'THE LEGITIMATE SCOPE OF JUDICIAL REVIEW'*

By Stephen Gageler SC
Member, Administrative Review Council

Introduction

There is in Australian legal theory a bright line between judicial review and merits review. The theory is rooted less in the nature of administrative decision-making than in the nature of judicial power which under Chapter III of the Australian Constitution is separated from legislative power and executive power and reposed in a separate branch of government. In that branch of government is reposed the final determination of legal truth. The same conception of the unique role of the constitutionally separated judiciary that justifies and sustains the judicial review of an exercise of legislative power justifies and sustains the judicial review of an exercise of executive power.

This was explained by Brennan J in *Attorney General (NSW) v Quin*[1] in terms that have come to be endorsed by all current members of the High Court with the possible exception of Kirby J. The explanation begins with the classic statement of the nature of judicial power drawn from the field of constitutional law:

> "The duty and jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*:
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> 'It is, emphatically, the province and duty of the judicial department to say what the law is.'"

The explanation continues by applying that statement with equal emphasis to the field of administrative law:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's powers. ... The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

Judicial review on the approach now accepted by the High Court is therefore an aspect of the rule of law which has itself been identified as an assumption against which the Constitution was framed.[2] Judicial review is justified and sustained by one consideration alone: the declaration and enforcement of the legal rules, which determine the limits and govern the exercise of a repository's powers. That is the duty and jurisdiction of the courts. For present purposes of equal importance is that that is the sole duty and jurisdiction of the courts. The judicial review of administrative action is in this respect no different from the exercise by a court of any other jurisdiction. Indeed, in *Corporation of the City of Enfield v Development*

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1 (1990) 170 CLR 1 at 35-36.

2 Paper presented to *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193; *Abebe v Commonwealth* (1999) 197 CLR 510 at [137].

Assessment Commission[3] four members of the High Court went out of their way to emphasise that:

> "[s]ignificant questions of public law, including those respecting ultra vires activities of public officers and authorities, are determined in litigation which does not answer the description of judicial review of administrative action by the medium of prerogative writs or statutory regimes such as the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)."

In a separate concurring judgment in the same case, Gaudron J observed that:[4]

> "[t]hose exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less."

It might equally be added to her Honour's observation that the rule of law requires no more.

The merits of an administrative decision on this analysis are wholly beyond the scope of judicial review. This is not because the merits constitute a separate or distinct field into which the judiciary ought not trespass as a matter of institutional competence or public policy. It is because the merits are simply outside the subject matter of judicial inquiry. The merits are the residue of administrative decision-making that in any given case lies beyond any question of legality.

That is the theory. The practice is somewhat blurred. The distinction between judicial review and merits review is not always so clear. This is in part because the theory is not always observed. It is in part because the applicable legal rules are uncertain or in a state of development. There is a raging debate as to whether the courts in discerning or developing or applying those legal rules have overstepped a line, which in the interests of public administration they should observe.[5] I do not want to enter into that debate. Nothing I want to say today involves an empirical or normative analysis of what courts do in fact. Nor does anything I want to say involve questioning the underlying theory of judicial review as it is now accepted in Australia.

The thesis I want to present is more limited and is pitched at the level of principle. The thesis is that while the legitimate scope of the judicial review of administrative action in Australia is fixed its content is ultimately determinable by the legislature in formulating the law, which sets the limits and governs the exercise of an administrator's powers. It is to the formulation of that law rather than to the question of the legitimate scope of judicial review that the policy debate would more profitably be directed.

To develop that thesis I need to say something about three potentially rather disparate topics:

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3 (1999) 199 CLR 135 at [17].

4 (1999) 199 CLR 135 at [56].

5 See generally the articles cited in Sackville, "Judicial Review of Migration Decisions: An Institution in Peril?" (2000) 23 UNSW Law Journal 190.

- jurisdictional error;
- privative clauses; and
- the mandatory/directory distinction.

But before turning to those topics in detail it is useful to place the issue in its historical context.

Historical context

We find ourselves at the centenary of federation and at the close of nearly a quarter of a century since the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). With the benefit of hindsight each of those events can now be recognised as a watershed in the development of judicial review: the former no less than the latter.

Federation brought with it the constitutional entrenchment of the separation of judicial power and the consequent acceptance as "axiomatic" of the great principle in *Marbury v Madison*[6] that it is the constitutional duty of the judiciary to declare and enforce the law.[7]

Although less celebrated at the time, federation also brought with it the specific constitutional entrenchment of judicial review of Commonwealth administrative action in the form of the conferral by section 75(v) of the Constitution of original jurisdiction on the High Court in all matters "[i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". The section was inserted to make it "constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power".[8] The intention of the framers of the Constitution was to avoid a limitation on the appellate jurisdiction of the Supreme Court of the States exposed by *Marbury v Madison*. The intention was specifically to ensure that the High Court would have original jurisdiction to issue writs of mandamus and prohibition to Commonwealth executive officers. Yet the High Court determined at an early stage that the words "officer of the Commonwealth" included judicial officers.[9] The remedies for which section 75(v) provides therefore needed to be accommodated to exercises of both judicial and executive power. This need has come to have a profound influence on the jurisprudence of the High Court and underlies in particular the Court's persistent and recently renewed emphasis on jurisdictional error as the basis of judicial review.

Mainly because of its procedural vagaries, the significance of the jurisdiction conferred on the High Court by section 75(v) of the Constitution lay largely unexplored for most of the last century. The constitutional writs remained as obscure in public law as the old forms of action had been in private law. Right, remedy and discretion seemed inextricably intertwined. The scope for injunctive relief also available against an officer of the Commonwealth under section 75(v) of the Constitution had the potential for greater clarity in its application but was virtually untested.[10]

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6 (1803) 5 US 87.

7 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262.

8 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 363.

9 *The King v Commonwealth Court of Conciliation and Arbitration and Australian Tramway Employees' Association; Ex parte Brisbane Tramways Co Ltd* **(**No 1**)** (1914) 18 CLR 54.

10 An early and spectacularly unsuccessful attempt to obtain injunctive relief was *The King v MacFarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 509.

The Administrative Decisions (Judicial Review) Act was designed to overcome those procedural difficulties. Introducing the Bill for that Act in the House of Representatives,[11] the Attorney-General described it as seeking:

> "to establish a single simple form of proceeding in the Federal Court of Australia for judicial review of Commonwealth administrative actions as an alternative to the present cumbersome and technical procedures for review by way of prerogative writ, or for the present actions for a declaration or injunction."

The essentially procedural nature of the Act was confirmed in *Kioa v West*.[12] There the High Court held that the mere existence in the Act of the ground of breach of the rules of natural justice did import an obligation to afford natural justice in respect of every decision to which the Act applied. That obligation needed to be found elsewhere: on one view in the statute conferring power to make the decision and on anther view in the common law.

While the Administrative Decisions (Judicial Review) Act was designed "to provide a comprehensive procedure for judicial review of Commonwealth administrative action",[13] there were many decisions to which it did not apply. A notable exclusion was that category of decisions more correctly characterised as "legislative" and therefore not of an "administrative character". Also specifically excluded from the operation of the Act were the disparate categories of decisions listed in Schedule 1. This eclectic group of exclusions lacked an organising principle. They ranged from decisions relating to the recovery of tax to decisions under the *Foreign Takeovers Act 1975* (Cth). All of the excluded decisions remained within the scope of section 75(v) of the constitutional but any challenge to them still encountered the practical impediment of the procedural vagaries attendant upon an attempt to invoke the High Court's jurisdiction.

The ramifications of the incomplete overlap between section 75(v) of the Constitution and the Administrative Decisions (Judicial Review) Act became more apparent with the enactment in 1983 of amendments to the *Judiciary Act 1903* (Cth). Those amendments were not designed to achieve any wholesale reform of the system of administrative law but to relieve what was then perceived to be the unduly heavy work-load of the High Court. The Federal Court was given by section 39B of the *Judiciary Act* concurrent jurisdiction with the High Court in most matters arising under section 75(v). The High Court was in turn given power to remit such matters commenced in its original jurisdiction to the Federal court. All of the decisions included within the scope of judicial review by the Federal Court under the Administrative Decisions (Judicial Review) Act were in this way brought within the separate and concurrent jurisdiction of the Federal Court under section 39B of the *Judiciary Act*. But so too were all of the decisions specifically excluded from the scope of judicial review under the Administrative Decisions (Judicial Review) Act. The result in practical terms was to render those carefully crafted exclusions otiose. Another and more pervasive result was to free the constitutional writs from their traditional procedural moorings and to necessitate some closer analysis of their precise scope.

All of this was before the introduction in 1995 of Part 8 of the *Migration Act 1958* (Cth). The purpose of that Part was unashamedly to curb the judicial review of migration decisions. The effect of the Part has been less to curb than to re-channel. What Part 8 does is:

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11 Hansard, House of Representatives, 28 April 1977 at 1394.

12 (1985) 159 CLR 550.

13 Hansard, House of Representatives, 28 April 1977 at 1396.

- to confer jurisdiction on the Federal Court to judicially review migration decisions but on specific grounds deliberately more limited than those set out in the Administrative Decisions (Judicial Review) Act;[14]
- to exclude migration decisions from the jurisdiction of the Federal Court under both the Administrative Decisions (Judicial Review) Act and section 39B of the Judiciary Act;[15] and
- to limit the powers capable of being exercised by the Federal Court on remitter of proceedings commenced in the original jurisdiction of the High Court to those which could be exercised in proceedings commenced under that Part.[16]

What Part 8 did not and could not do was to exclude migration decisions from the original jurisdiction of the High Court under section 75(v) of the Constitution or to restrict the grounds of review available to an applicant for relief in that jurisdiction. One effect has been to bring about a bifurcation of jurisdiction in which the same applicant is forced to seek essentially the same relief against the same respondent on different grounds in different courts. Another effect has been increase the workload in the original jurisdiction of the High Court to a level that makes that which precipitated the 1983 reforms to the *Judiciary Act* pale into insignificance.

The one benefit has been to produce for the first time a sustained and intensive examination by the High Court of the nature of its original jurisdiction under section 75(v) of the Constitution and of the principles that more generally govern the judicial review of administrative action.

Jurisdictional error

The distinction between jurisdictional and non-jurisdictional error was for some time thought unfashionable. That may still be the case elsewhere. It is no longer the case in Australia.

The change came in *Craig v South Australia*[17] where the High Court emphatically rejected as inapplicable to Australian conditions the approach of *Lord Reid in Anisminic Ltd v Foreign Compensation Commission*.[18] The ability of a court to set aside a decision on judicial review was explained wholly in terms of the identification of jurisdictional error resulting in the invalidity of the decision. The availability of the writ of certiorari to correct an error of law on the face of the record was treated as an anomalous exception to this fundamental principle and confined almost to the point of oblivion. The unstated premise of the reasoning in *Craig v South Australia* was that the maintenance of the traditional distinction between jurisdictional and non-jurisdictional error was critical to an understanding of the original jurisdiction of the High Court under section 75(v) of the Constitution.

The constitutional writs, we have now been told in more recent cases, are available only to correct jurisdictional error: prohibition where there has been a wrongful excess of jurisdiction and mandamus where there has been a wrongful failure to exercise jurisdiction.[19] Certiorari,

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14 Sections 475 and 476.
15 Section 485(1).
16 Section 481(3).
17 (1995) 184 CLR 163.
18 [1969] 2 AC 147 at 171.
19 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633.

which is not mentioned in section 75(v) of the Constitution but which can be granted where a matter is otherwise within the jurisdiction of the High Court, is available only as ancillary relief to clear away that which is already a nullity.[20]

The concepts of "invalidity" and lack of "jurisdiction" are here used interchangeably. The antonymous concept of "validity" is treated as "equivalent to legality or not being ultra vires".[21] The terminology of "invalidity" or "jurisdictional error" therefore signifies that there has been a breach of the legal rules that mark out the limits of a repository's power or which constitute a condition of its valid exercise. The existence of such a breach itself results in a purported exercise of power being without legal effect. The court in granting relief simply recognises that underlying invalidity.

While the notion of "jurisdiction" is generally very confined when applied to a "court", it is generally very broad when applied to an administrator. In *Craig v South Australia*[22] it was said that:

> "At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. That point was made by Lord Diplock in *In re Racal Communications Ltd* : "Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so." The position is of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

The same theme was picked up and applied much more recently in *Minister for Immigration and Multicultural Affairs v Yusuf*.[23] There McHugh, Gummow and Hayne JJ with the concurrence of Gleeson CJ and Gaudron J, quoted the latter part that passage from *Craig v South Australia* and continued:

> "'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

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20 Eg *Re Minister for Immigration and Ethnic Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407.

21 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [20].

22 (1995) 184 CLR 163 at 179.

23 [2001] HCA 30 at [80].

> material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if 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."

Their Honours added, with reference back to *Craig*, that nothing in the legislation with which they were concerned (being the Migration Act) suggested that the particular decision-maker (the Refugee Review Tribunal) was:

> "given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law."

The reference in the passage in *Yusuf* to the non-exhaustive nature of the list of jurisdictional errors set out *Craig v South Australia* is linked by a footnote to the High Court's decision in *Re Refugee Review Tribunal; Ex parte Aala*.[24] There it was held that the constitutional writs would lie where a decision was made in breach of the rules of natural justice. This was again on the basis that a breach of the rules of natural justice constitutes a breach of a condition governing the exercise of a power.[25]

Precisely the same explanation has been given of the doctrine of Wednesbury unreasonableness. In the words of Brennan CJ in *Kruger v Commonwealth* the explanation is that:[26]

> "when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised."

Or as earlier explained by Brennan J in *Attorney General (NSW) v Quin*:[27]

> "Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of power which is so unreasonable that no reasonable person could have taken the impugned decision or action."

This focus on jurisdictional error as the basis for judicial review has brought with it some close analysis of the terms in which a statutory power is conferred.[28] A power conferred in terms:

> "If X, a decision-maker can (or must) do Y."

is now perceived as having two distinct elements. There is an element of discretion (or duty): the doing or non-doing of Y. Separately and logically anterior to the discretion (or duty) there

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24 (2000) 176 ALR 219.

25 (2000) 176 ALR 219 at [5], [41],[142].

26 (1997) 190 CLR 1 at 36.

27 (1985) 170 CLR 596 at 36.

28 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 652-654; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 178 ALR 421 at [73].

is an element of jurisdictional fact: the existence or non-existence of X. The existence or non-existence of X, if challenged, is a matter for the objective determination of the court.

The same analysis applies where X is defined as the existence of an opinion or a state of satisfaction on the part of the decision-maker. The analysis works in the same way if, for example, a power is conferred in terms:

> "If the Minister is of the opinion (or is satisfied) that a person is a refugee the Minister may (or must) grant a visa."

The only subtlety is that here the question of the existence or non-existence of the jurisdictional fact gives rise to two subsidiary questions:

- did the Minister in fact hold an opinion (or state of satisfaction); and
- if so, did the opinion (or state of satisfaction) in fact held answer the statutory description.

In this respect, in the absence of some contrary intention appearing, the statute will be treated as referring to an opinion (or state of satisfaction):

> "which is one that can be formed by a reasonable man who correctly understands the meaning of the law under which he acts"[29]

so that:

> "[i]f it can be shown that the opinion (or state of satisfaction) actually formed is not an opinion (or state of satisfaction) of this character, then the necessary opinion (or state of satisfaction) does not exist."[30]

The statutory pre-condition to the exercise of the power in such circumstances falls away. The jurisdictional fact of a reasonable opinion does not exist.

All of this ties in precisely with the underlying justification for judicial review identified by Brennan J in *Attorney General (NSW) v Quin*. At least in relation to powers conferred by statute, to search for the law, which determines the limits and governs the exercise of a repository's powers is to search for the limits of the repository's jurisdiction. The existence of a breach of such a law itself results in a purported exercise of power being without jurisdiction and therefore without legal effect. The courts in granting relief do no more than recognise and enforce the jurisdictional limits.

The legal rules giving rise to the traditional grounds of judicial review are in this way linked by a common theme. They are not discrete or freestanding. They are all aspects of jurisdiction. They serve to identify the scope of a decision-maker's power and the conditions of its valid exercise.

But ultimately it is for the legislature to set the limits of any jurisdiction it confers. The scope of a decision-maker's power and the conditions of its valid exercise can always be defined differently. The traditional grounds are in truth no more than the default position to be

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29 *The King v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432.

30 Ibid.

applied in the absence of a contrary legislative intention to define the boundaries of a decision-maker's jurisdiction differently. They are not always applicable. Where they are applicable they are not immutable but in large measure take their content from the particular statutory scheme.

It matters not for this purpose whether the rules underlying the traditional grounds of review are perceived as arising wholly as a matter of statutory implication or as arising wholly or in part from the application of the common law.[31] To the extent that it may apply, the common law can operate in relation to a statutory power only by supplying "the omission of the legislature".[32] The common law can have nothing to say where the legislature has made known its intention concerning the precise limits of the power.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim*,[33] for example, McHugh J rejected an argument that the Refugee Review Tribunal had denied an applicant natural justice because section 427(6) of the *Migration Act* prevented him from being properly and adequately advised and represented at the hearing. That subsection declares that a person appearing before the Tribunal is not entitled to be represented or to examine or cross-examine witnesses. His Honour held that "the common law rules of natural justice cannot prevail against this legislative declaration."[34]

Another illustration of the proposition is *Re Minister for Immigration and Ethnic Affairs; Ex parte Miah*.[35] Although by majority rejecting it as a matter of construction, the High Court there entertained an argument that the "code of procedure" set out in Division 3 of Part 2 of the *Migration Act* operated to the exclusion of the rules of natural justice. The reasoning of all justices was consistent with the observation of Brennan J in *Kioa v West*[36] quoted with approval in the dissenting judgment of Gleeson CJ and Hayne J[37] that it is:

> "[b]y construing the statute [that] one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require."

As stated by Gaudron J:[38]

> "in the end the question is whether the legislation, on its proper construction, relevantly (and validly) limit[s] or extinguishe[s] [the] obligation to accord procedural fairness."

Privative clauses

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31 For an acknowledgement of the differing views see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238 at [89].

32 *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 at 194 [143 ER 414 at 420] quoted in **Kioa v West** (1985) 159 CLR 550 at 609.

33 (2000) 175 ALR 209.

34 (2000) 175 ALR 209 at [11].

35 (2001) 179 ALR 238.

36 (1985) 159 CLR 550 at 614.

37 (2001) 179 ALR 238 at [30].

38 (2001) 179 ALR 238 at [90] quoting *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219 at [41].

That brings me to the topic of privative clauses. The question is: how far can the legislature go? Can it so define the limits of an administrator's jurisdiction as to exclude procedural fairness and other traditional grounds of judicial review entirely?

Two things are tolerably clear from our constitutional structure. One is that it is impossible for any legislature in Australia to confer unlimited power on an administrator. Another is that it is equally impossible at least for Commonwealth legislation[39] simultaneously both to confer a limited power and to prevent a court from declaring and enforcing that limit.[40] The result, to use the language of Hayne J in *Aala*[41] is that while the legislature:

> "may lawfully prescribe the kind of duty to which an officer of the Commonwealth is subject and may lawfully prescribe the way in which that duty is to be exercised"

it cannot:

> "consistently with [section] 75(v) and [Chapter] III [of the Constitution] generally, withdraw from [the High Court] the jurisdiction which it has to ensure that power given to an officer of the Commonwealth is not exceeded."

A privative clause purporting to exclude the jurisdiction of the High Court to review an exercise of power conferred by Commonwealth legislation would therefore be invalid if literally construed. It can be given effect, if at all, not as a limitation on the curial jurisdiction of the High Court but as an expansion of the administrative jurisdiction of the relevant administrator.

Of course, to read a privative clause in this way creates a:

> "prima facie inconsistency between one statutory provision which seems to limit the powers of the [repository of power] and another provision, the privative clause, which seems to contemplate that the [repository's] order shall operate free from any restriction."[42]

The prima facie inconsistency is said to be reconciled by:

> "reading the two provisions together and giving effect to each."[43]

The approach to construction uniformly adopted in the High Court has been that expounded by Dixon J in *The King v Hickman; Ex parte Fox and Clinton*:[44]

> "Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or

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39 For a discussion of the differences between Commonwealth and State legislation in this respect see *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633-634.

40 *The King v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616.

41 (2000) 176 ALR 219 at [166].

42 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194.

43 Ibid.

44 (1945) 70 CLR 598 at 615.

> has confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."

This formulation had even forty years ago "come to be regarded as classical".[45] It has been repeatedly applied by the High Court in recent years in relation to the construction of both Commonwealth and State legislation.[46] It sits comfortably with the nature of judicial review as explained by Brennan J in *Attorney General (NSW) v Quin*. This is because it treats the question of the scope of judicial review of an administrative decision as turning entirely on the proper identification of the scope of the jurisdiction conferred on the administrator. It leaves wholly undisturbed the role of the court in declaring and enforcing those legal limits.

The so-called "Hickman principle" has in this way become a universally accepted rule of construction. Whether it also expresses an irreducible constitutional minimum for the ambit of the jurisdiction that may be conferred on an administrator is less certain. The are dicta to suggest that it does.[47] Professor Zines has argued strongly that it does not.[48]

One thing that is clear is that a statute that confers on an administrator a jurisdiction that complies with the "Hickman principle" will be sufficient to satisfy any constitutional minimum that may exist. What this means is that, at least as a general rule, jurisdiction may be validly conferred on an administrator in terms that require no more than compliance with the "Hickman proviso". The legislature can choose to require no more than that the administrator act bona fide in pursuance of a statutory power so as to produce a result that relates to the subject matter of the legislation and that is reasonably capable of reference to the power concerned.

This formulation brings with it its own ambiguities. A number of them have been explored to some extent in cases in the Federal Court that have dealt with challenges to taxation assessments following the decision of the High Court in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd.*[49] What the formula nevertheless demonstrates is that there is considerable scope for the legislative conferral of jurisdiction on an administrator in terms which by-pass entirely the traditional grounds of judicial review.

The Mandatory/Directory Distinction

Another possibility is suggested by the reasoning in *Project Blue Sky Inc v Australian Broadcasting Authority.*[50] The majority of the High Court in that case embraced the substance of the traditional distinction between mandatory and directory statutory provisions while rejecting its rigid classification. The majority said this:[51]

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45 *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia* (1960) 104 CLR 437 at 455.

46 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633.

47 Eg *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; Deputy *Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 .

48 Zines, "Constitutional Aspects of Judicial Review of Administrative Action" (1998) Constitutional Law and Policy Review 50.

49 (1995) 183 CLR 168. Eg *Kordan Pty Ltd v Federal Commissioner of Taxation* (2000) ATC 4812.

50 (1998) 194 CLR 355.

51 (1998) 194 CLR 355 at [91].

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition."

The majority went on to say that:

> "[u]nfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment."

But it need not be so. Where the legislature prescribes a condition that regulates the exercise of a statutory power there is no reason in principle why the legislature should not also prescribe the consequences of a breach of that condition. The legislature can spell out whether and, if so, in what circumstances, a breach will result in invalidity.

A condition placed upon the exercise of a power in this way need not always form part of the definition of the jurisdiction of the repository of the power. Whether it is or is not is entirely a matter for the legislature.

Conclusion

A close analysis of the emerging jurisprudence in the High Court therefore suggests that debate about the legitimate scope of judicial review of administrative action might usefully be refocussed. If judicial review in truth derives from the constitutional role of the judiciary then there is little that can practically be done about changing its essential features. More relevantly for present purposes, if the performance by the judiciary of that constitutional role means that judicial review in truth collapses into a search for jurisdictional error then the scope of judicial review in a particular case must by definition be coincident with the scope of the jurisdiction conferred.

Undue focus on how the jurisdiction conferred on an administrator should be determined by a court can perhaps unduly distract attention from what that jurisdiction should be.

The focus of consideration might therefore more profitably be turned from the scope of judicial review to the scope of an administrator's jurisdiction. What preconditions should exist to the exercise of that jurisdiction? How precisely should they be framed? Where those preconditions exist, what substantive considerations ought or ought not be taken into account in exercising the power? Must the administrator in all cases act only on a correct view of the law? What procedures ought followed in exercising the power? What should be the consequences of any breach of those procedures? These are all questions of policy. They are properly for the determination of the legislature. The answers need not always be the same.

We have now moved well beyond the days when the Administrative Decisions (Judicial Review) Act produced much needed procedural reform by replicating with minor modifications the traditional grounds of judicial review and making those grounds applicable to most Commonwealth statutory decisions of an administrative character. That was almost a

quarter of a century ago and the Act may now have done its work. We have also moved beyond the days when less than a decade ago Part 8 of the *Migration Act* sought to impose substantive limitations on the scope of judicial review by limiting the available grounds. It did not achieve that result and we have learned from its failure.

We now have a single and conceptually uncluttered notion of the scope of judicial review. The traditional grounds of judicial review doubtless enshrine general principles of enduring value. They are indicative of the limits of jurisdiction but they do not define jurisdiction and they ought not be equated within the limits of judicial review. It would be idle to suggest that they are determinative even when they are applicable. They ought not lightly be discarded but they are not the only way of defining jurisdiction. They may not be the best way of defining jurisdiction. To use a very modern metaphor, there is room to think outside the square.