The foundations of judicial review: the value of values

*Justice John Basten**

A bit like using Twitter, choosing the title of an article requires condensing a possibly complex communication into a few words. The result will probably be inaccurate and may be positively misleading. Both are true in this case; it is necessary, therefore, to start by explaining the issues I propose to address.[1]

Identifying the issues

Writing in 1998, shortly after the first issue of *AIAL Forum* was published, Professor Paul Craig lamented the extent to which administrative lawyers writing about judicial review focused on the legitimacy of the jurisdiction rather than the normative content of its principles.[2] The riposte from Mark Elliott was that the two elements could not be separated, the content of the grounds being a function of its constitutional foundation.[3]

The constitutional debates which have taken place in the UK may be viewed with a degree of detachment by Australian public lawyers. Where legislative power is vested in different parliaments, it falls to the superior courts to determine disputes as to the constitutional validity of legislation. Declaring an executive act invalid was (and is) far less of an apparent affront to parliamentary sovereignty.

Interestingly, while Craig would no doubt approve the 'unashamedly doctrinal' vision of the leading Australian text on judicial review of administrative decision-making,[4] Elliott's approach, developed in a country with no written constitution and no strong attraction to the separation of powers, is also well established in Australian jurisprudence. In 2017 Will Bateman and Leighton McDonald charted what they described as 'a profound reorientation' of the normative structure of Australian administrative law in the last 40 years.[5] That shift was identified as proceeding from principles of judicial review based on grounds of review (a 'grounds approach') to one based on principles of statutory interpretation (a 'statutory approach'). They stated that 'a shift in the formal grammar of the law of judicial review has resulted in a shift in the basic structure of its justification'.[6] They saw the statutory approach as having been developed in answer to challenges to the 'democratic legitimacy of judicial review of administrative action' by invoking a doctrine of legislative intent which avoids

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1 There are many who have written insightfully in this area, including S Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303; M Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law' (2005) 12 *Australian Journal of Administrative Law* 79; M Groves, 'Administrative Justice in Australian Administrative Law' (2011) 66 AIAL Forum 18.

2 P Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 *Cambridge Law Journal* 63, 86–87.

3 M Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001) 18.

4 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 1; by contrast, R Creyke, M Groves, J McMillan and M Smyth, *Control of Government Action: Text, Cases & Commentary* (LexisNexis, 5th ed, 2019) has a far broader scope; p xvii.

5 W Bateman and L McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153.

6 Ibid 154.

confrontation with the principle of parliamentary sovereignty. While accepting that such an approach will tend to defuse criticism of the courts as 'counter-majoritarian', they argued that it did little to support, and may have undermined, the broader claim for legitimacy of judicial review as a mechanism to render accountable modern administrative government, which now operates through extensive delegation of rule-making and the grant of discretionary powers.[7] The justification for the latter claim was that a focus on grounds for challenging the validity of administrative decisions creates a correlative procedural code which can be applied by administrative decision-makers. It was argued that principles of statutory interpretation provide no such practical guidance.[8]

There are several elements underlying the analysis by Bateman and McDonald which should be noted. First, if it were true that the adoption of an approach based on statutory interpretation is motivated by a perceived need to legitimise the court's role in undertaking judicial review, that might be a matter for concern. It would at least invite the question whether the approach was mere window-dressing or a veneer designed to deflect criticism of judicial over-reach in interfering with the exercise of executive power.

Those critical of reliance on judicially discovered implied legislative intentions to limit the scope of statutory powers conferred in unqualified terms have treated such reliance as a 'fig leaf'. Sir John Laws, writing in 1966 about developments in judicial review, stated:

> They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of the Parliament, save as a fig leaf to cover their true origins. We do not need the fig leaf anymore.[9]

Professor Paul Craig, a strong supporter of transparency and a critic of the English 'ultra vires' doctrine, has referred to 'the impenetrable formalism of legislative intent'.[10]

Secondly, as will be explained below, the dichotomy between a 'grounds approach' and a 'statutory approach' may be too rigid to recognise the interplay between the two and, indeed, the explanatory power of each. It will be suggested that greater understanding may be obtained by identifying the common elements of each, which then allows for a search for values and standards which underlie each approach. This kind of analysis has been undertaken with respect to constitutional principles[11] but less rigorously with respect to judicial review.

Thirdly, there are risks in focusing too precisely on judicial review of administrative action. When exercising jurisdiction under a statute, such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), which confers jurisdiction with respect to 'a decision of administrative character', it is, of course, necessary to focus upon the scope of the jurisdiction. It does not extend to conduct of a legislative or judicial character.

7 Ibid 173–4.
8 Ibid 178–9.
9 J Laws, 'Law and Democracy' [1995] *Public Law* 72, 79.
10 P Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 *Cambridge Law Journal* 63, 76; cf C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 50 *Cambridge Law Journal* 122.
11 See, eg, R Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018); L Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

Nevertheless, it may be important to bear in mind that courts also determine the validity of delegated legislation and the constitutional validity of statutes. Further, the supervisory jurisdiction of superior courts extends to review of judicial decision-making by inferior courts; so much was expressly recognised in *Craig v South Australia*[12] (*Craig*). Except for dicta, *Craig* is therefore not a case about administrative law; rather, it is concerned with the exercise of the supervisory jurisdiction in relation to the District Court of South Australia. Nevertheless, it is common to see the catchwords for such judgments including references to 'administrative law'.

There is no doubt that the High Court has engaged in the normative restructuring described by Bateman and McDonald. However, the High Court has suggested that any differences in approach are of historical interest only; differences have been resolved. To the extent that is so, it is necessary to ask whether anything has been lost in the switch of focus from grounds of review to principles of statutory interpretation. The suggestion made in this article is that each approach, and any approach which involves an amalgam of the two, will provide limited guidance as to the scope and proper function of judicial review, unless it is soundly based on a transparent recognition of the values and standards underpinning judicial review.

On any view, the statutory approach is more than a fig leaf justifying the exercise of judicial review powers. It imposes a framework for application by judges required to determine judicial review applications. The change in emphasis shifts the search for a principled justification from general law statements as to available grounds of review to general law principles of statutory construction. The normative structure of judicial review must depend upon the identification and application of public law values and standards in relation to particular areas of decision-making.

Stage I: from forms of relief to grounds[13]

Provision for judicial review based on specified grounds may have reached its apogee in the ADJR Act. However, there have in effect been three, rather than two, conceptually distinct mechanisms for explaining the scope of judicial review. Section 75 of the *Constitution* confers original jurisdiction on the High Court by reference to the subject matter of the legal dispute ('matter'), the parties involved (such as a state or an officer of the Commonwealth), the place of residence of the parties, or the form of relief. Section 75(v) defines jurisdiction by reference to relief: namely, writs of mandamus and prohibition; and injunctive relief against an officer of the Commonwealth.[14] Although the writ of certiorari is not mentioned, it is presumed to be available in its form as a quashing order (rather than merely the procedural calling up of the file from an inferior tribunal) in aid of an order in the nature of mandamus, requiring the decision-maker to determine the matter according to law. Section 75(v) did not identify the grounds upon which such relief might be sought: those grounds therefore depended on the general law, subject to the operation of the *Constitution* itself. As Lisa Burton Crawford has written: [15]

12 (1995) 184 CLR 163, 176–7; [1995] HCA 58.

13 See generally, S Gageler, 'Administrative Law Judicial Remedies' in M Groves and HP Lee (eds), *Australian Administrative Law* (Camb UP, 2007) Ch 23.

14 See L Burton Crawford, 'Why These Three? The Significance of the Selection of Remedies in Section 75(v) of the Australian Constitution' (2014) 42 *Federal Law Review* 253, 259.

15 Ibid 277.

> the framers regarded the remedies as legal terms of art, which could be picked up and incorporated into the *Constitution* with relative ease. They expressed a somewhat naïve belief that these common law concepts were relatively certain and static, and included them in the trust that they would not give the High Court a jurisdiction which was greatly different from or broader than the courts of the UK or Australian colonies. This will be relevant to determining whether s 75(v) implicitly entrenches the common law grounds on which those remedies were known to lie at the time the *Constitution* was drafted — and thus the 'full scope of the entrenched minimum provision of judicial review'.[16]

In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[17] Deane and Gaudron JJ held that the effect of s 75(iii) and (v) is to ensure 'that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority'. This passage was relied upon by Gaudron and Gummow JJ in in *Re Refugee Review Tribunal*; *Ex parte Aala*[18] (*Aala*) to conclude that the actual circumstances in which relief could be granted were not limited to those which may have been available in England from the Court of Kings Bench. In determining whether relief was available under Ch III for a failure to accord procedural fairness, Gaudron and Gummow JJ noted that in 1900 the law was in a state of development but nevertheless concluded:

> The doctrinal basis for the constitutional writs provided for in s 75(v) should be seen as accommodating that subsequent development when it is consistent with the text and structure of the *Constitution* as a whole.[19]

Self-evidently, relief was to be available with respect to the exercise of statutory powers which did not exist in 1900 and was to be available in relation to the invalid or unlawful use of such powers.

As Emeritus Professor Mark Aronson has noted,[20] a similar question arises as to the scope of the supervisory jurisdiction of state supreme courts in 1900 and the relevance of subsequent developments in determining the scope of their essential characteristics protected as part of an integrated judicial hierarchy, pursuant to s 73 of the *Constitution*. However, the statement in *Aala* that the basis upon which the writs were available was in a state of development in 1900 demonstrates that there was a stage — indeed, before the term 'judicial review' had been formulated — when there was no coherent conception of the available grounds.

The grounds-based approach was therefore a second stage. Importantly, the ADJR Act removed procedural obstacles to the effectiveness of the writs and made provision for decision-makers to provide reasons for decisions as well as formulating relevant grounds. The grounds were not a code: s 5(1)(j) covered any decision 'otherwise contrary to law'; s 5(2) further particularised improper exercises of power, ending with 'any other exercise of a power in a way that constitutes abuse of the power': s 5(2)(j). Nevertheless, s 5 provided a checklist of grounds which in practice left little need to look elsewhere in order to formulate a claim for judicial review.

16 W 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.
17 (1995) 183 CLR 168, 204–5; [1995] HCA 23.
18 (2000) 204 CLR 82; [2000] HCA 57 [20], [22].
19 Ibid [34].
20 M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179, 182.

Rather, the weakness of the drafting lay in seeking to be comprehensive — it did not identify grounds in discrete and independent terms, with the result that there was a high degree of overlap. Furthermore, it did not address the problem of a privative provision purporting to limit or exclude judicial review. The problems with s 5 became manifest when the Parliament removed a large area of its operation — migration decisions — and enacted a more constrained list of grounds in s 476 of the *Migration Act 1958* (Cth). Further, s 476 invited an approach which focused on statutory interpretation by identifying an error of law as 'an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision': s 476(1)(e).

The conventional language used in s 476 reflected what had been described in *Craig*[21] as 'jurisdictional error' under the general law. As the High Court noted in *Minister for Immigration and Multicultural Affairs v Yusuf*[22] (*Yusef*):

> 'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. … [I]f an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.[23]

A similar point was made in *Yusuf* by Gaudron J, in language reflecting that adopted in her joint judgment with Gummow J in *Aala*:

> The statement that errors involving the wrong denial of jurisdiction or the placing of limits on a tribunal's powers or functions are not reviewable under s 476(1) of the Act requires qualification. That is because notions that have been developed in relation to the grant of mandamus and prohibition, whether by way of prerogative relief or pursuant to s 75(v) of the *Constitution*, do not have precise equivalents in the scheme established by Pt 8 of the Act or, indeed, in other statutory schemes providing for judicial review of administrative decisions.[24]

Stage II: from grounds to statutory interpretation

A porous field of operation

As Bateman and McDonald explained, it is possible to describe the current focus on statutory interpretation as involving a paradigm shift in defining the principles of judicial review. However, the picture will remain incomplete unless judicial review is seen as part of a broader field of legal control of government action. As Professor Cheryl Saunders has noted, 'the boundaries between public and private law in common law systems have always been and remain porous'.[25] Much of what is currently described as 'administrative law' deals with the manner in which the government provides benefits (health and welfare), approves entry to the country (immigration) and confers licences (through a plethora of regulatory schemes,

21 (1995) 184 CLR 163, 179.
22 (2001) 206 CLR 323; [2001] HCA 30.
23 Ibid [82] (McHugh, Gummow and Hayne JJ).
24 Ibid.
25 See C Saunders, 'Common Law Public Law: Some Comparative Reflections' in J Bell, M Elliott, J Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 355.

including controls over land use). Yet some of the most intrusive interactions lie elsewhere, including police powers and taxation.

Taxation has been described as the 'compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered'.[26] Further, as explained by Kitto J in *Giris Pty Ltd v Federal Commissioner of Taxation*:

> There is no need to cite authority for the general proposition that the operation of a law with respect to taxation may validly be made to depend upon the formation of an administrative opinion or satisfaction upon a question, eg, as to the existence of a fact or circumstance, or as to the quality (eg, the reasonableness) of a person's conduct, or even as to the likelihood of a consequence of the operation of the law in an individual case, as in s 265 where the question is whether the exaction of an amount of tax will entail hardship.[27]

Yet in this area administrative law texts tend to focus upon two cases. The earlier, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[28] (*Richard Walter*), was decided almost exactly three years before *Project Blue Sky Inc v Australian Broadcasting Authority*[29] (*Project Blue Sky*). The relevance of *Richard Walter* for administrative lawyers was to be found in the pithy treatment of a privative clause by Brennan J:

> The privative clause treats an impugned act as if it were valid. In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded.[30]

Justice Brennan's description of a privative clause as expanding the authority of the decision-maker was sought to be relied upon by the Commonwealth in *Plaintiff S157/2002 v The Commonwealth*[31] (*Plaintiff S157*) but was not adopted by the Court in the context of the complex provisions of the Migration Act and Regulation.

Richard Walter also considered the operation of the principle in *The King v Hickman; Ex parte Fox and Clinton*[32] (*Hickman*), Dawson J stating in emphatic terms:

> In [*Hickman*] a formula was devised to reconcile the prima facie inconsistency between a statutory provision which limits the powers of a decision-maker and another provision — a privative clause — which contemplates that any decision will operate free from any restriction. …
>
> However, I am unable to discover in the present case anything which would warrant the application of the *Hickman* formula, either directly or by way of analogy. The requirements of the Act which govern the making of an assessment do not produce any inconsistency with the provision that a notice of assessment constitutes conclusive evidence in recovery proceedings. That is because s 175 provides that the validity of any assessment shall not be affected by reason of the fact that any of the provisions of the Act have not been complied with. The effect of s 175 is that the requirements of the Act relating to the making of an assessment are directory only and, whilst imposing obligations upon the Commissioner, their non-observance has no consequences for the validity of the assessment.[33]

26 *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, 270 (Latham CJ); [1938] HCA 38; but cf *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, 467; [1988] HCA 61.
27 (1969) 119 CLR 365, 379; [1969] HCA 5.
28 (1995) 183 CLR 168; [1995] HCA 23.
29 (1998) 194 CLR 355; [1998] HCA 28.
30 (1995) 183 CLR 168, 194; [1995] HCA 23.
31 (2003) 211 CLR 476; [2003] HCA 2.
32 *The King v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; [1945] HCA 53.
33 *Richard Walter* (1995) 183 CLR 168, 222–3.

Although abandoning the conclusory language of directory or mandatory provisions, the last step in the reasoning was consistent with the approach later adopted in *Project Blue Sky*, a case in which argument was heard one month following Dawson J's retirement.

The second case to which reference is frequently made is *Commissioner of Taxation v Futuris Corporation Ltd*[34] (*Futuris*). *Futuris* was also concerned with the operation of s 175 of the *Income Tax Assessment Act 1936* (Cth), which provided that '[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'. Applying the language of *Project Blue Sky*, the majority asked 'whether it is a purpose of the Act that a failure by the Commissioner in the process of assessment to comply with provisions of the Act renders the assessment invalid; in determining that question of legislative purpose regard must be had to the language of the relevant provisions and the scope and purpose of the statute'.[35] It was common ground that s 175 did not apply to the exercise of a power for ulterior or improper purposes. The Court held that there had been no deliberate failure to administer the law according to its terms. It was not necessary, therefore, to determine the effect of s 177(1) of the Act, which provided that '[t]he production of a notice of assessment … shall be conclusive evidence of the due making of the assessment and, except in proceedings … on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct'. In the final paragraphs of the joint judgment in *Futuris*, it was noted that 'not only is [s 177(1)] not a privative clause, but there is not the conflict or inconsistency between s 177(1), s 175 and the requirements of the Act governing assessment which calls for the reconciliation of the nature identified in *Plaintiff S157/2002 v The Commonwealth*'.[36] The description of the relationship identified by Dawson J in the passage set out above from *Richard Walter* was adopted.[37] Finally the joint reasons stated:

> Various views were expressed in *Richard Walter* respecting the construction of and relationship between ss 175 and 177(1). Reference was made to the then accepted distinction between mandatory and directory provisions, and to what seems to have been some doctrinal status then afforded to *Hickman*. As to the first matter, *Project Blue Sky* has changed the landscape and as to the second, *Plaintiff S157/2002* has placed 'the *Hickman* principle' in perspective. Hence this appeal should be decided by the path taken in these reasons and not by any course assumed to be mandated by what was said in any one or more of the several sets of reasons in *Richard Walter*.[38]

With respect to privative clauses, the conventional approach in the High Court from 1945 (*Hickman*) until 2003 (*Plaintiff S157*) was to treat the reconciliation of a privative provision with what otherwise appeared to be mandatory obligations, as a question of statutory construction. *Plaintiff S157* did not depart from that approach. Accordingly, the importance of statutory interpretation in determining the scope and operation of general law judicial review is longstanding.

Specifically in relation to taxation cases, the absence of discussion of taxation law in administrative law texts is in part a function of the highly specialised nature of the jurisdiction. However, there have been developments in the area of scholarly commentary in an

34 (2008) 237 CLR 146; [2008] HCA 32.
35 Ibid [23] (Gummow, Hayne, Heydon and Crennan JJ).
36 *Futuris* (2008) 237 CLR 146; [2008] HCA 32.
37 Ibid [67].
38 Ibid [70].

administrative law context, including papers by Geoffrey Kennett and David Thomas,[39] and by Mark Aronson.[40]

Secondly, there is the area of police powers. This label has a broad and variable coverage. Some areas are recognised as falling within the subject of administrative law; some are addressed within a confined scope because they arise in the context of collateral challenges to the validity of action[41] or are addressed, like some taxation cases, as illustrative of broader principles. The area potentially covers the issue of telephone interception warrants, search warrants, arrests, decisions to charge with an offence, the conduct of investigations by crime commissions and other bodies, and decisions to freeze or confiscate proceeds of crime. One aspect of the porous quality of the public law / private law distinction is that the lawfulness of an arrest will usually be considered in an action for damages for unlawful imprisonment. Challenges to the validity of warrants may be found in interlocutory proceedings in criminal cases seeking the exclusion of evidence obtained as the result of a search. Broadly speaking, administrative law covers claims for invalidity but not for damages.[42] However, the inclusion of government liability in damages in the sixth edition of Aronson, Groves and Weeks involves a recognition that there is some artificiality in this distinction.[43]

The point for present purposes is that, although determined against a general law contextual background, a case concerning the validity of an arrest will be decided by principles of statutory construction, not by reference to grounds of judicial review — a recent example is *State of New South Wales v Robinson*.[44] The same may be found with respect to challenges to the authority of an officer of a crime commission to conduct a compulsory examination of a person charged with an indictable offence, as illustrated by *X7 v Australian Crime Commission.*[45]

Once these broader aspects of the relationship between government and citizen are taken into account, reliance on principles of statutory construction in cases of judicial review may appear more conventional than novel.

The rise of statutory interpretation

In 1985 in *Kioa v West*[46] (*Kioa*), dealing with the basis upon which a decision might be reviewed for breach of procedural fairness, Mason CJ described the principle as a 'fundamental rule of the common law doctrine of natural justice'. Justice Brennan identified the basis as an implied legislative intention that 'observance of the principles of natural justice is a condition of the valid exercise of the power'.[47] In *Attorney General (NSW) v Quin*[48] (*Quin*) some five years later, Brennan J stated that 'the modern development and expansion of the law of

39 G Kennett and D Thomas, 'Constitutional and Administrative Law Aspects of Tax' in N Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) Ch 12.
40 M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179, 192.
41 See, for example, Aronson, Groves and Weeks, above n 4, 751–7.
42 Ibid [1.150].
43 For an early discussion, see P Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489.
44 [2019] HCA 46; 94 ALJR 10.
45 (2013) 248 CLR 92; [2013] HCA 29.
46 (1985) 159 CLR 550; [1985] HCA 81.
47 Ibid 609.
48 (1990) 170 CLR 1; [1990] HCA 21.

judicial review of administrative action has been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[49] However, as Stephen Gageler noted in 2000, what appeared to be 'diametrically opposed' approaches dissipated on closer examination. So much was apparent from the fact that Mason CJ conceded the power of the Parliament to manifest in clear terms a contrary statutory intention, and from the absence of any suggestion in the reasoning of Brennan J that 'the principles of natural justice' were themselves found in the text of the statute. Rather, Brennan J's reasoning postulated an independent and antecedent source; it was observance of the principles which the legislature implicitly accepted.

The principle of statutory interpretation must itself have been sourced in general law principles, without which the act of the court in supplying the omission of the legislature[50] would be an exercise of judicial power unfettered by established principle — something which would have been anathema to Brennan J's legal philosophy. Chief Justice Mason's concession that the Parliament could indicate a contrary intention (denying or limiting the requirements of procedural fairness) itself appeared to envisage an affirmative contrary implication, absent a clear statement of such an intention. This invocation of the clear statement principle echoed the language of O'Connor J in *Potter v Minahan*.[51]

The coexistence of the two approaches was upheld in 2012 in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,[52] dealing with a non-compellable, non-delegable personal discretion vested in the Minister to grant protection visas to persons whose applications had already been refused. The Court unanimously held that the exercise of the power did not attract an obligation to accord procedural fairness. The joint reasons of Gummow, Hayne, Crennan and Bell JJ explained the approach taken to such a question in the following terms:

> The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai* was identified as the interaction between the three branches of government established by the *Constitution*. … It is in this sense that one may state that 'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.[53]

However, although principles of statutory interpretation are part of public law, they are not focused on judicial review. Whether their application necessarily produces the same results as would the application of grounds of review deserves attention: there are reasons to suppose that results may differ.

49 Ibid 36.
50 (1985) 159 CLR 550, 609 (Brennan J).
51 (1908) 7 CLR 277; [1908] HCA 63.
52 2012) 246 CLR 636; [2012] HCA 31.
53 Ibid [97].

Stage III: Refining statutory interpretation — articulating values

Characterising limits on executive powers

The apparent differences in approach over time have been resolved by an appreciation that both descriptions invoke an external source to make good the 'omission of the legislature'. It is not simply a matter of construing the words of the statute in a legal vacuum; nor is it right to disregard the statutory language. It is, however, not the same exercise as reading the statute against the background of the settled law in order to determine its substantive effect. Rather, the implied limits on powers derive from the values, or standards, which are found within our legal and political systems of government, including constitutional principles governing the institutional structure of the government.[54]

The exercise may be characterised as an application of principles of statutory interpretation, but that label reveals little as to the source or justification of the applicable principles. Further, there is no fixed set of applicable principles or a hierarchical rule determining paramountcy in the case of conflict.

Limits on powers come in different forms — some are procedural, governing the manner of exercise of a power; others are substantive, governing the circumstances of their exercise. Because the latter are less obvious, a few examples may assist in making the distinction.

Powers are usually expressed in discretionary or mandatory terms: 'If x, the commissioner may issue a notice'; or 'If y, the commissioner shall issue a notice'. Interpretation statutes have long recognised and sought to regularise this dichotomy: 'may' confers a discretionary power; 'shall' or 'must' imposes an obligation. Yet this is not a rigid rule, although certainty of operation might be enhanced if it were. As was held in *Julius v Bishop of Oxford*,[55] 'may' will sometimes confer a power coupled with a duty to exercise it whenever its conditions of engagement are satisfied. However, recognising this possibility raises the further question of when a discretion is limited in this way. One such circumstance is said to be where a judicial power is conferred. Thus a judge who finds a breach of contract causing loss to an innocent party cannot decline to assess the loss and order payment of damages; as expressed from the point of view of the litigants, a breach of duty engages a right to relief. On the other hand, there is no doubt that many judicial powers to grant relief are truly discretionary; and many executive powers, such as determining tax liability or social security entitlement, are not. In some circumstances the use of 'may' reflects the fact that the condition of engagement involves an evaluative judgment in circumstances where elements of the condition overlap with factors affecting the grant of relief.[56]

Although the point cannot be developed here, the concept of a 'power coupled with a duty' does not necessarily give rise to a binary choice; some discretions are so heavily constrained as to generally involve a duty to act, whereas others are somewhat lower on the scale of

54 Rather more diffusely described in R French, 'Administrative Law in Australia: Themes and Values' in Groves and Lee, above n 13, Ch 2.

55 (1880) 5 AC 214.

56 An example is provided by the testator's family maintenance (or family provision) jurisdiction: see *Singer v Berghouse* (1994) 181 CLR 201, 210–11 (Mason CJ; Deane and McHugh JJ); 219–20 (Toohey J); [1994] HCA 40.

obligation. It can also readily be seen that there will be no bright line between characterising one situation as involving a duty to act or not act in particular circumstances, and another as a duty to take particular steps in identifying the existence of such circumstances.

There is a further complication. A countervailing principle in relation to the exercise of judicial functions is that powers conferred on superior courts should not be read down by imposing implied limitations.[57] Yet, on one view, that is precisely what is done when a discretion is read down as an obligation to grant relief.

These cases deal with the nature of a power: the more common cases are procedural and address the manner of its exercise. Of these, the most obvious and common example is the obligation to accord a person procedural fairness before exercising a power adversely to his or her interests. It was this obligation which led to the statement of principles addressed in *Kioa*.[58] Accepting that such an obligation derives from principles established under the general law, it is reasonable to inquire as to where precisely these principles are found and whether they are of general application. If one considers the history of the criminal law and the longstanding incompetence of the accused person to give evidence in his or her own defence when facing an adverse consequence as serious as life imprisonment or death, it may be doubted whether the modern concept of procedural fairness is longstanding or of general application.

To continue the structural analysis, somewhere between substantive and procedural limitations are fetters on the proper outcome. It is doubtful whether any executive power is entirely free from legal constraints.[59] For example, most powers have a readily discernible purpose; their exercise for an extraneous purpose will be invalid.

Further, powers are to be exercised 'reasonably'; that is, their outcome must fall within a range identified by reference to the circumstances of the individual case. If the potential outcomes are truly a binary choice, the analysis may involve something close to the exercise of a power coupled with a duty to act. However, where the outcome may fall along a spectrum, there must be a reasonable relationship between the chosen outcome and the circumstances engaging the power.

Public law values and statutory interpretation

There is a rich history of judicial dicta and academic writing on the topic of public law values. On the basis that values underpin legal principles, the assumption is that it is the principles rather than the underpinning values which are to be applied by a court determining a judicial review application. In 1991 Sir Gerard Brennan, delivering a lecture in honour of Sir Richard Blackburn, stated:

57 *Owners of Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404, 420–1; [1994] HCA 54.

58 *Kioa* (1985) 159 CLR 550; [1985] HCA 81.

59 Cf *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173; [2015] HCA 50 [39], referring to a criterion 'that is so open-textured that it may be doubted whether a challenge to its correctness is viable'.

> In the long history of the common law, some values have been recognised as the enduring values of a free and democratic society and they are the values which inform the development of the common law and helped to mould the meaning of statutes. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice, and immunity from retrospective and unreasonable operation of laws to ensure that effect is given to these values when they stand in the way of an exercise of power, especially the power of governments, a judiciary of unquestioned independence is essential.[60]

Such statements tend to focus on broad rule-of-law values. Similar views have been expressed by TRS Allan,[61] Peter Cane[62] and Paul Craig.[63] Interestingly, given the modern trend to demand written reasons in support of administrative decision-making, 'transparency' was not one of the values listed by Sir Gerard Brennan in 1991.

Addressing the grounds identified in the ADJR Act, Aronson wrote in 2005:

> ADJR's eighteen grounds say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, impartiality, political neutrality or legitimate expectations. Nor does ADJR mention the Thatcher era's over-arching goals of efficiency, effectiveness and economy … ADJR's grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security. Nowhere does ADJR commit to liberal democratic principles, pluralism, or civic republicanism.[64]

This casts the net more broadly but is focused on judicial review. Clearly the categories will overlap; many may be subsumed within principles of good administration. There is an assumption in some writing that such principles provide a standard against which judicial review is to be judged. At least when considering the power of an administrative agency to review its own decisions, the High Court has expressly referred to the standard of good administration;[65] however, while identifying this as a value or standard, there are also statements in the High Court that it should not be treated as a legal principle of direct application.[66]

There is, of course, nothing remarkable in judges speaking of values and standards. Referring to the equitable concept of 'conscience', the High Court has noted that it is 'a juridical and not a personal conscience',[67] noting that '[t]he conscience spoken of here is a construct of values and standards against which the conduct of "suitors" … is to be judged'. The present purpose is not to pursue a discussion of the nature of values and standards applicable to

60 G Brennan, 'Courts, Democracy and the Law; (1991) 65 *Australian Law Journal* 32, 40.
61 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2001) 2.
62 P Cane, 'Theory and Values in Public Law' in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays for Carol Harlow* (OUP, 2003) 3, 14; cf M Loughlin, 'Theory and Values in Public Law: An Interpretation' [2005] *Public Law* 48.
63 P Craig, 'Theory and Values in Public Law: A Response' in Craig and Rawlings, ibid, 23–4.
64 Aronson, above n 1, 79.
65 *Quin* (1990) 170 CLR 1, 20–1 (Mason CJ), 56 (Dawson J); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 [8] (Gleeson CJ), [122]–[123] (Kirby J)
66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 [32] (Gleeson CJ).
67 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 [15], citing JN Pomeroy and SW Symons, *Treatise on Equity Jurisprudence* (Bancroft-Whitney and Lawyers Cooperative, 5th ed, 1941) Vol 1, 74.

administrative law[68] but, rather, to note the effect of a change in focus from general law values encapsulated in specific grounds of review (which are values underpinning administrative law) to a focus on statutory interpretation. The change in focus will result in a change in underlying values. Principles of statutory interpretation, such as the 'principle of legality', better known as the clear statement principle, rest on assumptions as to how the legislature operates, or should operate in a liberal democracy. In applying such principles, the courts are conscious of the boundary between the legislative and judicial functions. They will be less concerned with the limits of executive functions, which are presumed to be determined by a correct reading of the statute. This shift in focus builds on the existing limits of judicial understanding of, and interest in, the way the bureaucracy operates.

The value-based reasoning underlying principles of interpretation is that famously expressed in Maxwell, *On the Interpretation of Statutes*,[69] quoted by O'Connor J in *Potter v Minahan:*

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.[70]

The application of this principle, now a normative proposition rather than one based on probabilities as to behaviour,[71] of which there are many examples in recent High Court decisions, requires the identification of relevant 'rights' and of what constitutes 'the general system of law'. This is no straightforward task: the latest edition of Pearce, *Statutory Interpretation in Australia*,[72] contains, in Ch 5, headed 'Legal assumptions: principle of legality', a table at paragraph 5.60. The table lists more than 60 'Principles, rights and privileges' which have been held to engage the clear statement principle for their abrogation.

The focus and purpose of the clear statement principle was explained by Gleeson CJ (albeit in dissent) in *Al-Kateb v Godwin*[73] (*Al-Kateb*) in the following terms:

> Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[74]

Al-Kateb was directed to the possible indeterminate detention of a non-citizen pending removal from Australia. The case was not concerned with administrative decision-making, because the statute (the Migration Act) dictated, as a matter of obligation, how the unlawful citizen was to be held, pending removal from the country. The case was not one of judicial review, but the significance of the statement by the Chief Justice is that it locates the

68 See generally P Daly, 'Administrative Law: A Values-based Approach' in Bell et al, above n 25, Ch 3.
69 PB Maxwell, *On the Interpretation of Statutes* (Sweet and Maxwell, 4th ed, 1905) 121; the language being taken from *United States v Fisher* 6 US (2 Cranch) 358, 390 (Marshall CJ) (1805).
70 (1908] 7 CLR 277, 304; [1908] HCA 63.
71 B Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372.
72 DC Pearce, *Statutory Interpretation in Australia* (Lexis Nexus Butterworths, 9th ed, 2019).
73 (2004) 219 CLR 562; [2004] HCA 37.
74 Ibid [19].

justification for the principle in the relationship between the legislature and the judicial arm of government.

A similar approach underlies an understanding of the limits of the principle, identified by Gageler and Keane JJ in *Lee v New South Wales Crime Commission*:

> The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.[75]

The application of this principle, widespread as it may be, must be understood as a qualification of the strong text-based approach demanded by the High Court in other contexts.[76] Its effect is to impose constraints on administrative action which might otherwise be thought to interfere with rights and freedoms found within the general system of law. As explained in revealing terms by Brennan J, the purpose is to 'supply the omission of the legislature'. It is not compatible with the underlying justification of an approach based solely on statutory interpretation — namely, to root the function of judicial review in the firm soil of parliamentary sovereignty.

The cases reading down the operation of privative clauses seek to protect access to the courts as an essential element of the 'rule of law' — a phrase used to encompass a set of public law values. Like *Al-Kateb*, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[77] (*Probuild*) was not concerned with an administrative decision but dealt with the availability of review for error of law on the face of the record. Legislation governing building and construction work[78] provided for progress payments to contractors. Disputes as to entitlement were determined by an adjudicator. The question in *Probuild* was whether the statute, which contained no express privative clause, was intended to allow the adjudicator to operate free of review for non-jurisdictional error of law. The Court held unanimously that it did. The majority[79] identified the need for a clear expression of intention 'to alter the settled and familiar role of the superior courts'.[80] They adopted the explanation of Brennan J in *Quin* that 'the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise'.[81] Construing the legislative scheme, the joint reasons concluded that the jurisdiction to review determinations of the adjudicator for non-jurisdictional error of law was ousted.[82]

Justice Gageler took a different approach, not dependent upon the statutory enactment of the supervisory jurisdiction or the interaction of two statutory schemes:

75 (2013) 251 CLR 196; [2013] HCA 39, [313].
76 S Gardiner, 'What Probuild Says about Statutory Interpretation' (2018) 25 *Australian Journal of Administrative Law* 234, 241–3.
77 (2018) 264 CLR 1; [2018] HCA 4.
78 *Building and Construction Industry Security of Payment Act 1999* (NSW).
79 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
80 *Probuild* (2018) 264 CLR 1; [2018] HCA 4 [34].
81 Ibid [33], quoting *Quin* (1990) 170 CLR 1, 36.
82 Ibid [35].

> The scope and incidents of that historical, inherited, supervisory jurisdiction were defined by the common law. The statutory perpetuation of that former jurisdiction does not alter its common law character.[83]

He further noted that the jurisdiction yields to legislation which, according to common law principles of interpretation, manifests an intention 'that a decision or category of decisions is not to be quashed or otherwise reviewed'.[84] His point of departure from the joint reasons lay in his approach to the principles of statutory construction. Those principles, he reasoned, 'are no longer adequately captured in the all-encompassing aphorism that "recourse to the courts is not to be taken away except by clear words" or in some variation of that aphorism'.[85]

There is a presumption, identified in *Craig*, that power conferred on a non-judicial body does not authorise decisions on a mistaken view of the law. Justice Gageler saw any additional presumption as to the availability of the supervisory jurisdiction to correct errors of law as essentially duplicative: accordingly, once satisfied that the statutory scheme did not require the adjudicator to form a correct view as to legal issues, there was no purpose in considering any additional presumption, which 'would at best be supererogation and at worst be conducive of incoherence'.[86]

Justice Edelman accepted that, if 'the traditional, narrow approach to construction of legislation that purports to exclude review for non-jurisdictional errors of law' were adopted, the legislation would fail that test.[87] He did not apply that test, however, in its full force, primarily because the adjudicator did not produce a final determination of legal rights of the parties.[88] His conclusion was expressed in the following terms:

> The Security of Payment Act did not authorise adjudicators to take unlawful steps by making errors of law. What it did do, by implication based upon a background legislative assumption, was to immunise from judicial review any non-jurisdictional error of law on the face of the record. The conclusion that judicial review of a non-jurisdictional error of law could be excluded merely by a background implication despite the narrow approach to construction is unusual. The reason for the unusual result is that the narrow approach applies only weakly to the construction of the provisions excluding judicial review of non-jurisdictional errors of law on the face of the record. The rationale for the narrow approach to construction is protective of the reason for judicial review, namely access to the courts to correct legal errors relating to a person's rights. Where, as here, that access is generally preserved without much practical effect on rights then the rationale is not sufficiently engaged to overcome the inference that arises from ordinary principles of construction.[89]

Probuild was not a case about grounds of review; rather, it was a case about the scope of the supervisory jurisdiction. All three judgments treated it as involving a question of statutory construction. The legal effect of the adjudicator's decision was to require a progress payment to be made, without usurping the judicial power to resolve disputes as to the legal entitlement to the payment. The legal effect was thus temporary rather than final. Its practical effect was to shift the risk of insolvency pending the judicial determination of any legal disputes.

83 Ibid [56].
84 Ibid [57].
85 Ibid [59], the quotation being from *Hockey v Yelland* (1984) 157 CLR 124, 130; [1984] HCA 72.
86 Ibid 78].
87 Ibid [100].
88 Ibid [102].
89 Ibid [108].

The result was consistent with the conventional view that the supervisory jurisdiction is ultimately protective of legal rights and only engages with steps taken on the way to a final determination of legal rights for limited purposes.

To the extent that principles of legality, fairness and reasonableness are embedded in public law values, they are protective of individual rights and freedoms. What find no reflection in such principles, as presently articulated, are the institutional values associated with good administration. Protection of individual rights may impose significant costs on administration which should be weighed against the benefits to be obtained for the public good. The focus of the court in a case of judicial review is squarely on the situation of the individual complainant; the focus of the author of the impugned decision is likely to have been far broader (seeking to achieve consistency and rationality over hundreds of cases) and far narrower (disregarding the case law through which complex principles of judicial review have been fine-honed). An unusual case, in which principles of good administration were determinative, was *Plaintiff M64/2015 v Minister for Immigration and Border Protection*.[90] As noted by French CJ, Bell, Keane and Gordon JJ:

> Policy guidelines … promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike. In particular, policies or guidelines may help to promote consistency in 'high volume decision-making' …[91]

Justice Gageler observed:

> Where, as here, the statutory question is whether the decision-maker should be persuaded that there are compelling reasons for giving special consideration to granting one of a finite number of permanent visas to a particular applicant, the correct or preferable decision in the individual case cannot be divorced from the correct or preferable decision across the range of cases in which an exercise of that decision-making power can be expected to be sought. Blinkered and individualised decision-making would be a recipe for maladministration.[92]

The demand for clear and cogent reasons as a condition of valid decision-making may also be seen as promoting transparency and guarding against arbitrariness. However, if the demands are too great, the results may be counter-productive.[93] While it is not clear that a grounds-based approach to judicial review has in the past provided an adequate vehicle for this balancing exercise, there is reason to doubt that an unqualified focus on statutory interpretation will improve the situation.

Further, as observed by Edelman J in *Minister for Immigration and Border Protection v SZVFW*:

> Speaking in the context of the adjudication of questions of construction of legislation, Aronson, Groves and Weeks observe that '[o]ne of the assumptions underlying Marshall CJ's judgment in *Marbury v Madison* remains to this day, namely, that to every question of law, there can be only one right answer'. On judicial review of, or appeal from, a decision concerning the construction of legislation, a contract, a will, or a trust, no latitude is given to a primary decision-maker even where the primary decision was one about which

90 (2015) 258 CLR 173; [2015] HCA 50.
91 Ibid [54].
92 Ibid [69].
93 J Mashaw, 'Public Reason and Administrative Legitimacy' in Bell et al, above n 25, 17; Aronson, Groves and Weeks, above n 4, 626–7.

> opinions might reasonably differ. 'As to construction, there is always one and only one true meaning to be given to fully expressed words.' [94]

In *Hossain v Minister for Immigration and Border Protection*,[95] referring to an essay by Alan Robertson,[96] Kiefel CJ, Keane and Gageler JJ demonstrated sensitivity to the need for a nuanced approach to the construction of statutes conferring executive powers, stating:

> The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecison-making is a function of the real world'.[97]

The second half of this passage will require an application of general principles of statutory interpretation with due regard to the nature of the particular power and, one hopes, to relevant public law values. It is an exercise entailing a degree of sophistication, not merely the articulation of a principle at a high level of generality, followed by a search for a contrary indication.

Conclusions

The focus on statutory interpretation when identifying the boundaries of judicial review may well have exacerbated a concern long held by John McMillan that judges are insufficiently attuned to the institutional framework within which administration occurs. Principles of statutory interpretation are, relevantly, protective of individual rights and freedoms and of the judicial system. They are not focused on institutional facets of good administration. Bateman and McDonald saw the focus on statutory interpretation as coming 'at the cost of limiting the predictability, applicability and generality of the legal norms of administrative law and, thereby, a diminution of the capacity of the legal norms of Australian administrative law to contribute to the legitimation of bureaucratic power in an administrative state'.

I would put it slightly differently: statutory interpretation depends to a large degree on general law principles. However, they are not principles which necessarily reflect the values and standards associated with good administration. A focus on individual rights and freedoms is a necessary element in imposing accountability on the executive arm of government. That is a proper function of the courts. However, it must be balanced by an understanding that, to paraphrase Brennan J, achieving a just result in a particular case may be a collateral or subsidiary benefit of the broader function of maintaining the regularity of administrative practice. Yet the collateral benefit is the motivation for the claimant, who is primarily

94 (2018) 264 CLR 541; [2018] HCA 30 [127].
95 (2018) 264 CLR 123; [2018] HCA 34.
96 A Robertson, 'Is Judicial Review Qualitative?' in Bell et al, above n 25, at 243.
97 (2018) 264 CLR 123; [2018] HCA 34.

concerned with the final outcome.[98] Ultimately, it is necessary to articulate the grounds on which judicial review is available by reference to a set of values and standards which promote good administration of the laws by the executive in the public interest. Hopefully these issues will be teased out in the next 100 issues of *AIAL Forum*.

98 Which is often beneficial: the administrative decision is reversed on reconsideration — see R Creyke and J McMillan, 'The Operation of Judicial Review in Australia' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact* (Cambridge UP, 2004) Ch 6.