JUSTICIABILITY OF NON-STATUTORY EXECUTIVE ACTION: A MESSAGE FOR IMMIGRATION POLICY MAKERS

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The non-statutory executive power of the Commonwealth is firmly back on the public law agenda. Far from being neutered by the High Court's decision in *Williams v Commonwealth*,[1] which focused on the non-statutory capacity of the Commonwealth to enter into contracts for the spending of money, the Commonwealth's apparent appetite for exploring the limits of its non-statutory executive power is currently on display again, this time in an immigration context. At the time of writing, the High Court has reserved its judgment in *CPCF v Minister for Immigration and Border Protection and the Commonwealth*, a challenge to events that occurred in June and July 2014 involving the interception by the Commonwealth of a vessel containing 157 Sri Lankan asylum-seekers outside of Australia's migration zone (but inside Australia's contiguous zone), the transfer of the asylum-seekers to an Australian ship and a decision to take them somewhere other than Australia. The Commonwealth parties submitted that, if the power to take that action was not sourced in the *Maritime Powers Act 2013* (Cth) (as was their primary submission), then it was sourced in the non-statutory executive power of the Commonwealth.[2] They argued that a non-statutory power to take that action is not fettered by an obligation to afford procedural fairness or any notion of proportionality, as was claimed by the plaintiff. The Commonwealth parties also submitted that the exercise of any such non-statutory power would be informed by matters that are not for judicial determination. In light of these submissions, and the submissions of the plaintiff to the contrary, the High Court may be providing more elucidation of limitations on the Commonwealth's non-statutory executive power in the very near future.

The invocation of non-statutory executive power by the Coalition government in the case of the intercepted vessel is not an aberration. In the election campaign for the 2013 Federal election, the then shadow Minister for Immigration announced a number of proposed changes to the review of immigration decisions in respect of people who were living in the Australian community having arrived in Australia by boat without a visa.[3] For simplicity in this paper, rather than any attempt to depersonalise or stigmatise them, this group will be referred to as 'boat arrivals'. The proposal that received the most attention, both by the press and academia, was the suggestion that the Coalition might seek to abolish the Refugee Review Tribunal.[4] But one that slipped more under the radar was the announcement that they would seek to assess any claims to Australia's protection that boat arrivals may make by a 'non-statutory process'. They did not expand on precisely what they meant by a non-statutory process, except to say that it would be 'more streamlined', or how they would seek to achieve it. But the announcement to move to a non-statutory process was made in the context of removing any rights of boat arrivals to seek review of any decision made by the government in respect of them. The suggestion was that if the assessment process is non-statutory, boat arrivals would no longer be able to obtain judicial review of the decision that Australia does not owe them protection obligations under the

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1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugee Convention).

Why would the Coalition think that? Undergraduate administrative law students could tell the Coalition policy-makers that, following the House of Lords' decision in *Council for Civil Service Unions v Minister for the Civil Service*[5] (*CCSU*) and its first reception into Australia by the Full Court of the Federal Court in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd,*[6] (*Arts v Peko-Wallsen*d) the non-statutory source of a decision alone is not enough to make a decision non-justiciable, in the sense of not being amenable to judicial review of administrative action. But the High Court has never finally determined the question. Further, the Commonwealth and other Australian governments, and also private parties advised by highly esteemed counsel and reputable solicitors, have continued to make the submission that a non-statutory source renders a decision immune from judicial review, at least on procedural fairness grounds.[7] The courts, in response, have where possible refused to engage with the submission, deciding the case on other grounds or accepting that the law in this regard is not settled.[8] Perhaps *CPCF v Minister for Immigration and Border Protection* will be the case in which the High Court determines this question once and for all.

It may also be that the Coalition was given hope by the reasons for judgment of the High Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[9] (*S10*), which indicated that lawmakers had finally devised a way to exclude any obligation to afford visa applicants procedural fairness. In that case, the High Court unanimously held that departmental officers were under no obligation to afford an applicant procedural fairness when deciding whether to refer the applicant to the Minister for Immigration for him[10] to consider whether to grant a visa, or allow the applicant to make a visa application, in circumstances where prior visa applications had been unsuccessful. The Minister had argued that this was the result of the non-statutory nature of the inquiries being made at that preliminary stage – the department was simply exercising the Commonwealth's executive power under s 61 of the Constitution to make inquiries of a person's circumstances, rather than affecting any legal rights or obligations. Although the joint judgment of Gummow, Hayne, Crennan and Bell JJ found that the power was sufficiently connected to an exercise of statutory authority,[11] perhaps the upholding of the 'mere inquiries' scheme was enough for the Coalition to think they had found a window of opportunity: a 'non-statutory' way to exclude procedural fairness and possibly all judicial review of decisions in respect of boat arrivals.

This paper argues that, even if it is possible for the government to make migration-related decisions 'non-statutory', about which there seems to be much doubt, these decisions will be judicially reviewable regardless of that non-statutory source. If the now government is hoping to exclude, so far as is constitutionally possible,[12] judicial review of protection visa decisions in respect of boat arrivals, their policy-makers will need to go back to the drawing board.

Can protection visa inquiries be made on a 'non-statutory' basis?

As alluded to at the beginning of this paper, the High Court has recently cast some doubt on the ease of the invocation of the Commonwealth's non-statutory executive power to authorise government action.[13] The non-statutory executive power referred to is that authorised by s 61 of the Constitution that is not incidental to an exercise of statutory power: that executive power extending to the execution and maintenance of the Constitution. The High Court has accepted,[14] without closing off the possibility of new categories,[15] the following as categories of non-statutory executive power:

- prerogative power, understood in Blackstone's sense as the powers that the government has by virtue of its sovereign authority that are not shared with the sovereign's subjects,[16] such as the power to enter into a treaty and declare war;
- non-prerogative capacities, being the powers that the government has the nature of which[17] is shared with its subjects, such as the power to enter into contracts[18] and make inquiries;[19] and
- 'nationhood' power, which is the shorthand name generally accepted by academics, and now even the High Court,[20] for the power to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which otherwise cannot be carried out for the benefit of the nation'.[21]

In *Plaintiff M61/2010E v Commonwealth*[22] (the *Offshore Processing case*), the Commonwealth and another plaintiff, M69, submitted that the power to make inquiries of detainees on Christmas Island for the purpose of determining whether they should be allowed to make applications for visas was a non-statutory power, falling within the non-prerogative capacities. The Commonwealth submitted that, as the inquiries were of this nature, they could not affect the plaintiff's legal rights or obligations so in making the inquiries the departmental officers and reviewers were not obliged to afford the plaintiffs procedural fairness. The High Court delivered a unanimous joint judgment, deciding in accordance with the submissions of plaintiff M61 that the process was actually taken under and for the purposes of the *Migration Act 1958* (Cth).[23] This being the case, and there being no statutory indications that the principles of common law procedural fairness had been excluded from the process, well-established procedural fairness principles applied to the inquiries[24] and those principles had been breached.[25]

Of relevance to the present discussion, however, is the conclusion by the Court that the inquiry process had statutory foundations.[26] This was due in large part to the connection of the inquiries to the exercise of a statutory power by the Minister for Immigration. Although there was no explicit statutory authorisation for the inquiries of detainees by the department or independent reviewers, the inquiries were for the purpose of assisting the Minister to decide whether he should consider exercising his statutory powers: his personal and non-compellable power to allow an offshore detainee to make a valid application for a visa where the *Migration Act 1958* (Cth) otherwise precluded it,[27] and his further personal and non-compellable power to grant a visa to a person in detention if he thought it was in the public interest.[28] The powers being personal and non-compellable meant that the Minister could not delegate their exercise to another person and that the Minister was under no duty to consider exercising the powers and could not be compelled to do so. However, the Minister had made an announcement to the effect that each time an offshore detainee invoked Australia's protection obligations, he would consider whether to exercise either or both of those powers. Inquiries into whether Australia's protection obligations were engaged were therefore necessary for and incidental to an exercise of that statutory power.

A further reason for determining that the process was essentially statutory was the ongoing detention of the plaintiffs.[29] If, as the Commonwealth submitted, the process being undertaken while the applicants remained in detention was non-statutory, where was the Commonwealth's authority for keeping the applicants in detention while the inquiries were being conducted? There was no non-statutory executive power to keep a person in the plaintiffs' circumstances in administrative detention.[30] The process must have been necessary and incidental to the exercise of the Minister's statutory power to decide whether to lift the bar on a visa application, otherwise the Commonwealth could not keep the applicants in detention during the course of the inquiries.

The consequences for the Commonwealth's detention policy of a non-statutory source of the inquiries meant that the High Court arguably did the Commonwealth a favour by deciding

that case in the way that it did. But their finding that the process was sufficiently connected to statutory power in that case has made it quite difficult for the Commonwealth to develop another scheme in the realm of migration that will be found to have a non-statutory source. In the *Offshore Processing case*, it was the close relationship of the department's and reviewer's inquiries to the exercise of the Minister's statutory power that gave those inquiries a statutory foundation. Given that it is Parliament's intention that the provisions for visas in the *Migration Act 1958* (Cth) be the only source of a right of non-citizens to enter or remain in Australia,[31] it is difficult to conceive of a scheme for the purpose of informing the exercise of the corresponding power that would not be statutory.

The difficulty of proceeding on a non-statutory basis in migration decision-making was raised again in *S10*. At a broad level, this case presented similar kinds of statutory regimes as that in the *Offshore Processing case*: the personal, non-compellable power that is preliminary to an exercise of statutory power that, if exercised in a beneficial way, confers on an applicant a benefit that he or she would not otherwise have, namely, the capacity to make a valid visa application and be considered for a visa.[32] However, as the High Court saw it, there was a crucial difference between the regime in question in the *Offshore Processing case* and the regimes in question in *S10*. This was that the plaintiffs in *S10* were not detainees who were offshore persons (that is, persons who entered Australia at an excised offshore place), as were the plaintiffs in the *Offshore Processing case*.[33] The consequence of this was that the plaintiffs in *S10* had been permitted to apply for visas (and had in fact done so and had sought and obtained merits and judicial review of the visa refusal decisions)[34] whereas the plaintiffs in the *Offshore Processing case* were not so permitted unless the Minister lifted the statutory bar on doing so. Whereas the process in question in the *Offshore Processing case* could have been the only opportunity for an offshore detainee to have his or her claims to Australia's protection assessed,[35] the powers in question in *S10* were ministerial discretions that only arose for consideration after an applicant had had his or her claims to a visa assessed, refused by a departmental officer, refused by either the Migration Review Tribunal or Refugee Review Tribunal and had an application for judicial review dismissed. Therefore, the discretions in *S10* only arose after an applicant's claims had been well-ventilated. Chief Justice French and Kiefel J identified a second important distinction: unlike in the *Offshore Processing case*, in *S10* the Minister had not decided that he would consider in every case whether to exercise the personal, non-compellable powers.[36] Would these differences render the inquiries process in *S10* non-statutory, with the consequence submitted by the Commonwealth: that the inquiries were not required to be attended by obligations of procedural fairness?

In joint reasons, Gummow, Hayne, Crennan and Bell JJ determined, consistently with the approach in the *Offshore Processing case*, that the inquiries were not divorced from the exercise of statutory authority.[37] The implication was that the inquiries were conducted pursuant to, or at least incidental to, statutory power. However, unlike in the *Offshore Processing case*, in *S10* the conclusion was that departmental officers conducting the inquiries and assessments were not required to afford applicants procedural fairness. Far from the clear and express words that previously had been required to exclude procedural fairness, Gummow, Hayne, Crennan and Bell JJ relied on certain aspects of the statutory scheme to imply an exclusion of an obligation to afford procedural fairness. These aspects included the personal and non-compellable nature of the powers, the accountability to Parliament for exercise of the powers, the presence of 'the public interest' as a relevant consideration if the Minister decides to consider exercising the powers, personal circumstances of an applicant not being a mandatory consideration and that the powers only become available after an applicant has exhausted other visa application and review avenues.[38]

It may be that this conclusion gave the Coalition some hope of reviving a non-statutory preliminary assessment process to exclude procedural fairness requirements, and therefore prevent most judicial review applications. But if it did, the government would need to take care: it was only the statutory scheme that excluded the common law requirements of procedural fairness in *S10*. If the government attempts to further divorce assessments from the statute, there may be no statutory scheme the features of which operate to exclude procedural fairness requirements. If, on the other hand, by 'non-statutory' the Coalition meant that it will simply mimic the *S10* assessment process, it should be aware that a process that will be used, as the media reports suggested, to assess protection visa claims in the first instance will be more akin to the process in the *Offshore Processing case* than *S10*. Even without any announcement by the Minister regarding an intention to consider exercising his powers, a process for assessing protection claims, or for recommending whether even to allow protection claims to be made, in circumstances where no claim has previously been assessed and the consequence of an adverse decision is removal from Australia, is likely to be judicially reviewable in the usual way and attended by procedural fairness obligations.

It thus becomes clear that the government will have a difficult time crafting a process for assessing Australia's protection obligations in respect of boat arrivals that will be 'non-statutory' in the sense of an exercise of non-statutory power under s 61 of the Constitution. But even if it can craft such a non-statutory process, will it achieve the apparent aim of rendering decisions in respect of boat arrivals non-justiciable?

Would a non-statutory assessment of protection obligations be non-justiciable?

The term 'justiciable' is used here in its narrow, administrative law sense of amenability to the administrative law process of judicial review, rather than broader questions encompassing jurisdiction and suitability for determination by a court in other kinds of legal proceedings.[39] On the current state of the law of justiciability of non-statutory action, would a court examine a non-statutory assessment of protection obligations for the presence of legal error, or satisfaction of an administrative law ground of judicial review?[40] Although the High Court has not yet been required to answer this question, other Australian courts, both state and federal, have considered it in the years since *CCSU* and *Arts v Peko-Wallsend*. Based on the cases and previous academic consideration of the subject,[41] there now seem to be four principles relevant to the general question of justiciability of non-statutory executive action. These are the public power principle, the subject matter principle, the affectation principle and the decision-maker principle.

The public power principle

The most recent cases examining the justiciability of exercises of non-statutory power have looked closely at the nature of the power being exercised: is it an exercise of public, as opposed to private or contractual, power? If it is an exercise of public power, then, subject to satisfaction of the subject matter principle, the exercise of power is likely to be justiciable.

The public power principle has risen to prominence largely in cases in which it was argued that a private actor, rather than a government actor, was subject to judicial review.[42] However, the cases reveal that its relevance extends to justiciability questions arising from government action also. This relevance is reflected in two aspects of modern governance:

1. the distinction between the private and public non-statutory actions of the government and the justiciability conclusions that proceed from that distinction; and
2. the trend of outsourcing various governmental functions, such as the management of facilities and investigation of executive misconduct, to the private sector.

Public v private functions of the government

The leading case here is *Victoria v Master Builders*.[43] This is a key case for the justiciability of non-statutory executive action because it extended reviewability beyond the prerogative powers to the non-prerogative capacities. Pursuant to its non-statutory executive power, the executive branch of the Victorian government established a taskforce to examine collusive practices in the building industry. Based on responses by building contractors to its inquiries, the taskforce compiled a 'black list' of building contractors who were not to be used by state or local government agencies. When the taskforce circulated this black list, the Master Builders Association challenged the compilation and circulation of the black list on the basis that the contractors contained on it had been denied procedural fairness.

In determining whether the action of the taskforce in compiling and circulating the black list was justiciable, Tadgell J drew a distinction between 'the exercise of a power in the performance of a public duty' (which would likely be justiciable) and 'the mere exercise of a capacity to make arrangements for the government's internal purposes',[44] (which would be unlikely to be justiciable).[45] It seems that for Tadgell J the characterisation of the task force's duty as 'public' was the essential criterion of justiciability. What took the compilation and promulgation of the black list out of the realm of private government action was that it was 'part and parcel of a scheme designed to induce former contractors and tenderers (successful and unsuccessful) to atone for their presumed past misconduct'.[46]

Justice Eames was willing to accept, without finally deciding, that for judicial review of non-statutory action to be permitted the impugned action needed to have a public law element or public law consequences.[47] In establishing whether this public law element was present, the source of the power would be relevant, but not determinative. More relevant in the present case was the need for a comprehensive analysis of the nature of the power being exercised, the characteristics of the body making the decision, and the effect of determining that the exercise of the power is not amenable to review.[48] Having conducted that analysis, his Honour decided that the action in question had a clear public law basis. This conclusion was based on considerations such as the fact that 50% of building contracts in Victoria were awarded by State or local government bodies, so the industry's integrity and efficiency were of immense public importance.[49] Further, he considered the task force to be applying the 'coercive force of the state',[50] echoing the concern of Tadgell J about the punitive intention of the scheme. Justice Eames also considered that the importance of the well-being of the building industry to the financial stability of the state indicated the presence of public law consequences.[51] It seems that, for Eames J, what made the power being exercised public power was the importance of the integrity of an industry kept afloat by public money.

The relevance of this for a non-statutory assessment process for the protection claims of boat arrivals is that if the assessments can be characterised as exercises of private power, it may be that claims arising out of the assessments are non-justiciable. Since, for present purposes, we are assuming that these assessments are able to be made on a non-statutory basis, we assume that the assessment process is constitutional and falls within one of the established categories of non-statutory executive power. In the *Offshore Processing case* and *S10*, the Commonwealth claimed that the assessments were an exercise of their non-prerogative capacity to make inquiries.[52] Is this power to make inquiries, since it is shared with private persons, private in nature? Does it fit Tadgell J's category of mere exercise of a capacity to make arrangements for the government's internal purposes? It is argued that it does not. While the power is of a kind that is shared with private individuals, its exercise in these circumstances is not private in nature because it has coercive consequences of public law significance; there is the required 'public law element'.[53] The inquiries have the consequence that, if not satisfactorily answered, the applicant may be removed from Australia. The inquiries are not coercive in themselves: applicants are not forced to answer

the inquiries and indeed many would consent to answering the questions asked. But the Commonwealth would be using the consensual inquiries as the basis from which to exercise their very public power of deciding who gets to remain in Australia and who does not. It seems very similar to the nature of the inquiries made of the building contractors in *Master Builders* but the public law power and consequences are more obvious.

The cases discussing public power reveal several different factors, the presence of one or more of which indicates the presence of public power:

- interpreting and applying a regulatory framework (not necessarily devised by the government) and thereby having an effect on, or capacity to affect, the public or section of the public that it regulates;[54]
- such effect or consequences being significant;[55]
- a capacity to affect those who must abide by the rules of the decision-maker simply because they are going about their lawful business, rather than entering into a voluntary scheme;[56] and
- the importance to the state of the industry or section of the public being regulated.[57]

While it is possible to argue that the assessment of protection obligations comes within each of those factors, it suffices to point out that the first two seem to be the most easily satisfied: the assessors will be applying some kind of guidance, whether from the Refugee Convention or some guidelines issued by the Minister, to decide whether a particular applicant should be recommended for a protection visa. Justices Gummow, Hayne, Crennan and Bell JJ in *S10* articulated the effect that this has on a particular applicant: it would allow them to apply to stay in Australia when they otherwise would not be able to.[58] That would seem to be a significant effect or consequence. It seems that, regardless of whether it is done pursuant to statutory power or non-statutory power, the making of inquiries to determine whether a person can apply to stay in Australia, or engages Australia's protection obligations, is an exercise of public power.

Outsourcing of government functions

The other aspect of government that warrants attention to the public power principle is the trend of outsourcing various government functions. This is of particular relevance to the question of the justiciability of the boat arrival assessments as the reviews of such assessments have been outsourced previously, as evidenced in the *Offshore Processing case*.

The justiciability questions that arise from the outsourcing of governmental functions were touched on in *Stewart v Ronalds*.[59] This was a case arising from misconduct allegations against a New South Wales minister, Tony Stewart, and his subsequent eviction from the ministry and executive council, as permitted by the New South Wales Constitution. The Premier had retained, pursuant to non-statutory executive power, a member of the independent bar to investigate the allegations of misconduct. Thus, although *Stewart v Ronalds* is primarily a case on the justiciability of claims regarding the exercise of statutory power by the executive branch of government, it also hinted at the new frontier in justiciability of non-statutory action: justiciability of claims against private persons retained by the government to perform government functions. Ultimately, the Court of Appeal determined that it would not decide whether the actions of the investigator were amenable to judicial review or, more specifically, whether an independent third party retained by the government to conduct an investigation was required to afford procedural fairness. The issue did not need to be decided to resolve the questions stated for the Court of Appeal.

However, each of the President and Justices of Appeal offered tentative views on the issue. President Allsop noted that the investigator was 'fulfilling a "private" retainer, though with potential "public consequences" and involving a relationship with the exercise of public power: the choice of the composition of the Ministry and the handling of the complaint otherwise by the Department.'[60] But the President stopped short of imposing a duty to afford procedural fairness to the plaintiff on this basis, taking the view that to impose procedural fairness requirements on any activity that has the capacity to affect someone's reputation would be a potentially significant development in the principles of procedural fairness, and it was probably best left for the law of defamation.[61] The distinction between public law causes of action and private law causes of action to remedy certain behaviour of government contractors was relevant.

Justice Hodgson did not exclude the existence of a duty of procedural fairness in the investigator[62] and was content that the non-statutory basis of the retainer would not be the reason to deny the existence of any obligation.[63]

Justice Handley appeared to be the most sceptical of imposing a duty to afford procedural fairness on the investigator. The main issue appeared to be the indirectness of any legal effect of the investigator's actions. The investigation was not authorised by any statute or 'consensual compact' to have any effect on Mr Stewart. Rather, the investigation was to form the basis of a report, which in turn would form the basis of a decision by the Premier, which in turn would form the basis of a decision by the Lieutenant-Governor-in-Council. His Honour did not appear to place any weight on the likelihood that the report resulting from the investigation would provide the sole basis of the Premier's decision and, therefore, that of the Lieutenant-Governor-in-Council, which would demonstrate that the investigator held great power over the plaintiff indeed.

The Court of Appeal was operating without the benefit of any High Court statements on the applicability of judicial review principles, and particularly procedural fairness principles, to the actions of independent people retained by the executive government. Perhaps the potential for executive use of independently retained investigators is what the High Court had in mind when, in the *Offshore Processing case*, it unanimously, and without fanfare, determined that an independent reviewer of offshore protection claim assessments was subject to an obligation to afford procedural fairness when conducting its reviews. The High Court's reasons are singular for the lack of explicit judicial reasoning dedicated to this point. There was no discussion of the questions left open by the New South Wales Court of Appeal in *Stewart v Ronalds*. This was despite the similarities between the positions of the investigator in that case and the independent reviewers in the *Offshore Processing case*: both were retained pursuant to non-statutory power and in both cases the influence of their reports on exercises of statutory power was extensive. The justiciability of conduct of the independent reviewer was mentioned only tangentially in the *Offshore Processing case* as part of the Court's explanation for why the assessment and review process was an essentially statutory process as opposed to a non-statutory process. In explaining why the process had statutory foundations, the Court noted that the only function of the reviewer was to make a recommendation about whether Australia owed protection obligations to the asylum-seeker.[64] From that point on, the Court made no distinction between the Department and the independent reviewers. Rather, the Court appeared to impute the action of the independent reviewers to the Department.[65]

Whether the High Court appreciated the significance of this approach at the time remains to be seen. But its approach to the justiciability of actions of the independent reviewers in the *Offshore Processing case* has great ramifications for the amenability of independent contractors to judicial review for exercises of public power that have been outsourced. To the extent that *Stewart v Ronalds* suggested that outsourcing information-seeking exercises

to independent third parties might shield those exercises from an obligation to afford procedural fairness, and consequently judicial review, the High Court has removed that possibility. This leads to the conceptually satisfying position that, subject to the subject matter principle discussed below, an exercise of public power will be justiciable regardless of whether it is exercised by the executive branch of government or outsourced by that branch to an independent third party.[66] This means that the hypothetical non-statutory scheme for the assessment of the protection claims of boat arrivals will not evade judicial review simply by outsourcing the assessments, or reviews of the assessments, to independent third parties.

The subject matter principle

Of course, the power being public power will not alone render an exercise of non-statutory executive power justiciable. Given the high-level policy context in which the exercise of prerogative or other non-statutory public power often arises, a crucial question for its justiciability is whether the subject matter of the dispute is one that is resolvable by an application of judicial power. That is, can the dispute be resolved by courts declaring the law and applying legal criteria?[67] Was the exercise of power attended by 'standards capable of being assessed legally'?[68] If the answer to these questions is 'no', then the exercise of non-statutory public power will not be justiciable.

Even after it was accepted that the exercise of prerogative powers could be justiciable in an appropriate case, various prerogative powers were carved out as non-justiciable due to their subject matter being considered best left to the executive branch of government, which is politically accountable for the exercise of such powers. In *CCSU*, Lord Roskill included 'the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers'[69] in his exposition of categories of powers that, in his view, were 'not susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process'.[70] An Australian example is the broad statement by Wilcox J in A*rts v Peko-Wallsend* that '[i]ssues arising out of international relations have been widely regarded as non-justiciable'.[71] However, to say that a particular power cannot be amenable to judicial review has since been shown to demonstrate too limited a view of justiciability. The modern trend, both in academic writing[72] and, as will be demonstrated, in the case law, is to view justiciability from an issues perspective, rather than purely from a subject matter perspective. This means that courts seem no longer willing to decide that an applicant's claim is non-justiciable merely because the claim arises in the context of an area traditionally considered off-limits to courts, such as the conduct of international relations or national security. Rather, courts now consider whether the precise arguments made by an applicant actually require 'an extension of the court's true function into a domain that does not belong to it'.[73]

In Australia, this trend began with the 1988 decision in *Re Ditfort; Ex parte Deputy Commissioner of Taxation*.[74] In this case, Gummow J was willing to examine the terms of communication between Australia and Germany to establish whether information afforded to Germany was true and complete and whether conduct of the Australian authorities was consistent with the terms of the extradition agreement in respect of Mr Ditfort.[75] Although the case involved Australia's interactions with a foreign state, neither of the two inquiries engaged in by Gummow J required the Court to make a decision as to the propriety of conduct of a foreign state or as to whether a particular action is suitable in the context of international relations. Rather, they were inquiries of the kind to which judges are well-accustomed – assessing conduct against agreed standards.

A more recent example of the courts examining the precise issues or claims raised is the decision of *Aye v Minister for Immigration and Citizenship*.[76] The applicant's visa was

cancelled and she sought to challenge that decision by challenging the antecedent policy decision by the Minister of Foreign Affairs to impose sanctions on senior members of the Burmese regime and their immediate families. The applicant was the daughter of a member of the regime. Although the judgments reveal different approaches to the issues by the justices, ultimately they all seem to reach the same point: the applicant's claims were about the policy decision to impose sanctions on family members of the Burmese officers.[77] She wanted to challenge that policy decision but the court would not allow it as the correctness or otherwise of the policy is not justiciable. If the applicant's claims had related to whether she fell within the terms of the policy; the application of the policy rather than its content; those claims would have been justiciable regardless of the foreign affairs context of the decision.[78]

The High Court can be seen to be supporting this more substantive approach in *Moti v The Queen*.[79] In this case, the Court was asked to review the conduct of Australian officials in facilitating the deportation of an Australian citizen from the Solomon Islands in circumstances where they knew that the deportation by officials of the Solomon Islands breached Solomon Islands law. In a majority joint judgment, French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ examined a rule of international law previously thought to be sacrosanct, that 'the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory'[80] (also known as the 'Act of State doctrine'). They held that any Act of State doctrine 'must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula'.[81] They concluded that 'the fact that the decision of a foreign official is called into question does not of itself prevent the courts from considering the issue'.[82]

Encompassing those international relations decisions, but extending much wider to capture many domestic questions, are polycentric and political decisions. A polycentric decision is one that is based on a number of different factors, some of which may conflict and compete with others for dominance and many of which may involve questions of policy rather than legal standards.[83] The decision in *Arts v Peko-Wallsend* to seek World Heritage listing for Stage 2 of Kakadu National Park was an example of this kind of decision, turning as it did on the Cabinet's evaluation of competing factors such as environmental preservation, international relations, indigenous claims, tourism, interests of miners and other economic factors. Chief Justice Bowen made it clear that such decisions are not suitable for judicial determination.[84] A political decision, to any extent that it is not polycentric, can be defined, for present purposes, as a decision that involves a choice between different policy outcomes or a choice between different methods of achieving a policy outcome, whether for the public at large or in relation to a class of the public. An obvious current example is the Commonwealth government's position on how to deal with climate change. The basis for non-justiciability of these kinds of decisions is that Australia's system of responsible and representative government commits such decisions not to the judiciary but to the branch of government that is accountable to the people, the legislature, either directly (when such decisions are translated into legislation) or via the decisions and conduct of the executive branch, which must maintain the confidence of the legislature. Their committal for resolution elsewhere leads back to the question of whether there is a lack of judicial standards for assessing the decision or conduct in question.[85] This was one of the problems facing the Full Court of the Supreme Court of South Australia in *Xenophon v South Australia*, when the Court was asked to review a decision to grant a minister indemnity for damages and costs in a defamation action. Justice Bleby stated that there were simply no criteria by which a court could judge the legal correctness or validity of any decision of that kind and that if a bad decision of that kind was made, it would be a matter for Parliament or the community.[86]

Ultimately, the subject matter principle reflects the separation of powers doctrine. An application of the substantive approach to subject matter justiciability that has found favour

with the courts has the result that each and every claim made in an application for review of non-statutory action is subjected to an analysis of whether the court is being asked to resolve a question that is properly the domain of another branch of government to resolve. If the court is being asked to perform that task, the court would properly conclude that the issue or claim is not justiciable. If, however, the court is being asked to resolve a question that arises in the context of, for example, international relations or some political decision, but does not involve casting judgment on the merits of that decision itself, the issue or claim may well be justiciable.

What does this more substantive approach to subject matter justiciability mean for the hypothetical non-statutory process for the assessment of protection claims? It means that while the policy decisions that the government makes in the field of assessment of protection claims are unlikely to be justiciable, any application of that policy to a specific person is likely to be. Although they occur in the context of Australia's international obligations under the Refugee Convention, there is nothing about the review of protection visa assessments that asks the judiciary to perform a task that the Constitution or Parliament has allocated to the executive. So much is clear because the courts have been reviewing these decisions since the government started making them. Even if it is possible to somehow take away any reference to the *Migration Act 1958* (Cth), what remains is a court looking at how the government has applied standards set out in the Refugee Convention and their own policy considerations to the cases of individual people. That is a classic example of an administrative decision. In the field of protection claim assessments, it seems that there will always be standards against which the exercise of public power can be legally assessed.

The affectation principle

The affectation principle refers to the requirement that a decision have the capacity to affect a person's legal rights, obligations or legitimate expectations before it can be justiciable.[87] In *Arts v Peko-Wallsend*, one of the bases on which Wilcox J considered the matter to be non-justiciable was that Peko-Wallsend's rights and obligations under its mining leases remained as they had been before the decision to nominate the site for listing; it was simply that they may be less valuable.[88] Similarly, in *Xenophon v South Australia*, it was held that the decision to grant the indemnities did not adversely affect the rights of any citizen and that this was one of several reasons why the decision was not reviewable by a court.[89]

However, in none of those cases was the failure of the applicant to satisfy the affectation principle the sole reason for the issues being non-justiciable. Rather, non-justiciability was the result of an application of the subject matter principle. In *Arts v Peko-Wallsend*, the polycentricity of the decision and its relationship to matters of international relations made the claims non-justiciable. In *Xenophon v South Australia*, it was the lack of criteria by which a court could judge the legal correctness of the granting of the indemnities. A similar analysis can be applied to two paradigm areas of non-statutory decision-making: entering into treaties and policy-making. The failure of entry into a treaty to create legal rights in an individual has been held to constitute a basis for denying the justiciability of entering into a treaty.[90] However, the reasons for which a government enters into a treaty or an agreement are matters within the knowledge of and for assessment by the executive branch of government, rather than the judicial branch, so treaty-making could be non-justiciable on this basis.[91] In respect of political decisions, such decisions of themselves will not ordinarily affect a person's rights, obligations or interests until they are implemented by a government scheme.[92] Adherence to the affectation principle could result in such decisions being non-justiciable on that basis. However, the same result occurs if the decision is looked at through the prism of the subject matter principle: policy-making is a matter for which a government is elected and for which the government is accountable to the electorate through the political process,[93] rather than to the courts through an application of judicial power.

Thus, it could be argued that failure to satisfy the affectation principle is an indication that the subject matter of the decision is one that cannot be resolved by an application of judicial power. It is a factor relevant to the subject matter principle, rather than a stand-alone principle of justiciability of non-statutory executive action.

However, in deference to the plethora of cases and commentary that consider the affectation principle to be a crucial justiciability principle in its own right, it will be used here to assess the justiciability of the hypothetical protection claims assessment process. It is clear that the assessment will affect the interest of the applicant in remaining in Australia, or at least the applicant's interest in liberty given that, if the assessment is adverse, the applicant is likely to be taken into detention pending his or her removal from Australia. In *S10*, the plaintiff's interest in obtaining a relaxation of the operation of the visa system would have been a sufficient interest for the implication of an obligation to afford procedural fairness, had the statutory scheme not displaced it.[94] Thus the applicant would satisfy the test for implication of procedural fairness. Does this also satisfy the affectation principle for justiciability?

Courts have remarked on the similarities between the affectation principle and the test for the implication of procedural fairness, being the making of a decision that will affect a person's rights, interests or legitimate expectations.[95] There are several examples of appeal court cases in which a judge mentions the affectation principle as going to justiciability but determines justiciability based on either the public power or subject matter principle and only discusses the affectation principle in considering grounds of review, namely, procedural fairness.[96] At a practical level, does this matter? If a court is engaging in judicial review to work out whether there was a breach of procedural fairness, obviously there is some implicit antecedent decision that there is a justiciable controversy.

In the case of the present hypothetical situation, which will operate at the Commonwealth level, the potential issue lies in reconciling the test for an implication of procedural fairness with the jurisdictional requirement of a 'matter',[97] being 'some immediate right, duty or liability to be established by the determination of the Court'.[98] Does this formulation leave any room for non-legal interests such as those of the hypothetical applicant? Once it is appreciated that the interest that attracted procedural fairness need not be the same 'right, duty or liability' that founds the matter, the answer is yes. The 'right, duty or liability' when an administrative decision is challenged could be the right of the decision-maker to act upon or give effect to the decision[99] or the duty of the applicant to abide by the decision. The legal right, duty or liability required for a 'matter' could be the right, duty or liability settled by the remedy:[100] a declaration of rights or legal position, or an order to re-make a decision that, in law, has not been made. Although the applicant has no legal right to a particular decision, and even perhaps, depending on how this hypothetical scheme works, no right to have an application considered, the applicant's interest in the outcome will be enough to give rise to a matter, and a justiciable controversy, because non-legal interests can still attract legal obligations which, if unperformed, can yield a public law remedy. Accordingly, the applicant would satisfy the affectation principle of justiciability.

It should be noted that even if, as suggested here, the affectation principle no longer plays the crucial role in establishing justiciability of non-statutory executive action that it once did, the principle remains relevant to judicial review. Certainly the impact of a decision on a person's rights, obligations or interests remains central to establishing standing and entitlement to remedies. So far as the present hypothetical scheme is concerned, the High Court has recognised on several occasions that the non-legal interests of the kind at play in visa and deportation decisions are the kind which attract the protection of procedural fairness principles,[101] and that the interests that attract the protection of procedural fairness principles are equal to those which confer on an applicant standing to seek a public law

remedy.[102] On this basis, there would be no doubt that the hypothetical applicant would have standing to challenge the legality of the assessment.

The decision-maker principle

The decision-maker principle refers to the status of the decision-maker as being either a determinative or influential factor in establishing justiciability. Historically, there has been reticence to conduct judicial review of decisions of the Crown, which is comprised of the ministers, public servants and statutory corporations and that make up the executive branch of government.[103] While the courts were willing to examine whether a prerogative power existed and its extent,[104] Crown immunities, steeped in notions that 'the King can do no wrong'[105] and that the counsels of the Crown are secret,[106] precluded a court from considering the motives and deliberations of the Crown when making administrative decisions. As the role of the Crown and government changed, this immunity began to break down. In *Padfield v Minister of Agriculture, Fisheries and Food*,[107] the House of Lords inquired into the motives of the Minister in making an administrative decision and conducted judicial review on the ground of unauthorised purpose,[108] rather than the simple ultra vires question of whether the power existed.[109]

This development cleared the way for an important ruling from the High Court of Australia in relation to the justiciability of actions by the Queen's representatives in Australia: the Governor-General, the state Governors and the territory Administrators. In *R v Toohey; Ex parte Northern Land Council*[110] all members of the High Court held that an exercise of statutory power by the Administrator of the Northern Territory could be subject to judicial review on grounds of unauthorised purpose and bad faith.[111] In oft-cited[112] obiter, Mason J indicated that he would be willing to extend review to the non-statutory acts of the Queen's representatives, where the representative had acted on the advice of Ministers.[113] His Honour suggested that the proper test for justiciability of an exercise of prerogative power is not who is exercising the power but whether the nature and subject matter of the power make it amenable to judicial review.[114]

Recently, in *Aye v Minister for Immigration and Citizenship*, Lander J confirmed that a decision of a Minister, whether under statute or the common law, or of Cabinet or of one of the Queen's representatives in Australia could be amenable to judicial review, and that this amenability depended not on the source of the power, in the sense of the identity of the decision-maker, but on the nature and subject matter of the power.[115]

There is a great deal more that can be said about the declining importance of the decision-maker principle, particularly as it applies to Cabinet decisions.[116] But even if the decision-maker principle remains relevant to the justiciability of non-statutory action, this would not assist the government in its quest to avoid judicial review of non-statutory protection assessments. It is extremely unlikely that these decisions, numbering in the tens of thousands as suggested by the Coalition, are going to be made by any officer higher than a Minister. Thus, for present purposes it suffices to say that, although the position in respect of non-statutory power has never been authoritatively stated and applied, the decision-maker principle seems to be no longer a basis on which a claim in respect of non-statutory power will be non-justiciable. The status of the decision-maker may make a claim very difficult to substantiate evidentially. For example, if a person wishes to impugn a decision of the Cabinet,[117] there will be great difficulties in obtaining information about Cabinet deliberations.[118] Claims of public interest immunity for decisions of high-ranking officials and bodies can also thwart challenges to such decisions. However, it seems that an exercise of non-statutory public power that satisfies the modern, substantive approach to the subject matter principle will not be rendered non-justiciable simply because a high level decision-maker is involved.

Conclusion

It is unclear quite what the Coalition intended to do to implement its announcement that the assessment of protection claims for boat arrivals living in Australia would be non-statutory. However, its aim in attempting to make the assessments non-statutory seemed clear enough: it wanted to exclude or minimise the possibility of the boat arrivals accessing the courts for judicial review of adverse decisions. This paper has attempted to demonstrate two things. First, given that these decisions will be made in the context of granting or refusing visas, which are granted or refused under the *Migration Act 1958* (Cth), it will be very difficult to formulate a process that is both non-statutory and successful at excluding the implication of procedural fairness obligations. Secondly, even if the government could formulate a non-statutory scheme, an application of what it is submitted are the modern principles of justiciability of non-statutory executive action suggests that the assessments will still be justiciable. The exercise of the non-statutory executive power of the government to make inquiries has public law consequences: forcing the movement of the applicant. There is nothing in the subject matter of these assessments that suggests that judicial review is not appropriate: bureaucrats, or contractors, will be making assessments based on, one assumes, criteria for being a refugee or other criteria devised by the government, and applying those criteria to individuals. Judicial power is exercised in respect of those kinds of decisions every day. If the government is looking for a way to make these 30,000 boat arrivals go away quietly, attempting to go 'non-statutory' is not the way to do it.

Endnotes

1 *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams No. 1*).
2 The questions stated for the Full Court and the written submissions of the parties are currently available on the High Court's website at http://www.hcourt.gov.au/cases/case_s169-2014. For a more detailed summary of the written submissions made to the Full Court in respect of non-statutory executive power, see Amanda Sapienza, 'CPCF: Will Tampa Finally Get its Day in the High Court?', Constitutional Critique, 11 October 2014, (Constitutional Reform Unit Blog, University of Sydney, http://blogs.usyd.edu.au/cru/2014/10/cpcf_will_tampa_finally_get_it_1.html).
3 Bianca Hall and Judith Ireland, 'Tony Abbott Evokes John Howard in Slamming Doors on Asylum Seekers', *The Sydney Morning Herald* (online), 15 August 2013 http://www.smh.com.au/federal-politics/federal-election-2013/tony-abbott-evokes-john-howard-in-slamming-doors-on-asylum-seekers-20130815-2rzzy.html.
4 See, for example, George Williams, 'Asylum Processing Plan Fails on Two Fronts, *UNSW Newsroom* (online), 27 August 2013 http://newsroom.unsw.edu.au/news/law/asylum-processing-plan-fails-two-fronts.
5 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (*CCSU case*).
6 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 (*Arts v Peko-Wallsend*).
7 See, for example, *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 (the *Offshore Processing case*), 328-330 (defendants submissions); *Victoria v Master Builders Association* [1995] 2 VR 121, 132-133 (Tadgell J), 147 (Ormiston J), 152 (Eames J); *Sweetwater Action Group Inc v Minister for Planning* [2011] NSWLEC 106 (7 July 2011) [101]; *Huntlee Pty Ltd v Sweetwater Action Group Inc* (2011) 185 LGERA 429, 450 [94].
8 See, for example, *Offshore Processing case* (2010) 243 CLR 319, 351 [73]; *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 [41]; *Huntlee v Sweetwater* (2011) 185 LGERA 429, 450 [94] (Sackville AJA).
9 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (*S10*).
10 The male pronoun is used in this paper as at all relevant times the Minister for Immigration has been male.
11 *S10* (2012) 246 CLR 636, 665 [93] (Gummow, Hayne, Crennan and Bell JJ).
12 It is now well-accepted that the High Court's jurisdiction to conduct judicial review, insofar as a claim falls within s 75(v) of the Constitution, cannot be excluded (see generally *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476) but that does not mean that all claims made in a s 75(v) application are justiciable.
13 See *Williams No. 1* (2012) 248 CLR 156.
14 See, for example, *Davis v Commonwealth* (1988) 166 CLR 79, 108-109 (Brennan J).
15 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 127 [60] (French CJ).
16 William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1765), vol 1, 232.
17 Though not necessarily the extent: see *Williams No. 1* (2012) 248 CLR 156 for an example of the High Court enforcing limits on the power of the Commonwealth to enter into contracts for the spending of money insofar as the power is derived from s 61 of the Constitution.
18 See *Williams No. 1* (2012) 248 CLR 156.

19 See *Clough v Leahy* (1904) 2 CLR 139; *Lockwood v Commonwealth* (1954) 90 CLR 177.
20 See *Williams v Commonwealth* [2014] HCA 23 (*Williams No. 2*) [23] (French CJ, Hayne, Kiefel, Bell and Keane JJ). Until this case, recent High Court judgments had avoided the use of the label 'nationhood power': see Anne Twomey, 'Pushing the Boundaries of Executive Power: Pape, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313, 317.
21 *Victoria v Commonwealth* (1975) 134 CLR 338 (*AAP case*), 397 (Mason J).
22 *Offshore Processing case* (2010) 243 CLR 319.
23 Ibid 334 [9].
24 Ibid 351-352 [73].
25 Ibid 334-335 [8]-[9].
26 See ibid 349-351 [65]-[70].
27 See *Migration Act 1958* (Cth) s 46A(2), (3), (7).
28 See *Migration Act 1958* (Cth) s 195A(2), (4), (5).
29 See *Offshore Processing case* (2010) 243 CLR 319, 337-338 [21], 341-342 [35] and 348 [62].
30 Such can be implied from ibid 337-338 [21] and 348-349 [62]-[65]. The extent of a non-statutory power to keep a person in administrative detention in other circumstances is another matter that may be determined in *CPCF v Minister for Immigration and Border Protection.*
31 *S10* (2012) 246 CLR 636, 657-658 [63] (Gummow, Hayne, Crennan and Bell JJ).
32 The sections in question in *S10* (2012) 246 CLR 636 were *Migration Act 1958* (Cth) ss 48B, 195A, 351 and 417.
33 *S10* (2012) 246 CLR 636, 652 [42] (French CJ and Kiefel J), 662 [79]-[80] (Gummow, Hayne, Crennan and Bell JJ), 673 [121] (Heydon J).
34 Ibid 642 [5] (French CJ and Kiefel J), 674 [121] (Heydon J).
35 A submission also made in respect of the plaintiff in *CPCF v Minister for Immigration and Border Protection*.
36 Ibid 652-653 [41], [43]-[46] (French CJ and Kiefel J).
37 Ibid 665 [93] (Gummow, Hayne, Crennan and Bell JJ).
38 Ibid 667-668 [99] (Gummow, Hayne, Crennan and Bell JJ).
39 Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 788. For a discussion of the different meanings of 'justiciability', see Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company Ltd, 1992) 180, 183-191. The focus in this paper would fall within Lindell's third conception of 'justiciability', although it is noted that Lindell questions whether use of the term 'non-justiciable' serves a useful purpose when used in this context because 'the lack of authority to deal with the issue classified as "non-justiciable" stems from the facts that as a result of exercising its jurisdiction and applying all relevant principles of law, the court finds that the facts raised do not give rise to any legal grounds for complaint' (p 188). For a similar argument regarding this conception of justiciability, see Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.
40 It is this examination of administrative action for legal error that I refer to as 'judicial review', rather than the narrower process of reviewing administrative action for the purpose of issuing prerogative relief. For an example of the narrower conception of 'judicial review' see *CECA Institute Pty Ltd v Australian Council for Private Education and Training* (2010) 30 VR 555.
41 See, for example, Margaret Allars, 'Public Administration in Private Hands' (2005) 12(2) *Australian Journal of Administrative Law* 126.
42 See, for example, *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 (*Forbes*), 264, 268-269 (Gibbs J), 274-275 (Murphy J); *Typing Centre of New South Wales v Toose* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988); *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd (No 2)* (2004) 50 ACSR 554; [2004] NSWSC 829 and *Mickovski v Financial Ombudsman Service Ltd* (2012) 91 ACSR 106.
43 *Victoria v Master Builders Association* [1995] 2 VR 121.
44 Ibid 138 (Tadgell J).
45 Ibid 137 (Tadgell J).
46 Ibid 137 (Tadgell J).
47 Ibid 162 (Eames J), following the approach of Lord Diplock in *CCSU case* [1985] 1 AC 374, 409.
48 *Victoria v Master Builders Association* [1995] 2 VR 121 163 (Eames J).
49 Ibid 164 (Eames J).
50 Ibid 164 (Eames J).
51 Ibid 164 (Eames J).
52 *Offshore Processing case* (2010) 243 CLR 319, 328 (first and second defendants' submissions); *S10* (2012) 246 CLR 636, 640 (defendants' submissions) citing *Clough v Leahy* (1904) 2 CLR 139, 156-157; *A v Hayden* (1984) 156 CLR 532; [1984] HCA 67, 580-581 and *Commonwealth v Mewett* (1997) 191 CLR 471, 546-551.
53 See also (in a more general context) Chris Finn, 'The Public/Private Distinction and the Reach of Administrative Law' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 49, 52.

54 *Forbes* (1979) 143 CLR 242, 268-269 (Gibbs J), 275 (Murphy J); *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815 (*Datafin*), 826, 838 (Donaldson MR); *Typing Centre* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988) (*Typing Centre*) 19-20.
55 *Victoria v Master Builders Association* [1995] 2 VR 121, 137-138 (Tadgell J), 163 (Eames J); *Masu Financial (No 2)* (2004) 50 ACSR 554; [2004] NSWSC 829, 560 [7].
56 *Datafin* [1987] 1 QB 815, 845-846 (Lloyd LJ); *Typing Centre* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988) 20.
57 *Victoria v Master Builders Association* [1995] 2 VR 121, 138 (Tadgell JA), 164 (Eames JA). See also *Typing Centre* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988) 20.
58 *S10* (2012) 246 CLR 636, 659 [69] (Gummow, Hayne, Crennan and Bell JJ).
59 *Stewart v Ronalds* (2009) 76 NSWLR 99.
60 Ibid 116 [71] (Allsop P).
61 Ibid 116 [71] (Allsop P).
62 Ibid 121 [108] (Hodgson JA).
63 Ibid 122 [113] (Hodgson JA).
64 *Offshore Processing case* (2010) 243 CLR 319, 344 [50].
65 See ibid 350 [69]. It should be noted, however, that the Court did not feel obliged to determine whether the independent reviewer was an 'officer of the Commonwealth' such as to ground the High Court's jurisdiction in s 75(v) of the Constitution because other bases of jurisdiction were available: 345 [51].
66 Though see Lisa Burton, 'Section 75(iii) of the Commonwealth Constitution and the outsourcing of public power' (paper presented at the 2014 AIAL National Administrative Law Conference, University Club, University of Western Australia, 25 July 2014) for an explanation of why it may be that not all outsourced public power falls within the High Court's jurisdiction to conduct judicial review.
67 Mason, above n 39, 796.
68 *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 [43] (Allsop P).
69 *CCSU case* [1985] 1 AC 374 418 (Lord Roskill). In relation to the prerogative of mercy, at least, this statement has proven not to be authoritative, at least in the United Kingdom, as can be seen in *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349 and *Lewis v Attorney General of Jamaica* [2001] 2 AC 50: see Mark Elliott, *Beatson, Matthews, and Elliott's Administrative Law: Text and Materials* (Oxford University Press, 4th ed, 2011) 124-126 [5.3.3]. In Australia, the High Court held in 1908 that 'no court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy' (*Horwitz v Connor* (1908) 6 CLR 38, 40, recently applied and extended to include ancillary statutory powers of the Attorney-General in *von Einem v Griffin* (1998) 72 SASR 110). However, the High Court recently left argument on the question open (see *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 297-298 [47] (Gleeson CJ, Gummow, Heydon and Kiefel JJ), 307 [80] (Kirby J).
70 *CCSU case* [1985] 1 AC 374 418 (Lord Roskill).
71 *Arts v Peko-Wallsend* (1987) 15 FCR 274, 307 (Wilcox J).
72 See, for example, Elliott, above n 69, 123-129 [5.3.3]; Alan Robertson, 'The Boundaries of Judicial Review and Justiciability; Comparing Perspectives from Australia and Canada' (Seminar sponsored by the Australian Institute of Administrative Law (NSW Chapter) in conjunction with the Constitutional and Administrative Law Section of the New South Wales Bar Association and the Australian Association of Constitutional Law, Supreme Court of New South Wales, 22 July 2013); Alan Robertson, 'The Relationship between the Crown and the Subject' (1998) 17(3) *Australian Bar Review* 209.
73 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370.
74 Ibid, particularly at 369-370.
75 Ibid 374-376.
76 *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449.
77 Ibid 452 [9], [12] (Spender J), 474-475 [127] (McKerracher J). Justice Lander considered that the applicant's claims related to the narrower determination that the applicant fell within the class of people targeted by the sanctions, which was justiciable (471-472 [108]), rather than the decision to actually impose the sanctions, which was not justiciable (470 [99]).
78 Ibid 452-453 [13]-[14] (Spender J), 473 [115] (Lander J), 475 [128] (McKerracher J).
79 *Moti v The Queen* (2011) 245 CLR 456.
80 Ibid 474-475 [46]-[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
81 Ibid 475 [52] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
82 Ibid 476 [52] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
83 See, for example, the discussion of the legislative scheme for allocating water entitlements in *Tubbo Pty Ltd v Minister Administering the* Water Management Act 2000 (2009) 302 ALR 299, 314 [69]-316 [77] (Spigelman CJ).
84 *Arts v Peko-Wallsend* (1987) 15 FCR 274, 279 (Bowen CJ).
85 See, for example, *Petrotimor Companhia De Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 369 [47] (Black CJ and Hill J) in the context of adjudicating on the acts of foreign states, citing *Buttes Gas and Oil Company v Hammer* [1982] AC 888, 938 (Lord Wilberforce) and 427-429 [228]-[234] (Beaumont J in the context of a discussion of America's 'political question' doctrine); and *Xenophon v South Australia* (2000) 78 SASR 251, 264 [60] (Bleby J).
86 *Xenophon v South Australia* (2000) 78 SASR 251, 264 [60] (Bleby J).
87 See *CCSU case* [1985] 1 AC 374, 408-409 (Lord Diplock).

88 *Arts v Peko-Wallsend* (1987) 15 FCR 274, 306 (Wilcox J).
89 *Xenophon v South Australia* (2000) 78 SASR 251 264 [60] (Bleby J).
90 See, for example, *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 362 [18]-[19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan J), *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 447 [36].
91 See *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, 693 for an example relating to other decision-making in the international sphere rather than treaty-making.
92 For an example of the application of a non-statutory high level policy decision to a particular person being justiciable on natural justice grounds, see *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 509 (King CJ).
93 See *Arts v Peko-Wallsend* (1987) 15 FCR 274, 279 (Bowen CJ).
94 *S10* (2012) 246 CLR 636, 659 [69], 666 [96] (Gummow, Hayne, Crennan and Bell JJ).
95 See, for example, *Arts v Peko-Wallsend* (1987) 15 FCR 274, 304 (Wilcox J). In relation to legitimate expectations, however, in deciding in *S10* that the inquiries were not attended by an obligation to afford procedural fairness, Gummow, Hayne, Crennan and Bell JJ sounded the final death knell for the affectation of 'legitimate expectations' as a basis for implying procedural fairness obligations, stating that the term 'either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded': 658 [65].
96 See, for example, *Xenophon v South Australia* (2000) 78 SASR 251, 253-254 [8], [11] (Prior J) and *Victoria v Master Builders Association* [1995] 2 VR 121, 160-161, 164 (Eames J).
97 See *Commonwealth Constitution* ss 75 and 76; *Judiciary Act 1903* (Cth) s 39B(1).
98 *Re Judiciary Act 1903-1920 and Navigation Act 1912-1920* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
99 See *Abebe v Commonwealth* (1999) 197 CLR 510, 555 [118] (Gaudron J, Gummow J (at 561 [139]) and Hayne J (at 574 [176]) agreeing).
100 See ibid 527-528 [31]-[32] (Gleeson CJ and McHugh JJ).
101 *S10* (2012) 245 CLR 636, 659 [66] (Gummow, Hayne, Crennan and Bell JJ) citing *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J), 632 (Deane J).
102 See, most recently, *S10* 659 [68] (Gummow, Hayne, Crennan and Bell JJ), referring to *Kioa v West* (1985) 159 CLR 550, 621 (Brennan J).
103 Robertson, above n 72 (1998), 209.
104 See, for example, *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352; *CCSU case* [1985] 1 AC 374, 398 (Lord Fraser of Tullybelton), 407 (Lord Scarman).
105 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 (*R v Toohey*), 217-218 (Mason J).
106 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 179 (Dixon J).
107 [1968] AC 997.
108 Although the more common name for this ground of review is 'improper purpose', I prefer the term 'unauthorised purpose' for the reasons given by Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd ed, 2009) 593 [9.2.1], namely, that '[t]here is no ethical or pejorative question arising, other than that the decision-making purpose must be authorised by the legislation'.
109 In Australia, it is considered that such an extension of judicial review principles beyond simple ultra vires grounds was recognised in *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1. See *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 380 (Aickin J).
110 *R v Toohey* (1981) 151 CLR 170.
111 Justice Wilson determined that the Administrator was the Crown's representative in the Northern Territory (at 279-280). Justice Mason was willing to assume such (at 217). Justices Stephen (at 202), Murphy (at 231, dissenting in the result) and Aickin J (at 265-266) held that the question was unnecessary to determine. Chief Justice Gibbs held that the Administrator was not the representative of the Crown (at 185) but determined the matter on the basis that he was in deference to the approach of the majority and decided that, even if the Administrator was the Crown's representative, the exercise of power was still amenable to judicial review (at 193).
112 See, for example, *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 465 (Lander J); *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 [40] (Allsop P); *Victoria v Master Builders Association* [1995] 2 VR 121, 156 (Eames J) and *Arts v Peko-Wallsend* (1987) 15 FCR 274, 278 (Bowen CJ), 302 (Wilcox J).
113 *R v Toohey* (1981) 151 CLR 170, 220 (Mason J).
114 Ibid 220 (Mason J).
115 *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 469-470 [98] (Lander J).
116 This is yet another matter that may get some attention in *CPCF v Minister for Immigration and Border Protection*, as the decision to take the plaintiff and other asylum-seekers to India was apparently made by the National Security Committee of Cabinet.
117 Perhaps, for example, in circumstances akin to those in *South Australia v O'Shea* (1987) 163 CLR 378 in which each of the justices was willing to examine Cabinet proceedings at least to the extent of receiving evidence about whether any information had been put before Cabinet that was personal to Mr O'Shea and about which he had not had opportunity to comment (see 387-388, 389 (Mason J); 403 (Wilson and Toohey JJ); 412 (Brennan J) and 416-418 for the more expansive approach of Deane J).
118 As was noted in ibid 387 (Mason CJ), 402-403 (Wilson and Toohey JJ), 420 (Deane J).