

GRAHAM AND THE CONSTITUTIONALISATION OF AUSTRALIAN ADMINISTRATIVE LAW

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The contemporary administrative state sits at the heart of Australia's working (small 'c') constitution. Government power is exercised predominantly through the exercise of administrative — rather than legislative or judicial — power. For this reason administrative law necessarily carries constitutional significance. Despite this significance, Australia's written *Constitution* provides almost no express guidance about how administrative institutions should be constituted or the character of the legal norms that guide administrative decision-making.¹ Although bureaucratic government developed earlier than is sometimes supposed, the administrative state was not at the forefront of the minds of those who debated and drafted the written *Constitution*.²

Nevertheless the *Constitution* has left profound marks on Australian administrative law for many years. These marks could, perhaps, be most clearly seen in the bifurcated institutional structure for the adjudicative review of administrative actions created in the 1970s. For reasons associated with the separation of judicial power (held to be an implication of structural features of the *Constitution*), the function of merits review has been conferred on tribunals rather than Commonwealth courts.³ Recent reports that administrative law is being 'constitutionalised' do not therefore mark an entirely new phenomenon.⁴

Having said that, when the High Court was provoked⁵ into plumbing the depths of s 75(v) of the *Constitution*, the constitutionalisation of administrative law not only intensified but also changed direction. Influence has moved from broad institutional questions (what functions may be conferred on particular institutions) to the nature and content of the legal norms of administrative law. One manifestation of this pivot is the renewed emphasis given to conceiving the legality/merits divide in Australian law through the prism of the separation of judicial power doctrine.⁶ But the most prominent and direct point of interaction between the *Constitution* and the normative content of Australian administrative law is to be found in the context of s 75(v). Here, the rebadged 'constitutional remedies' are no longer thought to entrench a mere jurisdiction but to also entrench what was described, in *Plaintiff S157/2002 v Commonwealth*⁷ (*Plaintiff S157*), as the 'minimum provision of judicial review'. In this way, *Plaintiff S157* has become the emblem of the latest constitutionalisation of administrative law.

*Graham v Minister for Immigration and Border Protection*⁸ (*Graham*) was handed down almost 15 years after *Plaintiff S157* and confirms two things: that the High Court meant what it said when it identified an entrenched minimum *provision* of review; and that working out the content of that minimum provision will keep Australian administrative and constitutional lawyers occupied for some time to come.

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In commenting on *Graham*, this article briefly considers how the Court conceptualised the notion of the entrenched minimum provisions of judicial review in *Plaintiff S157*, focusing on the work done by judicial silence as well as utterance. Next, it describes the impact of *Plaintiff S157* to the successful constitutional challenge mounted in *Graham*: that the impugned decisions were compromised by a provision that infringed s 75(v).⁹ Finally, it asks whether any general lessons can be learned from *Graham* about how the entrenched minimum provision of review is to be understood. Although the article concentrates on the majority, reference will also be made to Edelman J's puzzling dissent in his High Court administrative law debut.¹⁰

The significance of *Plaintiff S157*

In *Plaintiff S157* the High Court declared that s 75(v) introduced into the *Constitution* an entrenched measure ('provision') of judicial review, installing the judiciary at the apex of a system of legal accountability. The Court did not invalidate the infamous *Migration Act 1958* (Cth) privative clause for inconsistency with this constitutional baseline. Although there was a patent conflict between the terms of the privative clause and the terms of s 75(v) of the *Constitution*, the Court engaged in some fancy, albeit familiar, footwork to avoid this conclusion.¹¹ However, the Court was explicit (indeed, it could not have been clearer) that its *entire* approach was underpinned and framed by constitutional fundamentals that have a 'real and substantive' operation.¹² The Court's message was that, just as its constitutional function to review administrative action could not be evaded by the blunt force of a privative clause, neither could it be subverted by more subtle forms of legislative drafting. As in some other areas of constitutional law, substance should not yield to form.

The problem, however, was that, although the Court's language was strident, it studiously avoided specifics. In particular, very little was said about the substantive principles that mark out the boundaries of the minimum level of review. Prior to *Plaintiff S157*, s 75(v) was often said to only confer a jurisdiction, meaning that it did not entrench any substantive principles (or 'grounds') which would give the court power to grant the named remedies (prohibition, mandamus and injunction).¹³ But if, as the Court insisted in *Plaintiff S157*, its entrenched original judicial review jurisdiction was a matter of substance, not form, then the implication is that the idea that s 75(v) confers a *mere* jurisdiction must be jettisoned. For this reason, *Plaintiff S157* has become a central part of the Court's developing approach to understanding what exactly is entrenched by s 75(v).¹⁴ The Court could have relied on the familiar language of 'jurisdiction' but chose, rather, to speak of a minimum *provision* of judicial review.¹⁵ The Court seemed (quite clearly, in my view) to be insisting that there are *some* substantive principles entrenched by s 75(v) despite offering very little guidance about content of those principles (which was not necessary to resolve the case at hand).¹⁶ Indeed, the Court expressly stated that s 75(v) of the *Constitution* 'limits the powers of the Parliament or of the Executive to avoid, or *confine*, judicial review'.¹⁷

Of course, the Court did try to cash out the content of the minimum provision of judicial review by reference to the concept of jurisdictional error. The Parliament, it explained, cannot deprive the court of its constitutional jurisdiction to enforce the legal requirements that limit and condition a decision-maker's power. And, as previously held, the 'constitutional writs' are available only in cases of jurisdictional, as opposed to non-jurisdictional error.¹⁸

An entrenched provision of review for jurisdictional error may sound like a substantive principle. But it is not.¹⁹ Very soon after *Plaintiff S157*, it became clear that classifying an error as 'jurisdictional' is ultimately a question of statutory interpretation, meaning that Parliament has control over what jurisdictional requirements are imposed.²⁰ Although reliance on the concept of jurisdictional error provided the Court in *Plaintiff S157* a neat way to neuter the privative clause, it offers no intellectual resources to resist 'plenary provisions'

— that is, provisions which alter the law that confers administrative powers so that those powers are not subject to any meaningful restraints or jurisdictional requirements.²¹ If such clauses are interpreted according to their terms, review — although it remains available — is invariably rendered ineffective. That, then, was the core problem left unsolved in *Plaintiff S157*. Perhaps, in some cases, much heavy lifting can be done through statutory interpretation to imply limits into clauses that are, on their face, plenary provisions.²² At some point, however, such strategies may become disingenuous and raise questions of integrity.

Holding the line

In *Graham*, the plaintiff (Mr Graham) and applicant (Mr Te Puia), both citizens of New Zealand, each challenged a decision made by the Minister to cancel their visa. In both cases, the Minister had exercised his power under s 501 of the *Migration Act 1958* (Cth) on the basis that he ‘reasonably suspected’ the person did not pass the ‘character test’ and that he was ‘satisfied’ that the cancellation was in the ‘national interest’. In both cases, the Minister’s reasons pointed to an association between the visa holder and a bikie gang.

As noted above, my focus will be the constitutional challenge mounted on the basis of s 75(v). The provision challenged was not the Minister’s substantive power of cancellation but a secrecy provision relied upon in the course of making the substantive decisions. Section 503A(2) of the Migration Act (the ‘secrecy provision’) prevented the Minister from being forced to divulge information relevant to a cancellation decision to any person or to any court if:

- (a) that information had been communicated by a law enforcement or like agency; and
- (b) it had been communicated on the condition that it be treated as confidential.²³

In the plaintiff’s case, the Minister’s reasons indicated his suspicion that the character test was not met and satisfaction that cancellation was in the national interest was based in part on undisclosed material (though substantial objective facts were also available to establish the first criterion).²⁴ In the applicant’s case, the Minister’s suspicion that the person did not pass the character test relied exclusively on undisclosed information.

A six-judge joint judgment concluded that the secrecy provision struck at the ‘very heart of the review for which s 75(v) provides’.²⁵ The Court stated the applicable principle in this way: a ‘provision must be invalid if, and to the extent that, it has the legal or practical operation of denying to a court exercising jurisdiction under or derived from s 75(v) the ability to enforce the limits which Parliament has expressly or impliedly set on the decision-making power which Parliament has conferred on the officer.’²⁶

This statement affirms the approach in *Plaintiff S157* — namely, that the function of s 75(v) is to enforce *jurisdictional* requirements that condition an officer’s powers or duties (that is, those legal obligations imposed with the intention that they must be observed).²⁷ Further, as in *Plaintiff S157*, the *Graham* majority was at pains to emphasise that the ‘question of whether or not a law transgresses’ the constitutionally protected measure of judicial review ‘is one of substance, and therefore of degree’.²⁸

According to the majority, the practical effect of the secrecy provision was to deny the Court the ability to fulfil its function of making a determination about whether or not legislatively imposed conditions of, and constraints on, a lawful exercise of power had been observed. The constitutional problem was that the provision imposed a ‘blanket and inflexible limit’ on the Court’s capacity to even look at material which was, by definition, relevant to its review task — irrespective of the importance of the undisclosed material in a particular case.²⁹ As the Minister could base a decision in whole or in part on the protected information, the

secrecy provision could operate ‘to shield the purported exercise of power from judicial scrutiny’.³⁰ The Minister’s powers were framed in highly discretionary terms, but the fact that the Court could not require the ‘undisclosed information’ to be adduced in evidence left it in the dark as to whether the preconditions for the exercise of power were based on decisions which were reasonably reached on the material that was considered.³¹ Thus, it was not the breadth of the discretion as such but, rather, its effect on any subsequent judicial review application that worried the Court.

The majority was unpersuaded by the argument that the operation of the secrecy provision had an analogous operation to the common law principle of public interest immunity at the time of federation. And, over the vigorous protestations of Edelman J, the majority responded that the application of public interest immunity never entirely foreclosed the ability of the courts to have access to material over which public interest immunity had been claimed.³² Relatedly, the Court distinguished a number of cases where the constitutionality of secrecy clauses had been upheld on the basis that the provisions in question did not prevent courts from having access to the evidence upon which a decision was based (even if that information could not be disclosed to an affected individual or other person).

Thus, although the *Graham* majority did not shed further light on the substantive principles of review entrenched by s 75(v), the application of the core ideas articulated in *Plaintiff S157* demonstrates a continuing and robust commitment to them.³³ *Graham* provides a practical example of a possibility mooted in *Plaintiff S157*: a provision which does not directly remove jurisdiction to grant the constitutional writs but hollows out the exercise of that jurisdiction to the extent that judicial review falls short of the baseline implied by the notion of an entrenched minimum provision of review.

Graham’s lessons

What, if any, general lessons can be learned from the reasons in *Graham* about the entrenched minimum provision of review?

As noted above, the reasons of the majority emphasise that the Court will examine closely provisions which in substance, if not form, operate to erode its jurisdiction. In his dissent, Edelman J questioned the legitimacy of the ‘entrenched minimum provision of judicial review’, emphasising that its existence derived from a recently discovered constitutional *implication*. His Honour opined that this implication did not even form part of the *ratio decidendi* in *Plaintiff S157*.³⁴ Perhaps, however, the fact that the majority did not deign to respond to these strong doubts indicates not the fragility of the principle but, rather, how deeply *Plaintiff S157* has embedded into Australia’s constitutional landscape.

Although Edelman J is self-consciously ‘historical’ in his method, his dissent also contains faint traces of a Dworkinian interpretive approach — proceeding on the basis that newly recognised legal principles must ‘fit’ (to an unspecified extent) past cases and ‘established constitutional doctrines’.³⁵ Only an emaciated minimum ‘content’ of judicial review, his Honour’s line of thought runs, can fit the legal data. In contrast, the majority openly concede that it will not always be easy to draw lines between provisions that go too far and those that do not. Consider, in this context, Edelman J’s claim that the majority position would produce ‘intolerable inconsistencies’ with *Plaintiff M61/2010E v Commonwealth*³⁶ (*Plaintiff M61*).³⁷ In *Plaintiff M61*, the Court upheld a no-consideration clause (one means for the conferral of a broad or plenary power). But the Court’s brief and guarded reasons in *Plaintiff M61* should not, perhaps, be thought to suggest that *all* such provisions will receive a constitutional tick. If the question of whether a clause limiting review is constitutionally permissible is one of substance *and degree*, this conclusion is not surprising. (In)consistency between *Graham* and *Plaintiff M61* (or any other case) will thus in part lie in the eye of the beholder. The

majority in *Graham* appear to have assumed (they do not respond to the inconsistency charge) that the availability of declaratory relief in the unusual circumstances of *Plaintiff M61* meant that the impugned clause posed a lower threat of arbitrariness than that presented by the secrecy provision.

Justice Edelman also included an extended discussion of the 'limited content of judicial review at Federation' as a part of his argument for a tightly confined approach to the content of the minimum provision of judicial review.³⁸ He argued that the correct approach to determining the essential content of an implication is 'historical' insofar as 'common law decisions prior to, and at the time of, Federation ... form part of the context from which the meaning of the *Constitution*, and the content of its implications can be derived'.³⁹ Without trespassing into debate on the preferable interpretive method for understanding the Australian *Constitution*, an administrative lawyer might perhaps be permitted to wonder whether this historical strategy — at least in this context — is akin to an attempt to close the stable door when the horse is fading from sight. Justice Edelman himself emphasises how the contemporary bases for the availability of the 'constitutional writs' would be largely unrecognisable to the framers. Even the phrase 'jurisdictional error', which now sits at the centre of thinking about s 75(v), would probably not have been well understood.⁴⁰ Indeed, one wonders how Edelman J's historical approach is to be reconciled with the broader doctrinal developments in Chapter III jurisprudence (of which *Plaintiff S157*, *Kirk v Industrial Relations Commission*⁴¹ and, now, *Graham* form an important part). Like it or loathe it, the Chapter III edifice is a judicially built construction that reflects a reoriented conception of the Court's constitutional authority.⁴² Justice Edelman's 'ahistorical' epithet may be applied to many elements of these developments. Viewed in this context, the implication of a minimum provision of judicial review might be said to be one of the least controversial elements in the High Court's reorientated approach to judicial power.

To the extent that *Graham* involved a statutory provision which did not purport directly or indirectly to expand an administrator's jurisdiction or power (*à la* a no-invalidity clause), it was a relatively easy case. The Court was able to apply the entrenched minimum provision without elaborating its content. That is to say, it was possible to fall back on the mantra that the function of review is to enforce jurisdictional requirements — no less and no more. At the conclusion of its reasons, the majority observe that 'matters of substance and degree which may or may not result in the invalidity of a statutory provision affecting the exercise of a court's jurisdiction under s 75(v)' need not further be analysed in the case before the Court.⁴³ For this reason, the problem left unresolved in *Plaintiff S157* remains — but so does the Court's insistence that s 75(v) raises matters of substance and degree.⁴⁴

Interestingly, one of Edelman J's rejoinders to the argument that the secrecy provision was apt to 'stymie' the content of judicial review provided for by s 75(v) emphasised that judicial review would be available for compliance with the statutory preconditions for any application of the secrecy provision.⁴⁵ The relevant conditions were that the information:

- (a) is communicated to an authorised officer;
- (b) by a gazetted agency;
- (c) on a condition that it be kept confidential; and
- (d) is relevant to an exercise of specified powers under the *Migration Act 1958*.

Such review would, however, in all but the rarest cases leave the substantive exercise of power immune from challenge⁴⁶ and runs the risk of creating what have been referred to as 'grey', as opposed to 'black', holes in the law. Whereas a black hole is created by a decision that is unreviewable, a grey hole represents a decision that is subject to review of a type extremely unlikely in practice to provide any practical remedies. David Dyzenhaus has plausibly suggested that grey holes may present a more insidious problem than do black

holes.⁴⁷ A legal black hole represents a clear gap in *legal* regulation and thus the potential need for an alternative accountability mechanism may be more readily revealed. In contrast, it can be inferred from the majority's reasoning that the content of the minimum provision of review is unlikely to be satisfied by the legislature providing for *de minimis* jurisdictional limits.⁴⁸

Conclusion

What, then, does *Graham* tell us about the constitutionalisation of the norms of Australian administrative law? In general, it confirms that jurisdictional error is the go-to concept for expressing the legal norms that constrain the exercise of administrative power.⁴⁹ Perhaps ironically, however, when it comes to elaborating the minimum provision of review, an argument offered in Edelman J's dissent is most revealing of its content. That argument is useful insofar as it identifies an unhelpful line of inquiry.

Justice Edelman characterises the problem posed by the secrecy clause as being analogous to the express legislative removal of an unreasonableness 'ground of review'. Here Edelman J suggests that the idea that all grounds are entrenched is implausible.⁵⁰ Even natural justice may be excluded, and entrenching particular grounds would entail a very large transfer of power to the courts.⁵¹

Justice Edelman presents strong reasons for concluding that the minimum provision is unlikely to be found in the idea that some of the traditional grounds of review, developed by judges but subject to statutory modification and ultimately abrogation, are hardwired into the *Constitution*. But these arguments do not inexorably show that the notion of a minimum provision of review is incoherent or incompatible with established doctrine. An alternative response to these arguments is that new principles will be necessary to determine when a provision impermissibly limits the legal operation or practical efficacy of the Court's constitutional review jurisdiction.⁵² However, because the Court can often rely on creative statutory construction to provide adequate levels of review, it may be some time yet before these principles are fully articulated.

Endnotes

- 1 In this respect, Australia's written constitution is not unusual: Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in Susan Rose-Ackerman and P Lindseth (eds), *Comparative Administrative Law* (2010) 125.
- 2 Compare Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (2016) 3 ('The administrative state is the inescapable subject of contemporary legal theory.')
- 3 Commonwealth Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee*, Parliamentary Paper No 144 (1971) (the Kerr report) ch 4.
- 4 Here I use 'constitutionalisation' broadly — consistently with the Australian literature — to refer to the various influences of constitutional ideas on the development of administrative law, along with instances where it has been held that doctrinal propositions of administrative law are mandated by the *Constitution*. Note, however, that the term is sometimes freighted with a particular set of political objectives, such as the elevation of norms associated with 'liberal-legal constitutionalism': see Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (2010) 47–69.
- 5 By the winding-back of statutory sources of judicial review in migration matters — a process which commenced in earnest in the 1990s. See Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92.
- 6 See Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 166–7.
- 7 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 8 [2017] HCA 33.
- 9 A separate challenge based on an alleged inconsistency between the impugned provision and the constitutionally protected institutional integrity of Chapter III courts was unanimously dismissed.
- 10 Justice Edelman's dissent has also been described as 'powerful': Lisa Burton Crawford, 'The Entrenched Minimum Provision of Judicial Review and the Limits of "Law"' (2017) 45 *Federal Law Review* 570.

- 11 The basic interpretive argument relied upon in *Plaintiff S157* had been deployed in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
- 12 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511–12.
- 13 If there is no basis for the grant of a remedy then jurisdiction will subsist in an inutile form.
- 14 See, for example, Mark Aronson, 'Between Form and Substance: Minimising Judicial Scrutiny of Executive Action' (2017) 45 *Federal Law Review* 519, 537–8; Will Bateman, 'The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463; and Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14. Contrast Lisa Burton Crawford, 'Who Decides the Validity of Executive Action? No-Invalidity Clauses and the Separation of Powers' (2017) 24 *Australian Journal of Administrative Law* 81, where it is argued that *Plaintiff S157* should not be read so as to dislodge the view that s 75(v) entrenches a mere jurisdiction. See also Lisa Burton Crawford, 'Expanding the Entrenched Minimum Provision of Judicial Review? *Graham v Minister for Immigration and Border Protection*' (2017) 28 *Public Law Review* 277.
- 15 To speak of a 'minimum jurisdiction of judicial review' would, it seems to me, have been an odd locution. That phrase adds nothing to the obvious point that s 75(v) entrenches the jurisdiction it confers.
- 16 This reading of *Plaintiff S157* is not, in my view, undermined by the implausibility of the Court's own brief suggestions about where to look for substantive principles. For compelling critique of those suggestions, see Bateman, above n 14, 492–500.
- 17 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [104] (emphasis added).
- 18 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
- 19 McDonald, above n 14, 18. See also Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) ch 7.
- 20 For a discussion of these developments, see Bateman and McDonald, above n 6, 170–2.
- 21 See Bateman, above n 14, 466–8.
- 22 One possible vehicle for such work is the principle of legality. Perhaps ironically, leaving all the work to avoid plenary clauses to non-constitutional modes of legal reasoning may also lead to *Hickmanesque* strategies — strategies that many have assumed (typically, with great relief) would be swept away by *Plaintiff S157*. For discussion of interpretive strategies for avoiding some types of plenary clauses and their limits, see, for example, McDonald, above n 14, 30–2; and Crawford, 'Who Decides the Validity of Executive Action?', above n 14, 95–7.
- 23 An agency was covered by this provision if a 'gazetted agency': *Migration Act 1958* (Cth), s 503A(1). A total of 42 Commonwealth, state and territory statutory authorities had been gazetted, along with government departments and agencies from 285 countries: *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [51].
- 24 *Ibid* [23].
- 25 *Ibid* [65].
- 26 *Ibid* [46].
- 27 See *ibid* [43]–[44].
- 28 *Ibid* [48].
- 29 *Ibid* [50], [64].
- 30 *Ibid* [53].
- 31 *Ibid* [59].
- 32 This dispute raises not only a debate of legal history but also a dispute over how, and in what sense, history is relevant to the interpretation of a written *Constitution*. See Helen Irving, 'What is History, Again?' on AUSPUBLAW (5 February 2018) <<https://auspublaw.org/2018/02/what-is-history-again/>>.
- 33 Post-*Plaintiff S157*, the Court had previously invalidated a provision for inconsistency with s 75(v) on only one occasion. See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, where inflexible time limits for bringing applications for review were held to prevent the Court from exercising its entrenched jurisdiction.
- 34 One lesson that could be drawn from this observation is that the *ratio/obiter* distinction is not always a reliable guide to discerning what is of significance in the development of the law.
- 35 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [94], [85]. The traces are faint insofar as the judgment is silent on the extent (if any) to which the requirement of fit may be adjusted in light of questions of justification — a question central to Dworkin's own controversial approach. See Ronald Dworkin, *Law's Empire* (1986) 225–75.
- 36 (2010) 243 CLR 319.
- 37 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [99].
- 38 *Ibid* [112] ff.
- 39 *Ibid* [95].
- 40 As explained by Gageler, above n 5, 95–6, the term rose to prominence in the 1990s.
- 41 (2010) HCA 1; (2010) 239 CLR 531.
- 42 See Peter Cane, *Controlling Administrative Power: An Historical Comparison* (2016) 232.
- 43 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [65].
- 44 Contrast Crawford, 'Expanding the Entrenched Minimum Provision of Judicial Review?', above n 14, 288 ('the decision does not reveal newfound constitutional constraints on the scope of executive power that Parliament can confer'). Crawford contends that the basis for the decision in *Graham* was not that the

secrecy provision was inconsistent with s 75(v) per se but, rather, that the exercise of judicial power was impaired (in circumstances where s 75(v) authorised it to be used). This explains, she suggests, why the legislation was held invalid in its application to both the High Court and Federal Court. Even if one were of the view that the separation doctrine provides a more sensible analytical foundation than s 75(v) for the outcome in *Graham*, a number of difficulties confront Crawford's interpretation of the majority reasoning. Not only are the Court's analysis and conclusion framed by reference to s 75(v) but also the Court disavows reliance on the (basic or extended) separation of judicial powers doctrine: see *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [29]–[37]. Further, if the real problem was inconsistency with the nature of judicial power (because the provision unduly burdened its exercise), there is, as Crawford notes, an absence of any explanation of the point: *ibid* 285. Finally, an alternative explanation of why the provision was invalid in its application to the Federal Court is available (albeit not clearly articulated by the majority). A possible principle could be formulated this way: where the Parliament confers on the Federal Court a jurisdiction intended to be equivalent s 75(v) jurisdiction (as s 476A(2) of the *Migration Act 1958* appeared to be), that conferral of jurisdiction will be invalid if it cannot be exercised conformably with the entrenched minimum provision of review. Such a principle would not undermine the capacity of Parliament to confer less than the full scope of jurisdiction under s 75(v) on the Federal Court if it so chooses — as noted in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [47], referring to *Abebe v Commonwealth* (1999) 197 CLR 510.

- 45 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [169].
- 46 In relation to (d), it can be asked: how would review be possible at all in circumstances where the Court is prohibited from receiving the information?
- 47 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006) 42.
- 48 Such limits are considered by Bateman, above n 14, 503.
- 49 Jurisdictional error has become a proxy for an approach to the identification of the operable legal norms of administrative law which focuses on statutory purposes and specifics, see Bateman and McDonald, above n 6.
- 50 See, to similar effect, McDonald, above n 14, 18; and Bateman, above n 14, 480.
- 51 Justice Edelman's scepticism that the 'rule of law' ideal (let alone the very concept of law) might provide a sure foundation from which substantive doctrinal principles can be derived has been shared by a number of commentators: see McDonald, above n 14, 19, 26; Bateman, above n 14, 493; and Crawford, above n 10.
- 52 The most developed attempt to undertake this task is Bateman, above n 14.