Harris, ‘Recent Judicial Recognition of the Third Source of Authority for Government Action’ (2014) 26 *New Zealand Universities Law Review* 60; BV Harris, ‘Government “Third Source” Action and Common Law Constitutionalism’ (2010) 126 *Law Quarterly Review* 373; BV Harris, ‘The “Third Source” of Authority for Government Action Revisited’ (2007) 123 *Law Quarterly Review* 225; Bruce V Harris, ‘The “Third Source” of Authority for Government Action’ (1992) 108 *Law Quarterly Review* 626.

¹¹ For example, some of the judicial comments in *R (Jackson) v Attorney General* [2006] 1 AC 262 raised the question whether the Supreme Court could reject or fail to give effect to a law that attempts to ‘subvert the rule of law’: 318 [159] (Baroness Hale), and see also 302-3 [102] (Lord Steyn), 303 [104], [107] (Lord Hope). This sets up a competition between two principles of common law constitutionalism: parliamentary sovereignty and the rule of law. See Jeffrey Jowell, ‘The Rule of Law’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (Oxford University Press, 8th ed, 2015) 13, 33-4; Mark Elliott, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (Oxford University Press, 2015) 38.

conventions that today are said to be of ‘constitutional’ status are the product of battles between the King and Parliament in the Glorious Revolution of the 17th century. Consequently, these principles reflect the concessions that were won by, or values that prevailed in, those battles. For example, responsible government is designed to ensure the accountability of the executive branch of government to the Parliament, which represents the people.¹² Parliamentary sovereignty is designed to ensure the pre-eminence of the will of the people (represented by Parliament) over the views of others, including the monarch and judges. Other examples of principles of common law constitutionalism include the separation of powers and the rule of law.¹³ Whether these principles fall into any hierarchy is a matter of ongoing debate, though since the writing of Dicey it has been accepted that the two pre-eminent principles of common law constitutionalism are parliamentary sovereignty and the rule of law.¹⁴

Part II of this article provides a summary of the differences that have emerged between judicial review in Australia and the United Kingdom. How non-statutory executive power can provide the context in which judicial review developments in the United Kingdom may remain useful in Australia is the focus of Part III. Part IV explores which principles of common law constitutionalism that underpin decisions of the Supreme Court of the United Kingdom (‘UKSC’) can provide guidance in the Australian context. It discusses how parliamentary sovereignty, the presumptions of lawfulness and reason and the separation of powers have been used in cases to either impose or negate limitations on non-statutory executive action and speculates on how they might be used in appropriate Australian cases in the future. A brief conclusion is provided in Part V.

¹² See, eg, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 93 [121] (Gageler J) (*‘Plaintiff M68/2015’*) quoting from *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 441.

¹³ See Elliott, above n 11, 55 for a suggestion that the rule of law, rather than being a stand-alone principle, overlaps with or is a synonym for ‘principles and traditions of the common law’ generally.

¹⁴ See, eg, Jowell, above n 11, 13.

II JUDICIAL REVIEW IN AUSTRALIA AND THE UNITED KINGDOM: A BRIEF SUMMARY OF THE DIVERGENCE

Australia began its life as a federation of six British colonies and, for much of its early life, the law of judicial review in Australia developed largely in tandem with that of the United Kingdom.¹⁵ However, particularly since the later decades of the 20th century, the law of judicial review in the two jurisdictions has steadily grown apart. The divergence has been explored in depth elsewhere¹⁶ and it suffices here to mention a few of the suggested reasons for it. Most of them derive from the impact of European Union law on the law of the United Kingdom.¹⁷ This prompted the enactment of the *Human Rights Act 1998* (UK) and is the motivating factor behind the rise of proportionality analysis by British courts in the course of determining whether a right identified in that Act has been unlawfully breached,¹⁸ and perhaps even as a common law ground of judicial review in the absence of a human rights claim.¹⁹

¹⁵ See, eg, Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10 *New Zealand Journal of Public and International Law* 143, 145-7.

¹⁶ For fuller discussions of the divergence, see, eg, Peter Billings and Anthony Cassimatis, 'Australia's Codification of Judicial Review: Has the Legislative Effort been Worth It?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 180; Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43 *Federal Law Review* 59; Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114; Christopher Forsyth and Emma Dring, 'The Final Frontier: The Emergence of Material Error of Fact as a Ground for Judicial Review' in Christopher Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 245, 259; Cheryl Saunders, 'Constitutions, Codes, and Administrative Law: The Australian Experience' in Christopher Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 61; Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1.

¹⁷ On 29 March 2017, the UK government informed the European Union of its intention to withdraw from the EU. What the exit of the UK from the EU (commonly known as 'Brexit') will actually look like, in fact and in law, will take several years to determine. In particular, to what extent it is possible and desirable to detangle UK law from the European influences of the last half century is likely not to be known for many years. Accordingly, this article proceeds on the basis of the current state of UK law rather than speculates about what may follow Brexit.

¹⁸ See, eg, *Cunliffe v Commonwealth* (1994) 182 CLR 272, 356-7 (Dawson J); Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in Christopher Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 264, 265-7.

¹⁹ See, eg, *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 (25 November 2015) [131]-[134] (Lord Neuberger P with Lord Hughes SCJ agreeing), [280]-[283] (Lord Kerr SCJ); *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (25 March 2015) [98] (Lord Mance SCJ, with whom Lord Neuberger P, Lady Hale DP and Lord Wilson SCJ agreed), [104]-[109] (Lord Sumption SCJ, with whom Lord Neuberger P, Lady Hale DP and Lord Wilson SCJ

This in turn has prompted discourse in the United Kingdom on the appropriateness of judicial deference to executive assessments and variable intensity of judicial review depending on the nature and impact of the executive action being reviewed.²⁰ The closer relationship of the judiciary to the administrative branch in European countries has been perceived by Australian judges to be behind the British courts' embrace of giving substantive protection to a person's legitimate expectations of government conduct²¹ and their focus on the quality of decision-making and, thus, the merits of outcomes.²²

Put that way, the differences between judicial review in the United Kingdom and judicial review in Australia are stark. In Australia, at the Commonwealth level, there is no Bill of Rights, so it lacks the 'rights anchor' on which a proportionality analysis in respect of administrative action could hang in any orthodox way.²³ Clearly, neither the Commonwealth of Australia nor the Australian states have any need to accommodate the law of the European Union and the more substantive role for courts that seems to accompany it. And, insofar as legitimate expectations are concerned, the High Court has made extremely clear that it sees no use for the concept in Australian administrative law at all.²⁴

agreed); *Kennedy v Charity Commission* [2015] AC 455, 508-9 [54]-[55] (Lord Mance SCJ, with whom Lord Neuberger P and Lord Clarke SCJ agreed). In *Youssef* [2016] UKSC 3 (27 January 2016), Lord Carnwath SCJ (with whom the other members of the Court agreed) 'hoped that an opportunity can be found in the near future for an authoritative review in [the Supreme Court] of the judicial and academic learning on' whether the Court 'should authorise a general move from the traditional judicial review tests to one of proportionality': [55].

²⁰ See, eg, the speeches in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 ('*Carlile*') and the collection of essays in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow*, Hart Studies in Comparative Public Law (Hart Publishing, 2015).

²¹ See, eg, *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.

²² *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23-4 [72]-[76] (McHugh and Gummow JJ) ('*Lam*').

²³ See Boughey, above n 16, 70, 75-7. Proportionality may, however, be starting to make in-roads as an indicator of rationality of administrative action: see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 352 [30] (French CJ), 366 [73]-[74] (Hayne, Kiefel and Bell JJ).

²⁴ See *Minister for Immigration and Border Protection v WZARH* (2015) ALJR 25 ('*WZARH*'), 31-2 [28]-[30] (Kiefel, Bell and Keane JJ), referring to *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ) ('*S10*') and *Lam* (2003) 214 CLR 1. See also Greg Weeks, 'What Can We Legitimately Expect from the State?' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 147-147, 159-61.

But the most crucial difference between the two jurisdictions is the absence, in the United Kingdom, of a written constitution that expressly allocates power to different branches of government and that divides power between two spheres of government. The High Court of Australia pins its approach to the role of courts when conducting judicial review of executive action on the *Commonwealth Constitution*. This has, extra-judicially, been referred to as the ‘constitutionalisation’²⁵ of Australian administrative law. It is the process whereby constitutional principles have infused Australian administrative law, and particularly the law of judicial review, to the point where the *Commonwealth Constitution* is now accepted as entrenching a minimum provision of judicial review of executive action at both the State and Commonwealth levels.²⁶ The *Commonwealth Constitution* is also accepted to require, at least at the Commonwealth level, the separation of judicial power from legislative and executive power and this has been considered to necessitate a narrow role for the federal courts on judicial review.²⁷

Most relevant for present purposes is the effect of the separation of judicial power from executive power. Australian courts conduct judicial review of executive action to ensure that the executive branch remains within its jurisdiction; that is, within the limits of the law (including the relevant written constitution) conferring on the executive the power or authority to act.²⁸ The High Court has made plain that the rule of law, as a concept upon which the *Commonwealth Constitution* is based, requires no less.²⁹ And this is where

²⁵ See, eg, Stephen Gageler, ‘The High Court on Constitutional Law: The 2001 Term’ (2002) 25 *University of New South Wales Law Journal* 194, 199; Stephen Donaghue, ‘Justice Hayne and the Constitutional Underpinnings of Enforcement of the Limits on Public Power’ (2015) 26 *Public Law Review* 287. See also Stephen Gageler, ‘The Constitutional Dimension’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 165 and Saunders, above n 15, 146 and references cited in n 13 thereto.

²⁶ See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*‘Plaintiff S157’*); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-1 [98]-[100] (*‘Kirk’*); see also JJ Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77; Boughey, above n 16, 68-9.

²⁷ See, eg, *Lam* (2003) 214 CLR 1, 24-5 [76]-[77] (McHugh and Gummow JJ). For a recent, authoritative, description of this limited role, see *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174 [23].

²⁸ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 (Brennan J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-1 (Mason J).

²⁹ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J); *Plaintiff S157* (2003) 211 CLR 476, 513-4 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also R S French, ‘Administrative Law in Australia: Themes and

another area of Australian ‘exceptionalism’,³⁰ the retention of the distinction between jurisdictional error and non-jurisdictional error,³¹ becomes relevant. The High Court has utilised the concept of jurisdictional error to mark both the limits of the authority of the executive branch³² and the province of the executive upon which the judiciary cannot trespass when conducting common law judicial review.³³ Thus, any error by which either the executive or the judiciary transgresses the limits of its respective authority is a jurisdictional error. Jurisdictional error is a concept that Australia received from its British legal heritage. However, in the case of *Anisminic Ltd v Foreign Compensation Commission*,³⁴ the House of Lords gave ‘jurisdictional error’ an interpretation that resulted in all legal errors being jurisdictional errors, and British courts have since recognised that the distinction between jurisdictional and non-jurisdictional errors has been abolished.³⁵ Outside the confines of a written

Values Revisited’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24, 28; Murray Gleeson, ‘Constitutional Rights (lecture 4 in the 2000 Boyer Lecture series)’ in Donald McDonald (ed), *The Boyer Collection* (ABC Books, 2000) 533, 537.

³⁰ See Taggart, above n 16.

³¹ For the High Court’s decision that the abolition of the distinction between jurisdictional error and other legal errors in England should not be followed in Australia, see *Craig v South Australia* (1995) 184 CLR 163, 179. For a very recent application of the distinction, see *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (14 February 2018).

³² See, eg, *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, particularly 142-3 [168]-[169] (Hayne J) (*‘Aala’*).

³³ See, eg, *Plaintiff S157* (2003) 211 CLR 476, 522 [123] (Callinan J); *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 209 [32] (Gleeson CJ, Gaudron and Hayne JJ), 226-9 [80]-[87] (Kirby J). See also Matthew Groves and Janina Boughey, ‘Administrative Law in the Australian Environment’ in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 3, 18. ‘Common law judicial review’ refers to judicial review conducted in the High Court pursuant to s 75(v) of the *Constitution* or in the Federal Court pursuant to s 39B(1) of the *Judiciary Act 1903* (Cth) (on the equivalence of which see *Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Ltd* (2008) 237 CLR 146, 151-2 [4] (Gummow, Hayne, Heydon and Crennan)) (*‘FCT v Futuris’*), as opposed to a statutory scheme of judicial review, such as that provided in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

³⁴ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

³⁵ See, eg, *R v Hull University Visitor; Ex parte Page* [1993] AC 682, 701-2 (Lord Browne-Wilkinson, Lord Keith and Lord Griffiths agreeing) and 705-6 (Lord Slynn, Lord Mustill agreeing). For a recent rejection of a return to the distinction between jurisdictional and non-jurisdictional errors, see, eg, *Regina (Cart) v Upper Tribunal* [2012] 1 AC 663, 683-684 [39]-[40] (Baroness Hale SCJ), 702-3 [110]-[111] (Lord Dyson SCJ). It should be noted, however, that neither does the High Court limit errors that can be jurisdictional to the narrow, pre-*Anisminic*, approach of errors that negated a decision-maker’s authority to make the relevant decision from the outset. While the High Court has maintained the distinction between jurisdictional error and non-jurisdictional error, it is accepted that ‘an error of law may amount to a jurisdictional error even though the tribunal which made the

constitution, the English courts have been freer in modern times to conduct judicial review for ‘good administration’,³⁶ or for ‘the maintenance of the highest standards of public administration’.³⁷ That is, they have taken a normative approach to judicial review rather than an enforcement approach.

The High Court has expressly disavowed the appropriateness for Australia of the British courts’ dismissal of the distinction between jurisdictional error and non-jurisdictional error.³⁸ It has justified its retention of the distinction in the case of Commonwealth executive action by reference to the remedies provided for in the section of the *Commonwealth Constitution* that confers original jurisdiction on the High Court to conduct judicial review: s 75(v). Section 75(v) provides that the High Court has jurisdiction in all matters ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. The High Court has identified the role that jurisdictional error plays in the issue of the writs of prohibition and mandamus³⁹ and has justified its retention of the concept accordingly.⁴⁰ The

error had jurisdiction to embark on its inquiry’: *Re Gray; Ex parte Marsh* (1985) 157 CLR 351, 371 (Gibbs CJ).

³⁶ See, eg, *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546, 4556 [29] (Lord Wilson SCJ), with whom Baroness Hale DP, Lord Clarke SCJ, Lord Reed SCJ and Lord Hughes SCJ agreed) and *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 (PC), 637. See also Jason Varuhas, ‘Against Unification’ in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing, 2015) 91, particularly at 106, where he states that ‘[a] central concern [of common law judicial review] is to ensure public power is exercised according to basic expectations of good administration’; and the references to ‘principles of good administration’ in Elliott, above n 9, 28, 180-1, 193-4.

³⁷ *R v Lancashire County Council; Ex parte Huddleston* [1986] 2 All ER 941, 945 (Donaldson MR); see also Parker LJ at 947.

³⁸ See, eg, *Craig v South Australia* (1995) 184 CLR 163, 178-9 and *Kirk* (2010) 239 CLR 531, 571 [65]-[66] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁹ See, eg, *Plaintiff S157* (2003) 211 CLR 476, 505-6 [75]-[76], 508 [83] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 521-2 [121]-[123] (Callinan J); *Aala* (2000) 204 CLR 82, 92-4, 97 [34], 101 [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing at 89 [5]), 135 [142] (Kirby J), 140-1 [159]-[163] (Hayne J). See also William Gummow, ‘The Scope of Section 75(v) of the Constitution: Why Injunction and No Certiorari?’ (2014) 42 *Federal Law Review* 241, 248-9, Lisa Burton, ‘Why These Three? The Significance of the Selection of Remedies in Section 75(v) of the Australian Constitution’ (2014) 42 *Federal Law Review* 253, 260-1, Gageler, above n 25, 200. In relation to the injunction, however, see *FCT v Futuris* (2008) 237 CLR 146, 162 [47] where Gummow, Hayne, Heydon and Crennan JJ noted that ‘principles of jurisdictional error control the constitutional writs but do not attend the remedy of injunction including that provided in s 75(v)’.

⁴⁰ *Ibid* and, more explicitly justifying the retention of jurisdictional error by reference to s 75(v), see *Lam* (2003) 214 CLR 1, 24-5 [76]-[77] (McHugh and Gummow JJ). Though for examples of dicta questioning the need to retain the distinction between jurisdictional error and other errors of law, *FCT v Futuris* (2008) 237 CLR 146, 184 [129]-[130] (Kirby J); *Re Minister for Immigration and*

concept's retention has also been justified by reference to the reach of the label 'officer of the Commonwealth' in s 75(v). As this label extends to Commonwealth judicial officers as well as officers in the executive branch, and because fewer legal errors are jurisdictional errors when made by a judicial officer,⁴¹ it has been argued that it is necessary to maintain the distinction to ensure that only jurisdictional errors of Commonwealth judicial officers are examinable by the High Court in its original jurisdiction.⁴²

In the case of State executive action, the High Court determined in *Kirk v Industrial Court (NSW)*⁴³ ('*Kirk*') that Chapter III of the *Commonwealth Constitution*, which provides for the judicial branch of government (and in which s 75(v) appears), requires the ongoing existence of a body that meets the description of a 'Supreme Court of a State'.⁴⁴ A 'defining characteristic'⁴⁵ of this body is the inherent supervisory jurisdiction that the colonial Supreme Courts inherited by virtue of their having the same jurisdiction as the Courts of Queen's Bench in England at the time of federation.⁴⁶ The supervisory jurisdiction of the courts is the jurisdiction to 'grant certiorari for jurisdictional error';⁴⁷ 'the mechanism for the determination and enforcement of the limits on the exercise of'⁴⁸ executive power. At the State level, the retention of jurisdictional error operates to mark a limitation on the competence of State Parliaments: 'Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'.⁴⁹ However, the effect of the decision in *Kirk* was to reinforce the notion that judicial review by Australian courts is about identifying and enforcing the

Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57, 123 [212] (Kirby J). See also Taggart, above n 16, 9.

⁴¹ See *Craig v South Australia* (1995) 184 CLR 163, 176-80.

⁴² See Stephen Gageler, 'Administrative Law and Judicial Remedies' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 368, 377-8.

⁴³ *Kirk* (2010) 239 CLR 531.

⁴⁴ *Ibid* 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁵ *Ibid* 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁶ *Ibid* 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). For a critique of this approach, see Jeffrey Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (2014) 40 *Monash University Law Review* 75.

⁴⁷ *Kirk* (2010) 239 CLR 531, 580 [97].

⁴⁸ *Ibid* 580 [98].

⁴⁹ *Ibid* 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

limits of executive power, again reinforcing the contrast between Australian judicial review and the normative approach of British courts to judicial review.

III NON-STATUTORY EXECUTIVE POWER: PROVIDING SCOPE FOR CONVERGENCE?

In such an environment, and at least until any changes to United Kingdom judicial review law consequent upon ‘Brexit’ come to be,⁵⁰ it might be difficult to see how the law of judicial review in Australia and the law of judicial review in the United Kingdom could even re-align, let alone converge to an extent that would preserve the utility of British legal developments for Australian courts and lawyers grappling with judicial review of non-statutory executive action. However, judicial exploration of the justiciable limits of non-statutory executive power provides a context in which such convergence could take place.⁵¹

Perhaps perversely, the scope for convergence arises from the formal difference identified above between the approach to judicial review in the two jurisdictions: Australia’s maintenance of the distinction between jurisdictional error and non-jurisdictional error, and the focus on the determination and enforcement of limits on executive power. To understand how these aspects of Australian judicial review law might lead us back to our common law comparators, it is necessary to look at what the retention of the distinction means for judicial review.

In Australia, the High Court has made clear that the effect of a jurisdictional error is that the decision-maker acted beyond its jurisdiction, or acted in a way in which it did not have power, or jurisdiction, to act.⁵² Where a breach of the judicial review standards constitutes jurisdictional error, the result of the breach is that the impugned decision ‘lacks legal foundation and is

⁵⁰ See above n 17.

⁵¹ The potential for convergence between the laws of Australia, the United Kingdom and New Zealand in respect of what she called ‘inherent executive power’ was recognised by Saunders, above n 15, 164.

⁵² See, eg, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-5 [51] and the cases cited at fn 51 (Gaudron and Gummow JJ), 618 [63] (McHugh J), 646-7 [152]-[153] (Hayne J) (*Bhardwaj*); quoted with approval in *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

properly regarded, in law, as no decision at all'.⁵³ The imposition of judicial review standards is therefore to apply at the point of determining the extent of the power (purportedly) exercised. Judicial review standards inform the limits of the power ab initio, such that any departure from a judicial review standard that properly applies to an exercise of power will render the action invalid.⁵⁴ The standards operate as limitations on the executive power itself. This means that, for example, an attempt to make a decision in breach of the applicable standards of procedural fairness has the result that the power to make the decision in the way that it was made did not exist at all.

Thus, in Australia, the 'administrative law question' of whether a judicial review standard has been breached has become subsumed in the 'constitutional law question' of whether power existed. Looking at the relevant question in this way, to consider whether the decision-maker had the power to do what he or she did in the way that he or she did it, it is clear that the focus is on the identification of limits on power. The relevant question here is: how are these limitations to be identified in respect of non-statutory executive power?

The role of jurisdictional error in establishing the limits of executive power has always been discussed by the High Court in statutory terms. The High Court has spoken of the importance of statutory construction and presumptions as to Parliament's intention when determining whether an error is jurisdictional.⁵⁵ Judicial review standards manifest as limits on power, as Parliament is presumed to have intended that a power will not be exercised, for example, for an unauthorised purpose or without taking into account all

⁵³ *Bhardwaj* (2002) 209 CLR 597, 614-5 [51] (Gaudron and Gummow JJ).

⁵⁴ This is consistent with the approach taken by Elliott in his analysis with respect to the basis for imposing judicial review standards on the 'legal' category of non-statutory power, as opposed to de facto power: see Elliott, above n 936, 180-1. The UKSC has recently commented on the legal basis for judicial review of prerogative power (see *Youssef* [2016] UKSC 3 at [37]) but in terms that neither assert or deny the soundness of this approach.

⁵⁵ See, eg, *FCT v Futuris* (2008) 237 CLR 146, 164 [55] (Gummow, Hayne, Heydon and Crennan JJ), 188 [140] (Kirby J); *Plaintiff S157* (2003) 211 CLR 476, 506-7 [78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also JK Kirk, 'The Concept of Jurisdictional Error' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) 11, 12, 14; Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 248, 274; Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 151; Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (The Federation Press, 2012) 45-6; Spigelman, above n 26, 87.

relevant considerations.⁵⁶ To this extent, the High Court has maintained an ultra vires approach to judicial review, meaning they have used statutory construction principles to attribute an intention to Parliament regarding the limits of powers conferred by Parliament on the executive branch.

This statutory focus is to be expected for two reasons. First, jurisdiction is generally conceived of as being conferred or created by a statute. It is therefore logical to look to the statute to determine the limits of a decision-making body's jurisdiction. Secondly, and more relevantly for present purposes, the High Court has not yet been called upon to conduct judicial review of *exercises* of non-statutory executive power, as opposed to its *existence*. The High Court has not even yet been required to determine⁵⁷ whether it will apply the principle of the House of Lords decision in *Council for Civil Service Unions v Minister for the Civil Service*⁵⁸ ('the *GCHQ case*') that permits judicial review of non-statutory executive action in an appropriate case.⁵⁹ This case involved a decision by the Minister, pursuant to prerogative power, to prevent staff members of the intelligence headquarters of the Government (Government Communications Headquarters) from belonging to a national trade union. The decision was made without consulting with the unions, as had been the practice in the past when variations to conditions of

⁵⁶ See, eg, *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 347-8 [73]-[74] (McHugh, Gummow and Hayne JJ) in relation to the ground of relevant and irrelevant considerations and 351 [82] for the role of jurisdictional error in marking the limits of power conferred by statute. The joint judgment in *Plaintiff S157* (2003) 211 CLR 476 also equated jurisdictional error with marking limits on power: see 506 [76].

⁵⁷ Although see *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 65 [69] (McHugh, Gummow and Hayne JJ) for obiter recognising the principle and supporting its application in Australia.

⁵⁸ *GCHQ case* [1985] 1 AC 374.

⁵⁹ The High Court has, however, endorsed other aspects of the *GCHQ case*. There are instances of recognition of the *GCHQ case* by the High Court in relation to procedural fairness: *Lam* (2003) 214 CLR 1, 20 [61] (McHugh and Gummow JJ); *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 659 (Dawson J) ('*Haoucher*'); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 20 (Mason CJ), 57 (Dawson J); *Kioa v West* (1985) 159 CLR 550, 583 (Mason J); unreasonableness: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 646 [124], [127] (Crennan and Bell JJ) ('*SZMDS*'); *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 76 [89] (Kirby J, dissenting in result); areas of executive power suggested in the *GCHQ case* not to be subject to judicial review: *Coutts v Commonwealth* (1985) 157 CLR 91, 99-100 (Wilson J), 105 (Brennan J); *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, 690; and the requirement for judges to show restraint where a dispute requires the application of policy rather than law: *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 73 ALD 1, 34 [149] (Kirby J, dissenting in result).

employment were being contemplated. A majority of the House of Lords held that an exercise of prerogative power was not immune from judicial review simply on account of the power's non-statutory source, but that factors such as the subject matter of the power and its nature may render a particular power non-justiciable. The result in that case was that, while the action under scrutiny may ordinarily have been subject to procedural fairness obligations, the national security considerations that attended the functions of the GCHQ excluded these obligations in this case. This was the first time the House of Lords had accepted the availability of judicial review in respect of an exercise of prerogative power in an appropriate case.⁶⁰

There can be little doubt that, when required to determine the question, the High Court will endorse the principle from the *GCHQ* case that legal source alone should not determine whether government action is amenable to judicial review. Not only has the principle been endorsed by intermediate appellate courts,⁶¹ but to decide otherwise would be inconsistent with dicta from the High Court that is concerned not to create 'islands of power immune from judicial supervision and restraint'.⁶² It is not so much a question of whether such action can be reviewed, but how.

In terms of the 'how', the cases in which Australian intermediate superior courts have considered judicial review of non-statutory executive action have not explicitly engaged with the concept of jurisdictional error. They have not conceptualised grounds of review in terms of jurisdictional error or 'limits on power'. They seem to have preferred the more orthodox administrative-law approach of first establishing that there was power ('the constitutional question') and then examining the administrative law question of

⁶⁰ It had earlier been accepted by the Queen's Bench Divisional Court in *Lain* [1967] 2 QB 864.

⁶¹ Such as the Full Court of the Federal Court in *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449 and *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 ('*Arts v Peko-Wallsend*'); the Full Court of the South Australian Supreme Court in *Acquista Investments Pty Ltd v Urban Renewal Authority* (2015) 123 SASR 147 and *Xenophon v South Australia* (2000) 78 SASR 251; and the Appeal Division of the Supreme Court of Victoria in *Victoria v Master Builders Association* [1995] 2 VR 121.

⁶² *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Aala* (2000) 204 CLR 82, 103 [45] (Gaudron and Gummow JJ): 'Indeed, an important exercise of the judicial power of the Commonwealth is its utility in controlling actions by the executive branch of government beyond the exercise of the executive power vested by s 61'.

how the power was exercised to determine whether any of the traditional grounds of judicial review relied upon had been established.⁶³

But this does not mean that the utility of jurisdictional error is limited to its role in establishing the limits of power conferred by statute. The ‘constitutionalisation’ of the role of the court on judicial review must surely also apply to judicial review of non-statutory executive action. Neither the jurisdiction of the High Court that is conferred by s75(v) of the *Commonwealth Constitution* nor the supervisory jurisdiction that is a ‘defining characteristic’⁶⁴ of a State Supreme Court is limited by reference to the source of the power being reviewed. Conceptually, it would not be ideal to have a different explanatory principle for review of the exercise of powers conferred by statute on the one hand, and non-statutory powers on the other, when Chapter III of the *Constitution* makes no such distinction. Further, at least at the Commonwealth level, given that all non-statutory executive power is derived from the *Constitution* it is not necessarily incongruous to use the language of jurisdiction and jurisdictional error when conceptualising the limits of that power. So the concept of ‘jurisdictional error’ needs to be given content for application in a non-statutory context. We need a way to determine what are the ‘inviolable limitations’⁶⁵ of non-statutory executive power. It is here that I see a role for the principles of common law constitutionalism in Australian judicial review.

IV THE UTILITY OF PRINCIPLES OF COMMON LAW CONSTITUTIONALISM UNDER AUSTRALIA’S WRITTEN CONSTITUTION

What is meant by ‘principles of common law constitutionalism’ was discussed in the introduction, and it will be recalled that such principles include the

⁶³ See, eg, *Bristol-Myers Squibb Pharmaceuticals Pty Ltd v Minister for Human Services and Health* (1996) 42 ALD 540, 552 (procedural fairness) (‘*Bristol-Myers*’); *Victoria v Master Builders Association* [1995] 2 VR 121, 169 (Eames J) (unauthorised purpose), 172 (Eames J), 142 (Tadgell J) (unreasonableness); *Arts v Peko-Wallsend* (1987) 15 FCR 274, 282 (Sheppard J), 308 (Wilcox J) (procedural fairness); *Thurgood v Director of Australian Legal Aid Office* (1984) 56 ALR 565, 572 (unreasonableness) (‘*Thurgood*’).

⁶⁴ *Kirk* (2010) 239 CLR 531, 566 [55], 581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁵ *R v Coldham; Ex parte Australian Workers’ Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J).

separation of powers, responsible government, parliamentary sovereignty and the rule of law.

When British colonies received the British legal system, these principles formed part of the system received to the extent allowed and with the variations required by local institutions and arrangements.⁶⁶ Upon its federation, the Commonwealth of Australia became governed under a written constitution that incorporated many of these principles,⁶⁷ whether explicitly⁶⁸ or as ‘assumption[s]’ in accordance with which the *Constitution* is framed, such as is the case with the rule of law.⁶⁹ These principles thus provided limitations on Australia’s governing institutions.

This, of course, is not to say that all principles of common law constitutionalism will constitute limitations on executive power in Australia. Nor does it mean that the common law principles that constitute limitations on non-statutory power in the United Kingdom will constitute such limitations in Australia. The High Court has made clear that in Australia it is necessary to look to the *Constitution* to ascertain the ambit of executive power.⁷⁰ The *Constitution* is not as fertile a source of fundamental principles as is the common law of England, particularly in light of the European influence on the latter.⁷¹ However, the High Court has also said that ‘[t]he history of British

⁶⁶ *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 206 [21] (French CJ). See generally J Stoljar, ‘Invisible Cargo: The Introduction of English Law into Australia’ in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law, Volume 1: Institutions, Concepts and Personalities* (The Federation Press, 2013) 194 and S Kenny, ‘Colonies to Dominion, Dominion to Nation’ in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law, Volume 1: Institutions, Concepts and Personalities* (The Federation Press, 2013) 245.

⁶⁷ See generally *Plaintiff M68/2015* (2016) 257 CLR 42, 90-96 [115]-[128] (Gageler J).

⁶⁸ Such as *Commonwealth Constitution* s 64, which requires ministers to become members of a house of Parliament within three months of becoming a minister, enshrining responsible government.

⁶⁹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J) (‘*Communist Party case*’), though the High Court’s linking of the rule of law to s 75(v), see *Plaintiff S157* (2003) 211 CLR 476, 482 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), has given the principle a more explicit operation.

⁷⁰ *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 467-9 [76]-[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (‘*Williams [No 2]*’). See also *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (‘*Re Ditfort*’); Saunders, above n 15, 162.

⁷¹ See *Kennedy v Charity Commission* [2015] AC 455, 504 [46] (Lord Mance SC) for discussion of the relationship between the common law and the *European Convention for the Protection of*

constitutional practice is important to a proper understanding of the executive power of the Commonwealth'.⁷² To this I would add the executive power of the States, given their historic colonial status.

More explicitly, in *Assistant Commissioner Condon v Pompano Pty Ltd*,⁷³ French CJ stated that '[t]he common law informs the interpretation of the *Constitution*... It carries with it the history of the evolution of independent courts as the third branch of government and, with that history, the idea of a court, what is essential to that idea, and what is not'.⁷⁴ The High Court identified in *Kirk* that an essential characteristic of a State Supreme Court is its supervisory jurisdiction that it inherited from the common law tradition.⁷⁵ In *Re Refugee Review Tribunal; Ex parte Aala*,⁷⁶ the Court identified an essential characteristic of the 'constitutional expression'⁷⁷ of the writs provided for in s 75(v) of the *Constitution* as being their ability to issue where there has been jurisdictional error.⁷⁸ This suggests that common law principles relating to supervisory jurisdiction and jurisdictional error can bear upon the construction of executive power and judicial power on a judicial review application in Australia.

That it is permissible for the common law to assist in the interpretation of the *Commonwealth Constitution* is thus clear.⁷⁹ What is impermissible is the automatic transplantation of the development of judicial review principles

Human Rights and Fundamental Freedoms (the 'Convention') insofar as the richness of the common law as a source of fundamental rights is concerned.

⁷² *Williams [No 2]* (2014) 252 CLR 416, 468 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also at 469 [81]: 'Consideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history'.

⁷³ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 ('*Condon v Pompano*').

⁷⁴ *Ibid* 47 [2] (French CJ). For a further description of the 'symbiotic relationship' between the *Commonwealth Constitution* and the common law, see *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104, 141-2 (Brennan J). See also The Hon W M C Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167.

⁷⁵ *Kirk* (2010) 239 CLR 531, 580-1 [97]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁶ *Aala* (2000) 204 CLR 82.

⁷⁷ *Ibid* 92 [19] (Gaudron and Gummow JJ).

⁷⁸ *Ibid* 101 [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing at 89 [5]), 135 [142] (Kirby J), 140 [159] (Hayne J).

⁷⁹ For a further example, see *Condon v Pompano* (2013) 252 CLR 38, 47 [3] (French CJ): the Court's decisions as to limits of, relevantly in that case, legislative power 'will be informed by the text of the Constitution, implications drawn from it, and principles derived from the common law'.

in the United Kingdom to Australian judicial review. However, as outlined above, the constitutional and administrative law questions in Australia have now fused. This is particularly so in relation to questions regarding non-statutory executive power, the judicial review of which must involve interpreting the *Commonwealth Constitution*, whether s 61⁸⁰ or other provisions that may bear upon the contours of state executive power. Thus, provided the common law principles to be deployed are those that have either survived the operation of a written constitution that ‘effects a distribution of powers and functions between the Commonwealth and the States’,⁸¹ or are applicable in such a constitutional context, such principles can still be used to determine the limits on non-statutory executive power and, therefore, to conduct judicial review of non-statutory action. Three examples of such principles follow.

A *Parliamentary Sovereignty*

A common law principle that can provide common ground for Australian and British courts in respect of limitations on non-statutory executive action is parliamentary sovereignty. This is an unusual claim in at least two respects. In the first place, this article focuses on non-statutory executive action. Non-statutory action, of course, involves no parliamentary action that could be argued to be sovereign. In the second place, parliamentary sovereignty is commonly regarded as a key point of difference between the constitutional systems of the United Kingdom and Australia. Parliamentary sovereignty, understood as the power of the Parliament to enact whatever laws it deems suitable to make, is considered to be one of, if not the, corner stones of the unwritten British constitution.⁸² Australia’s legal systems make no claim to operate under a principle of parliamentary sovereignty, so understood. Both Commonwealth and State parliaments are limited in their powers by the *Commonwealth Constitution*. State parliaments may also be limited by their own constitutions.⁸³ The High Court routinely invalidates Commonwealth legislation due to its inconsistency with the *Commonwealth Constitution*, and

⁸⁰ JJ Spigelman, ‘Public Law and the Executive’ (2010) 69(4) *Australian Journal of Public Administration* 345, 351.

⁸¹ *Williams [No 2]* (2014) 252 CLR 416 469 [83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸² See the resources in above n 11 and the text accompanying above n 14.

⁸³ Consider manner and form provisions consistent with *Australia Acts 1986* s 6.

State legislation for its inconsistency with Acts made thereunder. But a lack of parliamentary involvement in conferring a power may determine what can and cannot constitute a limitation on that power. If parliamentary sovereignty is understood as short form for the importance attached to the involvement of a democratically-elected body in the activities of government, there may be more that unites the two jurisdictions than separates them in the context of non-statutory executive action.

In *Pape v Federal Commissioner of Taxation* ('*Pape*'),⁸⁴ Gummow, Crennan and Bell JJ gave several well-known examples of limitations on non-statutory power derived from the absence of legislative involvement:⁸⁵ the executive branch is incapable, without statutory authority, of interfering with an individual's liberty (for example by arresting fugitive offenders for extradition from Australia)⁸⁶ and of dispensing its officers from obedience to the law.⁸⁷ The rationale for such limitations is that only the body representing the people can curtail a person's rights or exempt a person from laws of general application. Their source lies deep in the common law, in the victories won by the English Parliament in the 17th century. However, the present focus is on an aspect of executive decision-making that has received less attention in this context: application of an executive policy. Courts in Australia have taken an ultra vires-like approach to the application of policies to guide the exercise of statutory discretions. While policies themselves are not legally binding, they can inform the content of procedural fairness obligations or constitute relevant considerations in the exercise of a statutory discretion, and misapplication of such policies can constitute a reviewable error.⁸⁸ The reason that policies are able to have such an effect is because the legislature is presumed to have

⁸⁴ *Pape* (2009) 238 CLR 1.

⁸⁵ *Ibid* 87 [227] (Gummow, Crennan and Bell JJ).

⁸⁶ Referring to *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 634-5 [49]-[50] (Gummow and Hayne JJ).

⁸⁷ Referring to *A v Hayden* (1984) 156 CLR 532, 580-1 (Brennan J) and *White v Director of Military Prosecutions* (2007) 231 CLR 570, 592 [37] (Gummow, Hayne and Crennan JJ).

⁸⁸ *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 206, 207 (French and Drummond JJ) ('*MILGEA v Gray*'); *Haoucher* (1990) 169 CLR 648, 655 (Deane J), 671 (Toohey J), 684 (McHugh J); *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 81. Though see *Jacob v Save Beelihar Wetlands (Inc)* [2016] WASCA 126 (15 July 2016) for an example of the statutory context negating any such legal effects of a policy.

intended that such policies will be created and used to guide the exercise of a broadly conferred discretion.⁸⁹

Predictably, then, policies and other documents that might form part of the context for decision-making but that do not have this implicit support of Parliament have been held in Australia not to constitute a basis for any limits on power. This has been made clear in the cases challenging decisions made under non-statutory schemes that operate pursuant only to guidelines.⁹⁰ Thus, where the policies or documents on which the executive decision-maker wishes to rely in the exercise of his or her non-statutory power have a statutory foothold, they can form part of the context from which limits on the power can be drawn. If this statutory foothold is lacking, they are unlikely to be able to form the basis for any justiciable limitations in Australia.⁹¹

A recent decision of the UKSC demonstrates an approach to executive policies that is, in principle, consistent with this approach of Australian courts. The reverse of the coin by which the legislature is presumed to have intended that policies will be created to guide the exercise of discretion, is that the legislature is also presumed to have intended that such policies will be applied flexibly with regard to all the relevant circumstances of the case, rather than to exclude a decision without considering its merits.⁹² This ‘no fettering’ side of the coin has not been considered in Australia with respect to a non-statutory executive policy. But it was the application of the ‘no fettering’ rule to an exercise of non-statutory executive power that the UKSC was required to consider in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs*⁹³ (*Sandiford*). This case involved a policy not to provide financial

⁸⁹ *MILGEA v Gray* (1994) 50 FCR 189, 206 (French and Drummond JJ).

⁹⁰ See, eg, *Australasian College of Cosmetic Surgery Limited v Australian Medical Council Limited* (2015) 232 FCR 225, 242-3 [86]-[94] (*College of Cosmetic Surgery v AMC Limited*); *Ex-Christmas Islanders Association Inc v A-G (Cth)* (2005) 149 FCR 170, 191 [99]; *Xenophon v South Australia* (2000) 78 SASR 251, 264 [60] (Bleby J); *Bristol-Myers* (1996) 42 ALD 540, 551-2; *Barnett v Minister for Housing and Aged Care* (1991) 31 FCR 400, 403. The validity of at least some of these schemes would have been put in doubt by the High Court’s decision in *Williams [No 1]* (2012) 248 CLR 156.

⁹¹ See *College of Cosmetic Surgery v AMC Limited* (2015) 232 FCR 225, 242-3 [86]-[94]; *Xenophon v South Australia* (2000) 78 SASR 251, 264 [60] (Bleby J).

⁹² See, eg, *Minister for Immigration and Ethnic Affairs v Tagle* (1983) 67 FLR 566; *British Oxygen Co Ltd v Board of Trade* [1971] AC 610.

⁹³ *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 (16 July 2014).

assistance to British citizens facing legal issues abroad. The Court made clear that the lack of a legislative source for the power meant that the usual implication made in respect of statutory action, that Parliament intended a discretionary power to be exercised 'in different senses in different circumstances',⁹⁴ can have no application to non-statutory action. The consequence was that the policy requiring the refusal of funding to a British citizen on death row in Indonesia was not subject to the requirement that it be flexible to permit exceptions in an appropriate case.⁹⁵

The reasoning of the Supreme Court in this case has been, in my view soundly, criticised for its return to a focus on the source of power and for its lack of engagement with other justifications for the rule against fettering besides legislative intent.⁹⁶ The omission of references in the judgment to the case of *R v Foreign Secretary; Ex parte Everett*⁹⁷ was singular. In that case, the Court of Appeal determined that fair exercise of a policy guiding the exercise of the prerogative power to refuse to issue a passport required the applicant to be afforded an opportunity to provide information of any exceptional circumstances that would warrant departure from the policy. However, the Court's narrow approach in *Sandiford* makes it a good example of the importance of legislative involvement to judicial scrutiny of matters relating to executive policies. In both jurisdictions, the courts have declined to derive limitations on the government's non-statutory power from non-statutory policies: the decision-makers have been free to apply or depart from such policies as they wish.

Outside the context of the application of policies in the making of discretionary decisions, but equally demonstrative of the weight attached by British courts to documents with legislative support when identifying limits on non-statutory action, is the recent case of *Youssef v Secretary of State for*

⁹⁴ Ibid [61] (Lord Carnwath SCJ and Lord Mance SCJ, with whom Lord Clarke SCJ and Lord Toulson SCJ agreed).

⁹⁵ Ibid [62].

⁹⁶ See, eg. Adam Perry, 'Policies, Flexibility and Participation' (2017) *Cambridge Law Journal* (forthcoming); and Paul Daly, 'Royal Treatment: The Crown's Special Status in Administrative Law' (2017) 22 *Review of Constitutional Studies* 81, 95-97. See also Philip A Joseph, 'Renouncing the Exercise of Prerogative Power' (2017) 133(Jul) *Law Quarterly Review* 358.

⁹⁷ *R v Foreign Secretary; Ex parte Everett* [1989] QB 811.

*Foreign and Commonwealth Affairs*⁹⁸ ('*Youssef*'). While *Sandiford* demonstrates that a lack of statutory basis for a policy negates the derivation from that policy of limitations on the power being exercised, *Youssef* demonstrates that even remote statutory support is all that is required for contextual documents to provide legal limitations on the exercise of a non-statutory power. The case involved the Secretary's decision in the exercise of his prerogative power regarding the designation of persons on the United Nations' Consolidated List of members of Al-Qaida and its associates. The appellant, a United Kingdom resident, challenged the Secretary's decision to lift the hold that the United Kingdom had previously placed on his designation on the list.⁹⁹ The result of the decision was that the appellant became subject to the asset freeze imposed on such persons under the *Charter of the United Nations* and implemented by European and United Kingdom legislation.¹⁰⁰

In determining whether the Secretary had applied the incorrect standard of proof in making his decision, Lord Carnwath, giving the only judgment of the five-member Court, looked to the basis for and purpose of the power that the Secretary exercised and gleaned from that context the standard that the Secretary was required to apply. In this case, that context included the language of the Security Council resolution to which the exercise of power was ultimately directed, and other documents referred to in that resolution.¹⁰¹ It also included other Security Council resolutions relating to financial sanctions and the views of the Ombudsperson responsible for assisting the international committee in its consideration of delisting requests.¹⁰²

What is significant about this approach is that, although the action under review was non-statutory, the resolutions that comprised the relevant context had statutory force, by virtue of their incorporation into British law by the *European Communities Act 1972* (UK).¹⁰³ In relying on the resolutions and their supporting documents to provide the context needed to establish

⁹⁸ *Youssef* [2016] UKSC 3 (27 January 2016).

⁹⁹ Lord Carnwath proceeded on the basis that the Secretary's decision was amenable to judicial review, but explicitly stated that he was not deciding the point: *ibid* [22]-[26].

¹⁰⁰ See *ibid* [1]-[3].

¹⁰¹ *Ibid* [38]-[39], [50].

¹⁰² *Ibid* [38]-[50].

¹⁰³ *Ibid* [34].

whether the Secretary had acted fairly and rationally, Lord Carnwath was acutely aware that the scheme itself had statutory backing.¹⁰⁴ This decision thus demonstrates the reflection of *Sandiford* and the Australian cases: whereas in those cases the lack of a statutory basis for the relevant policies meant that the policies could have no bearing on limitations on the exercise of the powers in question, the presence of *some* statutory support for contextual documents in *Youssef*, even though the statutory support did not itself authorise the relevant decision, meant that the contextual documents could form the basis for limitations on the exercise of a non-statutory power.¹⁰⁵

When the opportunity arises for an Australian court to consider the content of limitations on non-statutory action, the court can legitimately seek guidance from this approach by the UKSC. Provided the legislation that provides some statutory backing to the context of a decision is constitutionally valid, there is nothing in Australia's constitutional context that would prevent the court from using that context to identify limitations on the non-statutory power being exercised.¹⁰⁶

B *The Presumption of Reason*

In conducting judicial review, the High Court has often invoked a common law principle of statutory construction: the legislature is presumed to have intended that the powers it confers will be exercised according to reason and justice.¹⁰⁷ That this principle of statutory construction has its origins in the common law has been stressed in several High Court judgments.¹⁰⁸ However, ultimately, like the UKSC's understanding of the rule against fettering discussed in the

¹⁰⁴ See, eg, *ibid* [49].

¹⁰⁵ For an earlier example of a British court using contextually relevant legislation to determine whether a non-statutory policy is reasonable, see *R v Criminal Injuries Compensation Board; Ex parte P* [1995] 1 WLR 845.

¹⁰⁶ Indeed, for an analogous approach in Australia, see *Thurgood* (1984) 56 ALR 565.

¹⁰⁷ See, eg, *R v Anderson; Ex parte Ipec-Air Pty Limited* (1965) 113 CLR 177, 189 (Kitto J); *Applicant S20/2002* (2003) 73 ALD 1, 17 [67] (McHugh and Gummow JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 349 [24] (French CJ), 362-3 [64]-[65] (Hayne, Kiefel and Bell JJ), 371 [90] (Gageler J).

¹⁰⁸ See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 370 [90], 371 [92], 375 [105] (Gageler J); *S10* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

previous section, it is a common law rule that relies for its operation on the implied intention of the legislature.¹⁰⁹

The imposition of the requirements of ‘reason and justice’ on this basis has been traced by the High Court back to a statement by Lord Halsbury LC in *Sharp v Wakefield*.¹¹⁰ The word ‘justice’ appears to have been used by Lord Halsbury LC as a synonym for ‘law’, as the Lord Chancellor cited *Rooke’s Case*¹¹¹ as authority for the proposition. In *Rooke’s Case*, Coke LJ stated that, even though the words of the relevant instrument granted a discretion, ‘yet their proceedings ought to be limited and bound with the Rule of Reason and Law...’¹¹² In a later decision; arising from a dispute with King James I as to whether the King, rather than the courts, could determine any case he saw fit;¹¹³ Coke LJ said that the law is founded on reason, but not ‘natural reason’ with which the King was endowed. Rather, cases are to be decided ‘by the artificial reason and judgment of the law’.¹¹⁴ From this early time, therefore, it was recognised that what is reasonable in the legal sense in a particular case is coloured by the requirements and logic of the law. This is consistent with 19th century cases that equated acting unreasonably with exceeding the powers conferred by a statute,¹¹⁵ which cases have been referred to with approval by High Court justices in recent times.¹¹⁶

¹⁰⁹ What is being implied is not ‘the collective mental state’ of the legislature when it enacted the relevant provision, but the intention that is presumed following the application of accepted principles of statutory construction: see *Zheng v Cai* (2009) 239 CLR 446, 455 [28].

¹¹⁰ *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury LC)

¹¹¹ *Rooke’s Case* (1597) 5 Co Rep 99b.

¹¹² *Ibid* 100.

¹¹³ See *Prohibitions del Roy* 12 Co Rep 64.

¹¹⁴ *Ibid* 65. In response, King James I told Coke LJ that it was treason to suggest that the King was subject to the law. Lord Justice Coke responded with Bracton’s now well-known maxim: *Quod Rex non debet esse sub homine, sed sub Deo and Lege* (‘that the King ought not to be subject to man, but subject to God and the law’).

¹¹⁵ See, eg, *Vernon v Vestry of St James, Westminster* (1880) 49 LJ Ch 130 (‘*Vernon*’), 136 where Malins VC cited *Biddulph v Vestry of St George, Hanover Square* (1863) 33 LJ Ch 411 (‘*Biddulph*’) as an example of a court examining whether powers were exercised in a reasonable manner. The Lords Justice in *Biddulph* in fact did not state their analysis in terms of reason or reasonableness. Rather, they focused on whether the public body exceeded the powers conferred on it by statute or acted for an improper motive.

¹¹⁶ See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 349 [25], where French CJ cited *Vernon* (1880) 49 LJ Ch 130 to demonstrate the canons of rationality to be applied when considering exercise of a statutory discretion and referred to early High Court authority applying

Two things are thus clear: first, that the unstated requirements intended by the legislature to attend the exercise of a statutory discretion are reason and lawfulness; and, secondly, that this principle of statutory construction is a common law principle that the High Court accepts has survived the differences between the British and Australian constitutional contexts. Indeed, in the Australian context, lawfulness, to the extent that it encapsulates more than a requirement to act reasonably,¹¹⁷ can be dealt with shortly: given Australia's written constitution and the High Court's approach to the jurisdiction of the High Court and State Supreme Courts, summarised above, it is trite to say that exercises of non-statutory power are attended by the requirement of lawfulness. The rest of this section will therefore focus on the basis for imposing a requirement of reason on the exercise of non-statutory power.

To state the position in terms of statutory construction is to highlight the challenge in identifying a basis for imposing such requirements on non-statutory executive action. With the exception of *Prohibitions del Roy*, all of the cases cited above regarding the imposition of a requirement of reason involved the conferral and exercise of a statutory discretion. They make clear that the requirement of reasonableness attends the exercise of a statutory discretion unless it is excluded by the terms of the Act. They say nothing about the imposition of a reasonableness requirement on the exercise of non-statutory executive power. When Coke LJ in *Prohibitions del Roy* referred to the 'artificial reason and judgment of the law', his Lordship was discussing the exercise of judicial power, not executive power. To presume a standard of reasonableness on this basis is therefore questionable in a non-statutory context – how can the presumed intention of the legislature have any bearing on the limits of a power that the legislature did not confer? Indeed, this was the crux of the reasoning in *Sandiford*, discussed above. But, I argue that the proper question is not how the presumed intention of the legislature can be of use, but rather whether the requirement of reason can be attributed to the executive

Vernon: Local Board of Health of the City of Perth v Maley (1904) 1 CLR 702, 712 (Griffith CJ), 716 (Barton and O'Connor JJ agreeing).

¹¹⁷ Or rationally – there is a difference in terminology between French CJ and the plurality in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. French CJ viewed unreasonableness and other judicial review standards, such as failing to consider a mandatory consideration, as going to an overarching standard of rationality (see at 350-1 [26]-[28]), whereas the plurality contemplated that other judicial review standards could find a home as indicators of unreasonableness: see at 364-6 [69]-[72] (Hayne, Kiefel and Bell JJ). Nothing turns on this difference in approach for present purposes.

branch independently of the legislature. This is where the development by British courts of the common law principle imposing this requirement can play an informative role in Australia.

There is no authority in Australia denying the possibility of imposing a requirement of reason on the exercise of non-statutory executive power. Indeed, there are lower court decisions in which the application of a reasonableness standard has been contemplated,¹¹⁸ though such decisions did not consider the basis on which the standard was imposed. Most cases that refer to the possibility of seeking judicial review of prerogative (or, in more modern times, non-statutory) power date the engagement of Australian courts with the issue back to the High Court decision in *R v Toohey; Ex parte Northern Land Council*.¹¹⁹ In this case, Mason J made comments in obiter that can be read as supporting, in principle, the amenability of non-statutory action to judicial review while doubting the courts' ability, in practice, to assess whether judicial review standards ordinarily applicable to the exercise of statutory power (such as reasonableness) have been met in a case involving non-statutory action.¹²⁰

However, as seen above, the High Court has considered it appropriate to invoke authority dating back to decisions of Coke LJ in *Rooke's Case* to impose a reasonableness requirement on the exercise of statutory discretions. It could therefore seek guidance of decisions of a similar era to support imposing such requirements on exercises of non-statutory power.

To find an early imposition of a reasonableness requirement on exercises of non-statutory executive power, it is necessary to refer to another

¹¹⁸ See, eg, *Victoria v Master Builders Association* [1995] 2 VR 121; *Arts v Peko-Wallsend* (1987) 15 FCR 274; *Thurgood* (1984) 56 ALR 565.

¹¹⁹ *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 ('*R v Toohey*'). This case was cited in submissions in *GCHQ case* [1985] 1 AC 374.

¹²⁰ *R v Toohey* (1981) 151 CLR 170, 218-21 (Mason J). This approach, of conceptually accepting that all grounds of review are available in respect of non-statutory action while noting that certain issues and evidentiary difficulties would render review on many of the grounds near impossible, has also been taken in other Australian decisions: see, eg, *Arts v Peko-Wallsend* (1987) 15 FCR 274, 278 (Bowen CJ), 281 (Sheppard J); *Victoria v Master Builders Association* [1995] 2 VR 121, 158-9 (Eames J) and the cases there cited, Tadgell J agreeing at 142 and Ormiston J agreeing at 149. See also *GCHQ case* [1985] 1 AC 374, 411 (Lord Diplock).

decision of Coke LJ, that of *Case of Proclamations*.¹²¹ In this case, Coke LJ and (once he was permitted to seek their counsel) two other judges examined the limits of the King's power to change the law by Proclamation rather than by an Act of Parliament. In the course of his reasons, Coke LJ referred to precedents of Proclamations 'which are utterly against law and reason, and for that void: for *que contra rationem juris introducta sunt, non debent trahi in consequentiam*' ('what is introduced that is contrary to the reason of the law ought not be ascribed consequences/drawn into precedent').¹²² This is an early statement of the requirement of lawfulness and reason in the exercise of non-statutory executive power. He concluded by proffering his famous statement that 'the King hath no Prerogative, but that which the law of the land allows him'.¹²³ This made clear that the criterion of lawfulness, with all of the limits that that criterion imposes (including a requirement to act reasonably), applied to exercises of prerogative power.

It is this tradition that, it seems to me, Laws LJ in the England and Wales Court of Appeal in *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs*¹²⁴ (and quoted with approval in the UKSC)¹²⁵ drew on when he referred, without citing authority, to 'reason and fairness' as the cornerstones of the standards of the common law that form the basis for judicial review of prerogative powers.¹²⁶ And, it is this tradition that can inform the determination of limits of non-statutory executive action in Australia. None of the judicial statements on which the imposition of requirements of lawfulness and reason on non-statutory activity proceeds depends upon or is affected by constitutional conditions in the United Kingdom that do not obtain in Australia. Statements such as that of Laws LJ make clear that Coke LJ's imposition of a reasonableness requirement on the executive survived the assumption by Parliament of its supreme role in the years that followed. They are not affected by European influences on British law. Nothing about a requirement of reason is excluded by a written constitution that divides power

¹²¹ *Case of Proclamations* (1611) 12 Co Rep 74.

¹²² *Ibid* 75.

¹²³ *Ibid* 76.

¹²⁴ *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 728 (CA).

¹²⁵ *Youssef* [2016] UKSC 3 (27 January 2016) [37] (Lord Carnwath SCJ with whom Lord Neuberger P, Lord Mance SCJ, Lord Wilson SCJ and Lord Sumption SCJ agreed).

¹²⁶ *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 728 (CA) [23].

between three branches of government or is affected by the division of power between two spheres, federal and state. Use of such authorities is entirely consistent with the High Court's statements as to how British constitutional history can be used to inform the Australian conception of executive power.

The requirement of reason can be understood, as a result of the above analysis, to be as much a condition on the lawful exercise of non-statutory executive power as it is on the exercise of power conferred by statute. That is, it is a precondition for the lawful exercise of non-statutory power. Whether other judicial review standards, such as taking into account irrelevant considerations and acting for an improper purpose, are subsets of the requirement of rationality,¹²⁷ or themselves directly negate the lawfulness of a decision,¹²⁸ there is now an articulated legal basis, reasoned from common law authority, on which such standards can constitute limitations on non-statutory executive action in the Australian context. How, on a practical level, such standards can be established in respect of an exercise of non-statutory executive action is beyond the scope of this article but the subject of my broader research.

C Separation of Powers

The separation of powers is capable of bearing two meanings in Australian constitutional law. The first is the separation of judicial power from executive and legislative power at the Commonwealth level, mandated by the text and structure of the *Commonwealth Constitution*. This separation comprises two limbs. The first limb requires that federal judicial power be vested in no body other than a court constituted under Chapter III of the *Commonwealth Constitution*.¹²⁹ The second limb precludes non-judicial functions from being conferred on courts constituted under Chapter III of the *Commonwealth Constitution*.¹³⁰ Both limbs operate as limitations on Commonwealth

¹²⁷ See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350 [26] (French CJ).

¹²⁸ See, eg, *ibid*, 364-6 [60]-[72] (Hayne, Kiefel and Bell JJ); Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287.

¹²⁹ See, eg, *Huddart, Parker & Co Proprietary Limited v Moorehead* (1909) 8 CLR 330; *New South Wales v Commonwealth* (1915) 20 CLR 54 (the 'Wheat Case'); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹³⁰ See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. See also Groves and Boughey, above n 33; Gleeson, above n 29.

legislative power, in that the Commonwealth Parliament can validly confer neither judicial functions on a body other than a Chapter III court nor non-judicial functions on a Chapter III court.¹³¹

The second meaning of the phrase ‘separation of powers’ refers to the common law distribution of powers and functions between the legislative, executive and judicial branches of government. It is this meaning that I employ in the present analysis. This ‘small c’ constitutional principle informs the exercise of power at the State level also. It notes that each branch has its own institutional competence and each is required to respect the integrity of other branches by not trespassing on their functions. This is the separation to which Brennan J (as he then was) alluded in *Attorney-General (NSW) v Quin*,¹³² an appeal in a State matter, in what has been referred to as ‘the most frequently cited general proposition underlying contemporary Australian administrative law’.¹³³

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.¹³⁴

The common law separation of powers underlies the important role of a superior court’s supervisory jurisdiction.

In judicial review, the separation of powers often manifests as discussions of ‘institutional competence’ and reasons for courts to desist from entering the zone of executive activity: formulating and administering government policy. This principle comes into play most often in Australia

¹³¹ See, eg, *Huddart, Parker & Co Proprietary Limited v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ).

¹³² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

¹³³ Spigelman, above n 26, 84.

¹³⁴ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6.

when the court is faced with a claim that certain executive action is not justiciable. Modern approaches to justiciability provide a good illustration of the focus on limits of power. Justiciability is a concept that can have different meanings depending on the context in which it is used, but one way of putting it in the context of judicial review of executive action is to say that something is not justiciable if there are no limits on it that a court can or will enforce.¹³⁵ On its face, this does not sit well with the notion of courts having supervisory jurisdiction, the purpose of which is to police the boundaries of powers to ensure that the body entrusted with the power does not breach its limits. Consistently with supervisory jurisdiction, in both the United Kingdom and Australia it is no longer common to speak of entire powers that are ‘non-justiciable’ (though decisions of ‘high policy’ such as the entry of treaties¹³⁶ and committing armed forces to war¹³⁷ may remain exceptions). Rather, what is spoken of is the justiciability of a particular decision, particular claims or grounds of review alleged in respect of an exercise of non-statutory power.¹³⁸ A more substantive approach to justiciability is evolving in both jurisdictions, in which justiciability concerns are merged with the consideration of grounds of review or, more correctly, with consideration of the limits of power. That is, it may be that a certain claim is not justiciable because the claim does not relate to a judicially-enforceable limit on the power exercised. The aspect of the exercise of power about which the claim is made (for example, in *Sandiford*, the application of a policy in making a decision) may well not have justiciable

¹³⁵ See, eg, Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017), 122 [3.60].

¹³⁶ See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 213 (Stephen J), 237-8 (Murphy J); *Blackburn v Attorney-General* [1971] 1 WLR 1037, 1039-40 (Denning LJ). See also Fiona Wheeler, ‘Judicial Review of Prerogative Power in Australia: Issues and Prospects’ (1992) 14 *Sydney Law Review* 432, 458-9.

¹³⁷ See, eg, *R v Toohy* (1981) 151 CLR 170, 219-20 (Mason J); *R v Jones* [2007] 1 AC 136, 163 [30]-[31] (Lord Bingham), 172 [65] (Lord Hoffman). See also Wheeler, above n 136, 451-2.

¹³⁸ In Australia, see, eg, *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 471 [103] (Lander J), 475 [128] (McKerracher J); *Hicks v Ruddock* (2007) 156 FCR 574, 597 [77], 600 [93]; *Re Ditfort* (1988) 19 FCR 347, 374-6. In the United Kingdom, this more substantive approach is exemplified by the Court of Appeal in *R (Abbas) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598. See generally Amanda Sapienza, ‘Justiciability of Non-Statutory Executive Action: A Message for Immigration Policy-Makers’ (2015) 79 *AIAL Forum* 70; Alan Robertson, ‘The Relationship between the Crown and the Subject’ (1998) 17 *Australian Bar Review* 209; Mark Elliott, *Beatson, Matthews, and Elliott’s Administrative Law: Text and Materials* (Oxford University Press, 4th ed, 2011) 123-9 [5.3.3].

limits. This does not mean that the entire exercise of power is not justiciable; it simply means that the power was not subject to the legal limitations claimed.

Lord Neuberger P has recently cautioned against the United Kingdom adopting the approaches of jurisdictions with written constitutions in relation to certain aspects of justiciability.¹³⁹ Certainly there are constitutional differences between the United Kingdom and Australia, as outlined above. In the sphere of justiciability, it is notable that Australia's written constitution requires a strict approach to what constitutes judicial power and when it must be exercised. It leaves no room for notions of judicial abstention, self-restraint or deference. However, underlying these differences, one can identify in the case law of each jurisdiction the common law separation of powers manifesting as questions of the institutional competence of the various branches of government.

Australian examples include the first Australian decision on the justiciability of non-statutory executive action, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd.*¹⁴⁰ The case at first instance was brought as a challenge to Cabinet's decision to list Stage 2 of Kakadu National Park on the World Heritage List, thus affecting the value of interests held by the mining company applicant. On appeal to the Full Federal Court, each justice commented on the Court's lack of expertise when dealing with decisions of this kind. Bowen CJ focused on the polycentric nature of Cabinet decisions such as this,¹⁴¹ while Wilcox J held that the impact of the decision on Australia's international relations took it outside the competence of the Court.¹⁴² More recently in *Aye v Minister for Immigration and Citizenship*,¹⁴³ a case involving the consequences of a decision to impose sanctions on the military regime in Burma, the justices of the Federal Court were concerned that the applicant's submissions were directed to the decision to impose sanctions itself, rather than whether she fell within the policy's terms. The decision whether to impose

¹³⁹ *Belhaj v Straw* [2017] UKSC 3 (17 January 2017) [133] (Lord Neuberger P) regards the foreign act of state doctrine. Lord Neuberger P criticised the High Court's approach to this issue at [246]-[247].

¹⁴⁰ *Arts v Peko-Wallsend* (1987) 15 FCR 274.

¹⁴¹ *Ibid* 278-9 (Bowen CJ).

¹⁴² *Ibid* 308 (Wilcox J).

¹⁴³ *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449.

sanctions was a policy decision that '[a] court is not equipped to determine'.¹⁴⁴ The concern for the institutional competence of the court when reviewing executive conduct has been said to be reflective of the separation of powers 'as an institutional means essential to securing the effectiveness of the rule of law in Australia'.¹⁴⁵

The common law separation of powers was a feature of the British cases on judicial review of non-statutory executive action prior to the introduction of the *Human Rights Act 1998* (UK).¹⁴⁶ However, I argue here that the common law separation of powers and its concern for the respective institutional competencies of courts and executive branch remains entrenched in the case law of the United Kingdom even following the changes wrought by their proximity to European systems. This is best demonstrated by a case brought under the *Human Rights Act* rather than a case of common law judicial review: *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department*¹⁴⁷ ('*Carlile*'). This case involved an exercise of statutory power, though it was a power cast in extremely broad terms.¹⁴⁸ Review was sought of the decision of the Home Secretary not to allow an Iranian, described in the agreed Statement of Facts as a 'dissident Iranian politician',¹⁴⁹ to enter the United Kingdom. The decision was made on the grounds that her presence would not be conducive to the public good due to its impact on relations between the United Kingdom and Iran. The case was based entirely on art 10 of the *European Convention of Human Rights*, which protects freedom of expression. The Secretary claimed that the interference with this right was 'justified as a proportionate response to the threat to national security, public safety and the rights of others which would be posed by a hostile reaction from

¹⁴⁴ Ibid 459 [47] (Lander J).

¹⁴⁵ *White v Director of Military Prosecutions* (2007) 231 CLR 570, 634 [178] (Kirby J in dissent). See also *Lam* (2003) 214 CLR 1, 24-5 [76] (McHugh and Gummow JJ).

¹⁴⁶ See, eg, the speeches in *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513.

¹⁴⁷ *Carlile* [2015] AC 945.

¹⁴⁸ Para 320(6) of the *Immigration Rules* provides that if the Secretary of State has personally directed that a particular person's exclusion from the United Kingdom is 'conducive to the public good', that person will be refused entry clearance or leave to enter: ibid 962 [14] (Lord Sumption SCJ).

¹⁴⁹ Ibid 954 [2] (Lord Sumption SCJ).

the Iranian government and other forces in Iran'.¹⁵⁰ In the result, this argument, and thus the Secretary's decision, was upheld.

The case centred on the application of proportionality analysis required by claims of breach of rights under the Convention.¹⁵¹ However, even in the course of proportionality analysis when dealing with a claim of a breach of the freedom of expression under the Convention, common law constitutional principles came into play. Lord Sumption SCJ noted that, setting apart any notions of 'deference' accorded to the executive, the assignment of weight to be attributed to the view of the government as to why infringement of a fundamental right was necessary was sourced in the separation of powers (as well as the pragmatic view about the evidential value of certain judgments of the executive).¹⁵² His Lordship stated that 'the *Human Rights Act 1998* did not abrogate the constitutional distribution of powers between the organs of the state which the courts had recognised for many years before it was passed' and '[e]ven in the context of Convention rights, there remain areas which although not immune from scrutiny require a qualified respect for the constitutional functions of decision-makers who are democratically accountable'.¹⁵³

These concerns reflect those that apply in Australia at the point of querying the justiciability of a particular claim: does resolution of the claim require 'an extension of the court's true function into a domain that does not belong to it'?¹⁵⁴ Thus, it can be seen that the common law constitutional principles that inform the justiciability of claims in respect of non-statutory executive action in Australia are still being utilised in the United Kingdom even in the course of judicial review under the *Human Rights Act 1998* (UK). But this occurs not as part of the justiciability analysis, which is a given in

¹⁵⁰ Ibid 961 [10] (Lord Sumption SCJ).

¹⁵¹ For examples of concerns of institutional competence reflected in judicial reasoning outside the *Human Rights Act 1998* (UK) context, see *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756, 841 [31] (Lord Bingham); *Bancoult [No 2]* [2009] 1 AC 453, 488 [58] (Lord Hoffman), 525 [163] (Lord Mance).

¹⁵² *Carlile* [2015] AC 945, 965 [22] (Lord Sumption SCJ).

¹⁵³ Ibid, 968 [28] (Lord Sumption SCJ). See also Lord Sumption SCJ at [31]-[33], [46], [49] for concern to establish the different institutional competencies of the judicial and executive branch, especially in the context of a Convention-rights claim in which the court is required to undertake a proportionality analysis of government action.

¹⁵⁴ *Re Ditfort* (1988) 19 FCR 347, 370.

allegations that a person's Convention rights have been infringed.¹⁵⁵ Rather it occurs as an aspect of the proportionality analysis that requires weight to be assigned to the view of the government that 'the objective of [its] measure is sufficiently important to justify the limitation of a protected right'.¹⁵⁶ So what in Australia is relevant at the point of justiciability is, in the United Kingdom in a claim under the *Human Rights Act 1998* (UK), relevant at the later stage of assigning weight to the government's view. But whether language of 'deference' or 'appropriate weight' or 'justiciability' is used, the same questions of institutional competence come into play.

This is not to negate the substantial differences between traditional, process-oriented judicial review, of the kind that still obtains in Australia, and the more substantive review that obtains under the *Human Rights Act 1998* (UK), as Lord Sumption SCJ went on to note.¹⁵⁷ Indeed, Lady Hale DP was careful to distinguish this case from those to which Australian judicial review is limited: judicial review of the lawfulness of a decision of a government officer.¹⁵⁸ But even Lady Hale DP recognised the value of 'wise observations of distinguished judges' in cases of the lawfulness review kind as to the respective competencies of courts and the executive, and noted that such observations help the Court in their 'approach to some at least of the questions which' they have to answer in rights cases.¹⁵⁹ That is, the Court can use the jurisprudence on the respective roles and institutional competencies of the executive and the judiciary legitimately to accord 'great respect' to judgments that 'the primary decision-makers are better qualified to make than are the courts'.¹⁶⁰ Even Lord Kerr SCJ, in dissent, accepted that the different institutional competencies of the executive and judicial branches called for 'very considerable respect' to be accorded to the executive's view when assessing the risks that might flow from government action in a particular case.¹⁶¹ But his Lordship emphasised also the

¹⁵⁵ *Carlile* [2015] AC 945, 968-9 [29]-[30] (Lord Sumption SCJ).

¹⁵⁶ *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700, 791 [74] (Lord Reed SCJ).

¹⁵⁷ *Carlile* [2015] AC 945 968-969 [29] (Lord Sumption SCJ).

¹⁵⁸ *Ibid* 988-989 [84] (Lady Hale SCJ).

¹⁵⁹ *Ibid* 989 [88] (Lady Hale SCJ).

¹⁶⁰ *Ibid* 989 [88]. Lord Neuberger P also devoted his reasons to the need to maintain the distinct roles of the executive and the judiciary (see especially at 981-2 [56]) and recognised the ongoing utility of traditional judicial review grounds in some *Human Rights Act 1998* (UK) cases (see 985 [68]-[69]). Lord Clarke SCJ largely agreed with the reasons of Lord Neuberger P: see 995 [111].

¹⁶¹ *Ibid* 1007 [150] (Lord Kerr SCJ).

court's competence in assessing whether executive action breaches a Convention right and the importance to be attached to the right.¹⁶²

The separation of powers is thus an example of a principle of common law constitutionalism that continues to pervade British cases on the limits of executive power, even in statutory *Human Rights Act* cases. It would be too hasty, therefore, to dismiss such cases as having no relevance to judicial review in Australia when they might provide insights into the allocation of responsibilities between the different branches of government, an understanding of which is of great utility when giving content to justiciable limits of non-statutory power.

V CONCLUSION

Principles of common law constitutionalism can provide meaningful, justiciable limitations on exercises of non-statutory executive power both in Australia and the United Kingdom, despite different constitutional contexts and approaches to judicial review. Common law principles including parliamentary sovereignty, the requirement of reason and the separation of powers can assist in determining the limits on non-statutory executive action in both jurisdictions and thus whether the limits have been breached. None of the arguments put negate the significance of the constitutional differences between the two jurisdictions or suggest that all common law principles at play in the United Kingdom can constitute limitations on non-statutory executive action in Australia. An obvious source of limitations that Australia will not be adopting in the near future, if at all, is the doctrine of substantive protection of legitimate expectations. For as long as Australian courts tie their approach to judicial review on Australia's written constitution and European law has an influence on the law of the United Kingdom, judicial review in Australia and the United Kingdom are unlikely to converge to a meaningful extent. But there remain basic common law principles that still apply in both jurisdictions. And when statutes conferring power and controlling judicial review are stripped away, these principles still provide enough commonality to render British cases helpful to Australian courts and lawyers considering the application of judicial review principles to non-statutory executive action.

¹⁶² Ibid 1007-8 [152] (Lord Kerr SCJ).