

STATUTORY EXCLUSION OF NATURAL JUSTICE: POSSIBILITY AND IMPROBABILITY

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Since the landmark case of *Plaintiff S157*,¹ judicial review of administrative decisions has been dominated by two notions: jurisdictional error and the High Court's original jurisdiction in s 75(v) of the *Constitution*. In 2010, Spigelman CJ labelled 'the emergence of a constitutional dimension, indeed a constitutional foundation, for administrative law' as 'one of the most important developments of the last decade.'² The legacy of *Plaintiff S157* itself is that a privative clause is not effective to bar applications for judicial review in cases involving jurisdictional error, as a result of s 75(v). *Plaintiff S157* forms part of a line of cases which make it clear that a finding of jurisdictional error will lead to the issue of constitutional writs (subject to discretion³), and that Parliament cannot prevent the issue of writs. However, jurisdictional error is not a monolith, and nor is it free from Parliament's interference.

Fundamentally, judicial review of administrative action is intended to prevent acts done in excess of the power conferred.⁴ It 'confers no jurisdiction to review an exercise of power by a repository when the power has been exercised or is to be exercised in conformity with the statute which creates and confers the power.'⁵ The most important consideration in determining whether there has been an error that goes to jurisdiction and therefore will ground relief is nature of the power and the construction of the statute that grants it. This is clearest in the recent case of *Li*,⁶ in which Part 5, Division 5 of the *Migration Act 1958* provided an exhaustive statement of the natural justice hearing rule 'in relation to matters it dealt

¹ *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157*').

² The Hon JJ Spigelman, "The centrality of jurisdictional error" (2010) 10 *The Judicial Review* 11, 11.

³ See for example *parte Miah* (2001) 206 CLR 57; *Commissioner of Taxation v Futuris Corporation* (2008) 237 CLR 146 ('*Futuris*').

⁴ See *Aala* (2000) 204 CLR 82.

⁵ *Annetts v McCann* (1990) 170 CLR 596, 604-5 (Brennan J).

⁶ *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 ('*Li*').

with'.⁷ The impugned decision was a failure to grant an adjournment by the Migration Review Tribunal, in relation to a matter to which the Division applied. However, the application for the adjournment was held to be a different type of decision, to which the Division did not apply, and hence the common law rules of procedural fairness were followed.

Suggesting, as Spigelman CJ does, that s 75(v) of the *Constitution* provides a 'foundation'⁸ for administrative law is an overstatement. As Hayne J made clear in *Aala*, s 75(v) preserves the High Court's jurisdiction to grant constitutional writs, without affecting the substantive law associated with those writs. In this essay, I therefore aim to displace the primacy given to the *Constitution* as the foundation for judicial review and return such primacy to the statute in each case. Whereas s 75(v) prevents Parliament from depriving the High Court of jurisdiction in judicial review proceedings, it is the content of the statute which determines the scope of the power and the limitations attached to it. Jurisdictional error simply describes when an administrator has acted in excess of his/her power given the terms of the power and such limitations as are imposed on it. There are elements of constitutional law in administrative law, such as the need for a valid conferral of power⁹ and constitutional elements of statutory interpretation.¹⁰ Insofar as s 75(v) protects minimal standards of judicial review for acts that are ultra vires on their face, the *Hickman* principle also operates to invalidate legislative provisions that purport to protect such acts from review. Other grounds, however, can be excluded without any inconsistency with either the *Constitution* or *Hickman*.¹¹

This essay is in two parts. The first section deals with jurisdictional error, the grounds which may be excluded and how breaches of the rules of natural justice¹² fit within this framework. In the second, I examine notions of statutory interpretation as they apply to the exclusion of natural justice,

⁷ *Migration Act 1958* s 357A.

⁸ Above note 4.

⁹ See *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156.

¹⁰ *Quin*.

¹¹ *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

¹² For brevity, I use the term 'natural justice' to refer to the natural justice hearing rule. Where a statute purports to exclude natural justice, it is generally taken to refer only to the natural justice hearing rule: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013), 453. Issues relating to such reading down are beyond the scope of this paper.

adopting theoretical frameworks to critique the application of the principle of legality in its assumption that the rules of natural justice are not excluded by particular statutes. I will not be engaging in polemic criticisms of jurisdictional error as a legal principle or rebutting the importance of s 75(v) as entrenching judicial review of administrative action. These are tasks for other texts. What I will seek to do in this essay is to *shift the focus* away from the Constitution and its centrality since *Plaintiff S157*, and instead focus on statutory interpretation as the true crux of judicial review.

JURISDICTIONAL ERROR

The grounds of jurisdictional error have been listed in cases such as *Craig*¹³ and *Anisminic*.¹⁴ A compilation of the grounds listed in those two cases by Professor Aronson was cited with approval by Kirby J in *Futuris*:

1. "A mistaken assertion or denial of the very existence of jurisdiction.
2. A misapprehension or disregard of the nature or limits of the decision maker's functions or powers.
3. Acting wholly or partly outside the general area of the decision maker's jurisdiction...
4. Acting on the mistaken assumption or opinion as to the existence of a [jurisdictional fact]...
5. Disregarding a relevant consideration...or paying regard to an irrelevant consideration...
6. Misconstruing the decision maker's Act...in such a way as to misconceive the nature of the function being performed or the extent of the decision maker's powers...
7. Bad faith.
8. Breach of natural justice."¹⁵

Such lists are not exhaustive.¹⁶ Other grounds such as *Wednesbury* unreasonableness, a form of which was applied this year in *Li* may also be added. Such lists are merely demonstrative of the types of error found in various cases that result in jurisdictional error.

A Two Concepts of Jurisdictional Error

¹³ *Craig v South Australia* (1995) 184 CLR 163.

¹⁴ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

¹⁵ Mark Aronson, "Jurisdictional error without the tears" in Matthew Groves and HP Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007), 335-6.

¹⁶ *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.

Jurisdictional error *is* jurisdictional error regardless of the grounds under which it is found. It denotes a finding that an act or decision was unauthorised and therefore liable to remedy. In *Project Blue Sky*, Brennan CJ (speaking with respect to statutory instruments) said:

‘...the source of the invalidity is the restricted ambit of the power, not the absence of some act or occurrence extrinsic to the statute. A statutory direction as to the manner in which a power may be exercised is not a direction as to the doing of some preliminary or collateral act; it is a delimitation of the power itself.

...Either there is power available for exercise in the manner in which the repository has exercised it and the exercise is lawful or there is no power available for exercise in the manner in which the repository has purported to exercise it and the purported exercise is invalid.’¹⁷

To illustrate the distinction between grounds of review that can and cannot be excluded by statute, I will separate jurisdictional error into two forms. The division has been visible as early as *Craig*, in which grounds for review were identified as belonging to two groups: error ‘at its most obvious’ involving acts ‘wholly or partly outside the general area of jurisdiction’, and less obvious where the authority, acting within jurisdiction, does ‘something which it lacks authority to do.’¹⁸ This was restated in *Kirk*, that there is jurisdictional error if a body (in that case, an inferior court):

‘mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.’¹⁹

This restatement shows two genera within the taxonomy of jurisdictional error. The first, most obvious form is where the authority acts outside of its powers, whether in whole or in part, due to wilful action or an error of law that caused the authority to misinterpret its power.²⁰ Such acts will always constitute jurisdictional error and lead to invalidity. The second, less obvious form of jurisdictional error is where the authority is acting within jurisdiction, but fails to comply with a condition placed on the exercise of the jurisdiction. Whereas the first genus of jurisdictional error applies to all

¹⁷ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 373 (emphasis added).

¹⁸ *Craig v South Australia* (1995) 184 CLR 163, 177.

¹⁹ *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.

²⁰ *Futuris* (2008) 237 CLR 146.

powers conferred by statute, the second depends on whether those limitations arise from the statute itself.

In the first category are a mistaken assertion of jurisdiction, acts in bad faith²¹ and breaches of natural justice which result in an arbitrary exercise of power²². Jurisdictional facts can be included in this category on the basis that the grant of power requires some limitation (if not as a result of a jurisdictional fact in the usual sense, then as a constitutional fact),²³ although a jurisdictional fact expressed in a statute will fall in the second category. These grounds of jurisdictional error are protected by the common law and s 75(v) of the *Constitution* and cannot be excluded by statute.

Grounds of review in the second category can be either omitted or excluded by the statute. Those grounds include the 'qualitative grounds' of failure to consider a relevant factor and consideration of an irrelevant factor, jurisdictional facts expressed in statutes, some rules of natural justice, bias and *Wednesbury* unreasonableness. Where any of these grounds place a condition on the power under consideration, breach of such a condition will lead to a constructive failure to exercise jurisdiction.²⁴ This is demonstrated in Gaudron J's formulation of the prosecutor's claim in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*:

'The contention is that the delegate's decision was made in excess of jurisdiction. The basis of that contention is that *the power to refuse to grant a visa was conditioned upon the observance of a duty which was not fulfilled.*'²⁵

The natural justice hearing rule, apparent bias and *Wednesbury* unreasonableness are creatures of the common law, and are often excluded by statute. The 'qualitative grounds' of judicial review arise purely from limitations expressed in the statute conferring the power, and rather than be excluded can simply be *omitted* from the statute. The ground of failure to consider a relevant factor does not apply 'unless some statute expressly or

²¹ Ibid.

²² See *Miah* (2001) 206 CLR 57, 73.

²³ See *Li*, where French CJ noted that 'every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it was conferred' ((2013) 87 ALJR 681, 629).

²⁴ Aronson (above note 17) discusses 'constructive failure to exercise jurisdiction' in a narrower sense, but I have used the expression here to indicate that a failure to adhere to a limitation on a power is jurisdictional error in the same way that an act that is ultra vires on its face would be.

²⁵ (2001) 206 CLR 57, 74 (emphasis added).

by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition in exercising the power.²⁶ In the same way, the ground of considering an irrelevant factor is only available if factors which must not be considered are identified in the statute.²⁷ Natural justice, bias and *Wednesbury* unreasonableness raise more difficult questions as to when they apply and when they are excluded. In this essay, I will only be addressing the question of when the rules of natural justice are excluded; addressing *Wednesbury* unreasonableness and bias would require a much larger work.

B Plaintiff S157 and the Hickman Principle

Plaintiff S157 determined that a privative clause will not be effective to prevent judicial review of a decision affected by jurisdictional error. This was the required by s 75(v) of the *Constitution*, which preserved the High Court's jurisdiction to grant constitutional writs and therefore to conduct judicial review proceedings. The High Court re-examined the decision of Dixon J in *Hickman*, in which His Honour said it was 'necessary to ascertain before issuing a writ whether the persons or body against which it is sought are acting in excess of their powers.'²⁸ He went on to say:

'...if in one provision it is said that certain conditions shall be observed, and in a later provision of the same instrument that, notwithstanding they are not observed, what is done is not to be challenged, there then arises a contradiction, and effect must be given to the whole legislative instrument by a process of reconciliation.'²⁹

With that emphasis on statutory construction, one of the questions that arose in *Plaintiff S157* was:

'whether, on the true construction of the Act as a whole, including s 474, the requirement of a fair hearing is a limitation upon the decision-making authority of the Tribunal of such a nature that it is inviolable.'³⁰

The effect of the *Hickman* principle is to preserve judicial review where two conflicting provisions purport to confer a power subject to limitations and

²⁶ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 41 (Mason J), 55 (Brennan J).

²⁷ *Ibid.*

²⁸ *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 614.

²⁹ *Ibid.*, 617.

³⁰ *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476, 491.

that those limitations do not apply. As discussed above, it does nothing to protect a decision that is made consistently with the power.³¹

The *Hickman* principle would protect the first category of judicial review grounds, as it would be inconsistent with a grant of power to exclude them. An exercise that is ultra vires on its face, or made in the absence of a jurisdictional fact, cannot be made valid by a provision stating that acts made in excess of that authority are valid.³² To authorise such acts would be inconsistent as a matter of logic and construction, and would be prevented by the *Hickman* principle.

The *Hickman* principle is not engaged by attempts to exclude grounds of review that I have identified in the second category. Where the statute is inconsistent with the rules of natural justice, *Wednesbury* unreasonableness, apprehended bias or mandatory relevant/irrelevant factors, these grounds simply do not operate as limits on the power; in other words, no such jurisdictional error could arise. Nor does any inconsistency arise as it would in the case of a privative clause claiming to validate otherwise invalid decisions (as in *Bodruddaza*) or oust the High Court's power to review administrative decisions in cases involving jurisdictional error (as in *Plaintiff S157*).

C Breach of the Rules of Natural Justice as Jurisdictional Error

So far I argued that the central element in determining jurisdiction is statutory construction, and that whenever the decision-maker acts beyond the authority conferred by the statute, that will lead to jurisdictional error. Some grounds of jurisdictional error, such as fraud, apply to all powers because it is always beyond the statute that the powers be used for fraudulent purposes. Within the group of grounds that can be excluded with respect to particular grants of power, there is a difference between those grounds that exist because of limitations expressed in the statute and those which are traditional instances of the common law.

The two examples of review grounds derived directly from the statute are relevant/irrelevant considerations and jurisdictional facts. As discussed above, where mandatory relevant/irrelevant factors are not prescribed by the statute, it is for the decision-maker to decide what to consider in

³¹ See *Annetts v McCann* (1990) 170 CLR 596, 604-5 (Brennan J).

³² See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

exercising the power.³³ Similarly, a jurisdictional fact will limit the jurisdiction if it appears on the statute, but will not be implied in the absence of statutory expression, as seen in *Plaintiff M70* and the legislative response to repeal s 198A of the *Migration Act 1958*.

Such a formula cannot be put for natural justice. Although it is common to speak of ‘a breach of the rules of natural justice’ as a form of jurisdictional error,³⁴ those rules are not uniform and in some cases their content is reduced to nil.³⁵ In *Aala*, Gaudron and Gummow JJ identified that the ‘the relevant “rule” of natural justice is that requiring procedural fairness,’³⁶ but shortly after stated that ‘that the practical content of the obligation, and thus the issue of breach, may turn upon the circumstances of the particular case.’³⁷ Despite these issues of identification, in *Annetts v McCann* the High Court thought it was:

‘settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intentment.’³⁸

In the second half of this essay, I will go on to consider how such necessary intentment may be shown.

STATUTORY CONSTRUCTION AND THEORY

The long-held legal fiction of statutory construction is that courts aim to find the meaning of a statute according to the intention of Parliament, manifested by the words of the statute.³⁹ In this section, I will use three perspectives to demonstrate that this is not the case in construing statutes that purport to exclude natural justice. First, the principle of legality places effective manner and form requirements on the Parliament in order that

³³ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

³⁴ See *Annetts v McCann* (1990) 170 CLR 596; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

³⁵ *Kioa v West* (1985) 159 CLR 550 (Brennan J).

³⁶ *Aala* (2001) 204 CLR 82, 91 [15].

³⁷ *Ibid*, 91-92 [17].

³⁸ (1990) 170 CLR 596, 598 (Mason CJ, Dean and McHugh JJ).

³⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1, 168-9 (Gummow J); *Saeed* (2010) 241 CLR 252, 264 [31].

certain meanings be adopted,⁴⁰ and otherwise imputes contrary intentions. This is backed by the second perspective, Dworkin's model of the 'best' available meaning of the statute. Third, I will employ elements of Gadamer's hermeneutics in *Truth and Method*, investigating the role of preunderstandings and the fusion of horizons. I will give a brief explanation of these frameworks as I introduce each to the discussion.

I will be analysing the judgment of Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*⁴¹ as exemplary of the interplay of these frameworks. *Miah* concerned an application for judicial review of a decision not to grant a protection visa to the applicant, a citizen of Bangladesh who claimed he was being persecuted by Muslim fundamentalists on the basis of his political opinions. The delegate of the Minister rejected the application on the basis of events that had taken place between the application for a protection visa and the decision being made which were not called to the notice of the applicant. The High Court considered whether Subdivision AB of the *Migration Act 1958*, headed 'Code of procedure for dealing fairly, efficiently and quickly with visa applications' excluded common law rules of natural justice. The Minister contended that this exclusion was achieved by Subdiv AB providing a complete code for procedural fairness in cases covered by it. That argument was rejected by the Court, which found that a breach of the rules of natural justice had occurred and issued writs of prohibition, certiorari and mandamus.

A The Principle of Legality

The principle of legality was famously stated by the joint judgment in *Coco v The Queen*:

'The courts should not impute to the legislature an intention to interfere with fundamental rights. *Such an intention must be clearly manifested by unmistakable and unambiguous language.* General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.'⁴²

'Imputing an intention' is not to be taken literally; it merely adopts the canonical language of statutory interpretation to justify the conclusion that

⁴⁰ The Hon Chief Justice Robert French, "The Courts and the Parliament", Queensland Supreme Court Seminar (4 August 2012), 15.

⁴¹ (2001) 206 CLR 57.

⁴² *Coco v The Queen* (1994) 179 CLR 427, 437 (emphasis added).

something other than the plain meaning of the statute applies.⁴³ As I will go on to show, rejecting one interpretation and favouring a more restrictive one according to the principle of legality is consistent with both theoretical frameworks I have identified. To take a hermeneutical approach, judges preunderstand statutes not to interfere with common law rights, and will refuse to adopt such a construction unless it is irresistibly clear. To take Dworkin's approach, the court's adoption of the best construction avoids, so far as it is possible, a meaning which would affect common law rights. Whether it is the result of the principle of legality itself or either of these decision-making frameworks, judges are predisposed to maintain the common law, and with it, natural justice.

Kirby J in *Miah* came to the conclusion that the code did not oust the common law rules of natural justice:

'because the obligation to conform to the rules of natural justice is so deeply entrenched in the assumptions upon which our law is based, it can normally be treated as implicit in legislation enacted by the Parliament. *It would require much clearer words than exist in Subdiv AB to convince me that the provisions of the Code exhaust the applicable rules of natural justice, although not mentioned and however important such requirements might be in the particular case.*'⁴⁴

Kirby J referred to the gravity of the decision weighing against a construction that excluded natural justice, as it was 'so obviously important to the making of a correct decision on such a potentially serious matter.'⁴⁵ He also linked his decision to the *Constitution*:

'The fact that relief may be granted by this Court, pursuant to s 75(v) of the Constitution, suggests that *truly fundamental obligations of natural justice, otherwise imposed on the decision-maker by law, are not excluded by provisions such as are contained in the Code.*'⁴⁶

This appears to conflict with what I have said about s 75(v) protecting jurisdiction and not grounds for review.⁴⁷ However, French CJ (writing extrajudicially) has identified that elements of the common law have constitutional import, and that 'the principle of legality can...be regarded as "constitutional" in character even if the rights and freedoms which it

⁴³ See French CJ, above note 42, 10.

⁴⁴ *Miah* (2001) 206 CLR 57, 113 [181] (footnotes omitted) (emphasis added).

⁴⁵ *Ibid*, 115 [187].

⁴⁶ *Ibid*, 113 [181] (Emphasis added).

⁴⁷ See *Aala* (2001) 204 CLR 82 (Hayne J).

protects are not.⁴⁸ To paraphrase French CJ, the rules of natural justice are not constitutionally enshrined, but the presumption that the rules of natural justice apply is, as a breach of those rules is grounds for jurisdictional error. This presumption is seen in Kirby J's judgment:

'I would not read s 69(2) as having the effect of protecting the Minister from the consequences of non-compliance with a *legal requirement arising outside the Code*.'⁴⁹

The fact that Kirby J identifies natural justice as arising outside the statute indicates another layer of complexity to natural justice as a form of jurisdictional error. Although the terms of the statute and the nature of the power which it confers will determine the content of natural justice as it applies in the particular case, the rules are to be found in the common law, and are protected by common law assumptions such as the principle of legality. This is not to say that these grounds of review, or the principle of legality which protects them, are inconsistent with statutes. As French CJ stated:

'The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms.'⁵⁰

B Dworkin and the Best Construction

Dworkin developed a model of statutory construction in his book *Law's Empire* which does not rely on the intentions of Parliament (referred to as 'speaker's meaning') and seeks to provide 'a better interpretation of actual judicial practice.'⁵¹ His model is that decision-maker will interpret the words of the statute so as to give them their 'best' meaning, making decisions that are the 'best' they can be.⁵² Dworkin explains that this does not mean a judge seeks 'the best substantive result, but to find the best justification he can of a past legislative event. He tries to show a piece of social history...in the best light overall.'⁵³ In a later piece, Dworkin explains

⁴⁸ French, above note 42, 14.

⁴⁹ *Miah* (2001) 206 CLR 57, 121 [207] (emphasis added).

⁵⁰ French, above note 42, 16.

⁵¹ Ronald Dworkin, *Law's Empire* (Belknap Press, 1986), 316.

⁵² *Ibid* 313.

⁵³ *Ibid* 338.

this as 'making it the best from the point of view of law's integrity.'⁵⁴ Kirby J's judgement in *Miah* begins with the comment that the provisions under consideration 'do not reveal public administration or legal practice in Australia at their best,'⁵⁵ lending itself to consideration on Dworkin's model.

Dworkin's framework sits well with the principle of legality, as both provide frameworks to interpret statutes coherently with common law presumptions such as that against the exclusion of natural justice, and although both recognise the role of the judge in interpretation, both recognise that the judge does not seek a meaning which is contrary to the statute. Similarly, Kirby J noted in *Miah* that

'the fundamental duty of a court is to express a rule that is harmonious, and not inconsistent, with the enacted provisions. Decisions upon such matters must be made by reference to the language of the legislation, its history, the apparent purposes of any amendments and the conclusion reached concerning the exclusivity of the statutory remedies which the Parliament has provided.'⁵⁶

The enacted provision and its legislative context, then, provide a scope in which a decision is to be made, and the judge selects a meaning from within that scope which best preserves the law's integrity. Dworkin states that the judge would fail the interpretive task 'if his interpretation showed the state saying one thing while doing another.'⁵⁷ The judge's respect for the statute must be such that 'he will not think that he makes a statute the best it can be *merely by projecting his own convictions onto it*.'⁵⁸ However, like French CJ, Dworkin shows that the principle of legality is not inconsistent with the primacy of the statute. Rather, judges employ the principle of legality to ensure law's integrity. As Kirby J stated, this principle is 'deeply entrenched in the assumptions upon which our law is based.'⁵⁹ According to Dworkin, rules such as these are useful in that they provide a framework independent of legislative intent to guide statutory interpretation, which allows legislators to predict how their statutes will be interpreted.⁶⁰

⁵⁴ Ronald Dworkin, "Law, Philosophy and Interpretation", 80 *Archiv. fur Rechts- und Sozialphilosophie*, 1994, 463, 474.

⁵⁵ *Miah* (2001) 206 CLR 57, 103 [155].

⁵⁶ *Miah* (2001) 206 CLR 57, 111 [178] (footnotes omitted).

⁵⁷ Dworkin, above note 53, 343.

⁵⁸ *Ibid* 342.

⁵⁹ *Miah* 113 [181].

⁶⁰ Dworkin, above note 53, 324.

C Gadamer's Hermeneutics: Preunderstandings and the Fusion of Horizons

In *Truth and Method*, Gadamer described structural and normative notions of hermeneutics. One of the structural lessons from Gadamer is that we cannot (and in the normative mode, should not) seek to understand something simply as the author intended. Rather, interpretation takes place within a given situation, which gives the interpreter certain prejudices. I will refer to these prejudices as 'preunderstandings'. The goal of the interpreter is not to ignore his/her preunderstandings, as this is impossible: it is only through recognising our preunderstandings that we are able to engage in understanding.⁶¹ Similarly, the text that is being interpreted has been produced in a particular context,⁶² and is affected by this context and the preunderstandings of the author. In light of these two sets of preunderstandings, the aim of the interpreter – in our case, the judge – is to achieve a 'fusion of horizons', which Gadamer describes as 'the mediation between history and the present in the act of understanding itself.'⁶³ It is in this fusion that understanding is achieved in context.

Kirby J sets out some of the context of judicial decision-making in *Miah*:

'The common law may not be inconsistent with the Constitution. Nor may it be inconsistent with applicable statute law. In either case, judge-made law gives way to the superior authority of constitutional and legislative provisions.'⁶⁴

The question that Kirby J was approaching, then, is not simply 'what does the statute mean?' Rather, he asks, 'What does the statute mean in light of the Constitution, and where applicable, the common law?' So much might seem obvious, however it becomes relevant in application, which is central to both natural justice⁶⁵ and hermeneutical enquiry.⁶⁶

⁶¹ Arthur Glass, "A Hermeneutical Standpoint" in Jeffrey Goldsworthy and Tom Campbell (eds) *Legal Interpretation in Democratic States* (Ashgate, 2002), 134.

⁶² Hans-Georg Gadamer, *Truth and Method* (Bloomsbury, first published 1975, 2013 ed) 339.

⁶³ *Ibid*, xxix.

⁶⁴ *Miah* (2001) 206 CLR 57, 109 [172] (footnotes omitted).

⁶⁵ See *Miah* per Gleeson CJ and Hayne J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 14; Matthew Groves, "The Insecurity of Fairness in Security Cases" (2013) 24 *Public Law Review* 151, 151-152.

It is in application that we see the importance of jurisdictional error and natural justice. According to Kirby J, it is obvious that:

‘the Parliament did not purport to exclude the constitutional jurisdiction of this Court to consider complaints about departures by officers of the Commonwealth from the requirements imposed on them by law, including (if applicable) the legal requirement to accord natural justice to persons affected by their decisions.’⁶⁷

Kirby J cites s 75(v) as his authority for this statement (although it relies implicitly on *Plaintiff S157*). On a plain reading of the statute – even on a plain reading of s 75(v) – it is not so ‘obvious’ that Parliament had or did not have the stated intention; this becomes clear only through the court’s application of the provision in the context of jurisprudence on s 75(v).⁶⁸ In applying the text of the statute to legal decision-making, the context of the decision and preunderstandings of the judge point to common law meaning in the statute, found in Kirby J’s application of the principle of legality. Further, Kirby J’s finding that s 69(2) of the *Migration Act 2958* did not exclude ‘a legal requirement arising outside the Code’ demonstrates the *preunderstanding that natural justice applies*, and that this preunderstanding *precedes consideration of whether it has been excluded* by the words of the statute.

Accepting the role of Kirby J’s preunderstandings in *Miah* only paints half of the hermeneutical picture. The role of the judge is not simply to interpret the law in the context in which s/he finds it, but to reach a ‘correct’ decision through the fusion of horizons.⁶⁹ As Gadamer states, ‘someone who is seeking to understand the correct meaning of a law must first know the original one’,⁷⁰ considering the historicity of the original meaning, but this is done to ensure the best interpretation in the present context.

D Conclusions on Interpretation

⁶⁶ Gadamer, above note 64, 335.

⁶⁷ *Miah* (2001) 206 CLR 57, 109 [173].

⁶⁸ For an a further example of the importance of application in determining the meaning of the statute, see *Saeed* (2010) 241 CLR 252, 268 [44], where the majority (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) discuss the difference of the application of s 57(2) of the *Migration Act 1958* in relation to onshore and offshore visa applicants.

⁶⁹ Gadamer, above note 64, xxix.

⁷⁰ *Ibid*, 335.

Kirby J's judgment in *Miah*, and the outcome of the case overall, fit well in their common law context. The Court in *Miah* applied *Annetts v McCann*, in which it was held that the rules of natural justice were not to be excluded by providing a statutory equivalent. Further, the principle of legality was recently applied in *Saeed*⁷¹ to again find that natural justice had not been excluded by statute. In that case, the High Court held that the legislature, being aware of the common law, would intend that it apply unless the legislature clearly provides otherwise. Aronson and Groves⁷² argue this creates uncertainty, as parliaments can never be sure what the requirements of natural justice are and whether they have been excluded. However, Dworkin suggests that rules such as the principle of legality create certainty by giving a framework to statutory interpretation independent of the legislators' intent. Further, Gadamer teaches us that the legal interpretation is affected by the context of the courts, which as Kirby J states includes the framework of the statute, common law and the Constitution. French CJ takes this a step further, arguing that elements of the common law – including the principle of legality – are constitutional in character. On any of these three frameworks, we can see that if a construction that does not exclude natural justice is available, it will be preferred over a construction which does exclude those rights.

An issue remains regarding Gadamer's normative approach to understanding. I have discussed above that understanding is based on the fusion of horizons. However, applying one's preunderstandings to a text in the context in which interpretation takes place is not the end of understanding; it is only the beginning of it. The normative element of hermeneutics involves not only recognising how interpretation takes place and recognising the role of the self, but also efforts to avoid error that are otherwise found by wrongly applying preunderstandings to the text.⁷³ The interpreter must reflect on her/his preunderstandings in order to understand 'the truth that becomes visible to me only through the Thou, and only by letting myself be told something by it.'⁷⁴ The courts cannot, inflexibly apply rules such as the principle of legality without seeking to understand the legislative context of the provision. Here we find value in Aronson and Groves' statement that application of the principle of legality has created uncertainty. Cases such as *Annetts v McCann*, *Miah* and *Saeed* have consistently found that, although it is legally possible to exclude

⁷¹ *Saeed* (2010) 241 CLR 252.

⁷² Aronson and Groves, above note 14, 455.

⁷³ Gadamer, above note 64, xxx.

⁷⁴ *Ibid*, 335.

natural justice by statute, it was not achieved. The Court in *Li* added to that confusion by finding that natural justice was excluded from the decision of whether a visa should be granted, but that the failure to grant an adjournment was so far in breach of principles of procedural fairness to be unreasonable in the *Wednesbury* sense. Whereas on Dworkin's reading, courts have followed the best interpretation available by finding that natural justice was not excluded, Aronson and Groves' argument highlights that it is not clear what legislative formula will succeed in excluding natural justice:

'Saeed left the theoretical possibility of legislative exclusion intact but did so using language which suggests that exclusion is very difficult in practice. Only time will tell if the requisite level of irresistible clearness is actually possible within the complex of migration legislation. Saeed also confirmed another longstanding obstacle to the legislative exclusion of natural justice, namely that the implication process is one of construction which proceeds "upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of the power" to which natural justice applied.⁷⁵ The problem with that assumption is that parliaments can never be entirely sure what fairness will be held to require until the courts have pronounced upon the issue.'⁷⁶

In the context of this struggle for meaning between the Parliament and the courts, we should also note that, hermeneutically, neither can have exhaustive control of legislative meaning. Aronson and Grove's argument should not be seen as a criticism of the courts playing a role in finding legislative meaning, but that the way that they have gone about it has created confusion. French CJ also notes a reservation to the principle of legality, citing Meagher's criticism that it is often applied but 'lacks extended judicial exegesis.'⁷⁷ Both criticisms point to the application of structural aspects of Gadamer's theory – that legal interpretation is guided by common law preunderstandings – without the normative aspects, which would require critical reflection on judicial preunderstandings and a willingness to adapt them to the legislature. Without critical reflection through application, common law principles such as legality – especially when given constitutional status – are merely reifying, giving the common

⁷⁵ Citation in original: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258-259 per French CJ, Gummow, Hayne, Crennan and Keifel JJ.

⁷⁶ Aronson and Groves, above note 14, 455.

⁷⁷ French, above note 42, 16.

law operation that is incommensurate with the words of the statute and intention of Parliament.

A further criticism would be that imputing intentions to Parliament without critical reflection has led the courts to hypocrisy. On one hand, courts have applied the principle of legality to find against the exclusion of common law rules of natural justice, in other words using the common law to avoid strict enforcement of other available meanings. On the other hand, where statutory procedural fairness provisions have applied, courts have required strict adherence to them.⁷⁸ In *SZEEU*, Weinberg J was critical of Parliament for having set excessively prescriptive rules 'instead of allowing for such matters to be dealt with in accordance with the well-developed principles of the common law.'⁷⁹ These well-developed principles, however, have contributed to Parliament's need to be so specific to achieve its intended purpose.

CONCLUSION

Following *Plaintiff S157*, s 75(v) has been credited with protecting the jurisdiction of the courts in cases involving jurisdictional error. Whether a decision involves a jurisdictional error, however, is to be determined with reference to the ambit of the power and limitations placed on it. Actions in excess of such power, or in contravention of a limitation, are infected with jurisdictional error, and will lead to discretionary issue of writs.⁸⁰ I have argued that the terms of the statutes conferring power, and not s 75(v) of the Constitution, provide the basis of judicial review. Section 75(v) preserves the original jurisdiction of the High Court in such matters, but does not affect the content of judicial review grounds for which the prescribed remedies may be issued. These grounds are to be determined with reference to the statute. If an act is authorised by a valid statute, then administrative law offers no remedy against it.⁸¹

⁷⁸ See for example *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 (24 February 2006).

⁷⁹ *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 (24 February 2006) at [174] of the judgment of Weinberg J.

⁸⁰ *Aala* (2001) 204 CLR 82.

⁸¹ *Annetts v McCann* (1990) 170 CLR 596, 604-5.

I have divided jurisdictional error into two concepts to demonstrate that some grounds, breach of which will lead to acts that are ultra vires on their face, cannot be excluded by statute, but others can. To exclude grounds in the first category – i.e. to confer a power and purport to authorise decisions made in excess of that power – would fall foul of the *Hickman* principle, such that the purported act cannot be rendered valid by a provision that is inconsistent with that granting the power. The other grounds form limitations on some powers, but can be omitted or excluded in others. Natural justice is such a ground.

Accepting the primacy of the statute the Parliament's ability to exclude grounds such as natural justice, our next locus for inquiry is statutory construction. It is in construction that we see that the exclusion of natural justice is possible, but improbable. The common law nature of natural justice presents obstacles that are not found in omitting grounds of judicial review that arise from the statute itself, namely mandatory relevant and irrelevant considerations. Those grounds may simply be omitted from the statute. On the other hand, the principle of legality preserves natural justice unless it is unmistakably clear that it is excluded. This is supported by Dworkin's model of making the law the best it can be, and a structural application of Gadamer's hermeneutics, based on the preunderstandings of the courts.

Two lessons can be learnt from understanding the principle of legality as the an element of the courts' preunderstandings in statutory interpretation. First is a lesson for the courts, which should engage in the normative aspects of Gadamer's hermeneutics, not simply applying their preunderstandings in statutory construction but reflecting on them and seeking to better approach the correct meaning of statutes. The nature of the common law and constitutional importance given to the principle of legality have instead created a reifying jurisprudence, perverting the hermeneutical goal of understanding. The courts should not simply assume, on the authority of prior decisions, that the Parliament does not intend to exclude common law rights such as natural justice; they should question whether this is in fact the most correct decision based on a genuine fusion of horizons.

Second is a lesson for the Parliament. If we assume, as was done in *Saeed*, that the Parliament is aware of the common law and intends that it is to be applied unless excluded by the most unmistakable language, then the Parliament should use such language to effectively exclude natural justice. In the words of Lord Hoffman, 'Parliament must squarely confront what it

is doing and accept the political cost.’⁸² Doing so would not be alien to the federal legislature, which has excluded natural justice in the most express terms in provisions such as the *Migration Act 1958* ss 501(5) and 501A(4). Stating, as those subsections do, that ‘natural justice does not apply’ to relevant decisions, permits no construction other than the exclusion of natural justice. On the present jurisprudence, that result cannot be achieved by implication or ambiguous language. Although the relevant level of clarity is difficult to determine,⁸³ where the language of a statute directly addresses the exclusion of natural justice it cannot be avoided. The primacy of the statute requires that such clear words be given their ordinary meaning, whether through the principle of legality, the best decision to preserve law’s integrity or the correct decision reached through a fusion of horizons. Although it is legally possible to exclude natural justice from constituting jurisdictional error, without such precise words it is improbable that it can be achieved.

⁸² *R v Secretary for Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

⁸³ Aronson and Groves, above note 14, 455.