

# THE 2017 HARRY WHITMORE LECTURE

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## SEPARATION OF POWERS – DIALOGUE AND DEFERENCE

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It is a privilege and a particular pleasure for me to deliver this lecture in honour of the late Harry Whitmore. I first met Harry when I applied for a position at the new law school at the University of New South Wales. Harry was the dean responsible for creating from the fledgling institution established by Hal Wootten a full scale and dynamic Australian law school. While it is true that Harry employed me, he also made some very sound decisions, including employing a young Mark Aronson with whom he collaborated in establishing a truly Australian academic tradition of public law.

I must also say a word about my topic for tonight. It was entirely of my choosing and it seemed like a good idea at the time. I can now see that it may appear misleading. The term “dialogue” in relation to the legislature and the judiciary has overtones of the declaration that a statutory provision cannot be interpreted consistently with human rights provided for in the Victorian Charter and addressed in *Momcilovic v The Queen*.<sup>1</sup> I do not propose to address that issue. What I had in mind was closer to Sir Gerard Brennan’s “symbiotic relationship”<sup>2</sup> in which the institutional interaction occurs. Legislation is not enacted in a legal vacuum; sometimes legislation has no purpose other than to override the judgment of a court, as happened to two of our judgments last week. My real focus will be to explore whether there is a role for a doctrine of deference in dealing with legislation and administrative decision-making.

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\* Judge of Appeal, NSW Court of Appeal. I am grateful to Rosalind Acland for assistance in preparing this paper.

<sup>1</sup> (2011) 245 CLR 1; [2011] HCA 34.

<sup>2</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141; [1994] HCA 46 applying the phrase to the Constitution and the common law; see also Gleeson CJ in *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29 at [31] describing the relationship between statute and the common law.

## Courts and the legislature

There are occasions when quite unprepossessing cases gain fame (or notoriety) out of all proportion to their circumstances. One such was *Zheng v Cai*.<sup>3</sup> The appellant had been injured in a motor vehicle accident. A church for which she did volunteer work made payments to her after her injury, to help her through difficult times and to allow her to carry on her voluntary work more effectively. The question was whether the payments went in diminution of the damages awarded against the other driver. The answer to that question depended on the intention of the donor. Sometimes such intentions are to be derived from a legislative regime, such as the *Social Security Act 1947* (Cth). The comparison had nothing to do with the outcome of the case, except by an analogy which was rejected. However, the joint reasons of the Court did compare the ascription of an “intention” to a legislative provision, on the one hand, and to a donor making a private benefaction, on the other. The Court proceeded, unremarkably, to note that the attribution of an intention to a legislature was “something of a fiction”<sup>4</sup> and that one should not regard legislators as having a collective mental state. However, the Court went further, in a passage which has frequently been cited as reflecting two important principles of public law in Australia:

“Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>5</sup> the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.”

Justice Gageler, who was not a party to that judgment, writing extra-judicially, has since described that passage as involving “carefully crafted references” which are “open-textured.”<sup>6</sup> He has also noted that those references “raise questions which demand further principled inquiry.”

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<sup>3</sup> (2009) 239 CLR 446; [2009] HCA 52.

<sup>4</sup> *Zheng* at [28], quoting *Mills v Meeking* (1990) 169 CLR 214 at 234 (Dawson J); [1990] HCA 6, and *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 339-340 (McHugh J); [1991] HCA 28.

<sup>5</sup> (2002) 123 FCR 298 at 410-412 (French J).

<sup>6</sup> S Gageler, “Legislative Intention” (2015) 41 Monash U L Rev 1 at 9.

The statement from *Zheng* has two elements of some importance. First, it highlights the significance of the doctrine of separation of powers as it applies to the legislature and the judiciary. Secondly, it identifies the function of statutory interpretation as an important, if not critical, point of reference in determining where that boundary lies. The Hon Robert French, in concluding remarks in a paper published in the *Australian Law Journal*, identified the point in the following terms:<sup>7</sup>

“This article has focused upon that function of the courts, the interpretation of statutes, which lies at or close to the boundary between the legislative function of the Parliament and the lawmaking function of the courts. There are fundamental differences between the two functions. Parliament makes its laws to give effect to public policies which are thought to be beneficial. The formulation of such policies and the laws designed to give effect to them involve political decisions and consideration of a spectrum of interests that may be advanced or disadvantaged by the law. These are things beyond the constitutional competence of the courts. The courts, on the other hand, deal with interpretation in so far as it is necessary to do so to decide disputes. The courts do not choose the disputes which come before them. Nor can courts, particularly final appellate courts, avoid the reality that their interpretation of statutes may have wider consequences, perhaps adverse to public policy, which the statutes were intended to advance.”

The author had something further to say about the nature of the judicial function:<sup>8</sup>

“When contested interpretations of law are advanced in litigation and close scrutiny of the law is required to resolve the contest, a degree of indeterminacy is often apparent. It is in the nature of language that words have nuances and shades of meaning. ... It is not at all unusual therefore that, in a contest about the meaning of a statute, more than one reasonable outcome is exposed. Courts are frequently faced with constructional choices. Where the choice is identified and made according to rules which reflect the constitutional function of the court interpreting the statute, the choice can be regarded as legitimate even though reasonable minds might differ as to the outcome.”

He concluded his paper with the following observation:<sup>9</sup>

“The relationship between the courts and the Parliament is defined by Commonwealth and State Constitution[s] and the common law. To work that relationship also requires the respect of each for the limits of its own function and the proper functions of the other. It requires courtesy and civil discourse between the institutions. These are necessary aspects of any working relationship however tightly defined by law.”

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<sup>7</sup> R French, “The courts and the Parliament” (2013) 87 ALJ 820 at 829.

<sup>8</sup> *Ibid* at 824.

<sup>9</sup> *Ibid* at 830.

The comments in *Zheng* were an affirmation of the need to see statutory interpretation in a constitutional context which, in a matter arising under State law, may not depend on a strict separation of powers doctrine.

As Justice Gageler has pointed out, again writing extra-judicially, this is properly described as a relationship based on deference. Not deference in the sense of servile self-subjugation, or even gracious concession, but in the sense of a respectful acknowledgment by one party to a relationship of the authority of another or, where authority rests with the speaker, the acknowledgment that respectful regard should be had to the opinion of the other.<sup>10</sup> In a governmental structure which has no bright-line boundaries delineating separate functions, such an approach might well be seen as desirable, if not mandatory.

Nevertheless, many judges have been squeamish about the language of “deference” and even such concepts as “margin of appreciation” and “relative institutional competence”.<sup>11</sup> The *cri de coeur*, or perhaps the rationale, which is widely accepted in this country is Lord Hoffmann’s statement in 2003 in *ProLife Alliance*:<sup>12</sup>

“In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law.”

This language echoes the language of Marshall CJ in *Marbury v Madison*, now treated as axiomatic,<sup>13</sup> that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>14</sup> In *City of Enfield*, Gaudron J said that for a court to decline

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<sup>10</sup> S Gageler, “Deference” (2015) 22 AJ Admin L 151 at 152.

<sup>11</sup> K M Hayne, “Deference: an Australian perspective” (2011) PL 75.

<sup>12</sup> *R (on the application of ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 AC 185 at [75]-[76].

<sup>13</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263 (Fullagar J); [1951] HCA 5; but see also J T Gleeson and R A Yezerski, “The Separation of Powers and the Unity of the Common Law” in J T Gleeson, J A Watson and R C A Higgins (eds) *Historical Foundations of Australian Law, Vol 1 Institutions, Concepts and Personalities* (The Federation Press, 2013) 297 at 323-327.

<sup>14</sup> *William Marbury v James Madison, Secretary of State of the United States* 5 US 137 at 177 (1834).

to determine a jurisdictional fact for itself was “to abdicate judicial responsibility.”<sup>15</sup> Writing extra-judicially in 2011, the Hon Kenneth Hayne referred to deference as “duty absconded.”<sup>16</sup>

It is common legal parlance now to describe problems of statutory interpretation as involving “constructional choices”. What I think those who would doubt that “deference” is a useful concept miss is the legitimate interest in exploring the process by which those choices are made. It may be true, as Hayne remarked, that to say, in dealing with the validity of an Act or action, that the court has deferred, or should have deferred, to the legislature or executive, expresses a conclusion that the speaker approves or advocates the result, but it does not necessarily tell us anything more.<sup>17</sup> Yet the last proposition ignores a legitimate inquiry into the judicial process.

A fair picture of the judicial function is far more complex and involves a number of elements. As Professor William Gummow explained, extrajudicially, in 2005, the common law and the Constitution are inextricably linked. What, he asked, does it mean to speak of the common law as “an ultimate constitutional foundation?”<sup>18</sup> Clearly, the common law provides a conceptual base from which we, as lawyers, form our understanding of the framework and concepts of the Constitution and therefore our interpretation of its language. Further, as Lisa Burton Crawford has recently explained, there are concepts to which the Constitution gives effect, and concepts which the drafters simply assumed.<sup>19</sup> One may say the same of statutes. Further, a particular reading of a statute by a court gains precedential status under common law doctrine, so that the statutory language is not revisited afresh each time a similar case arises. These considerations demand a somewhat nuanced approach to understanding the judicial function.

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<sup>15</sup> *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [60].

<sup>16</sup> Hayne, fn 10 above, at 83.

<sup>17</sup> *Ibid* at 84.

<sup>18</sup> W M C Gummow, “The Constitution: Ultimate foundation of Australian law?” (2005) 79 ALJ 167.

<sup>19</sup> Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (The Federation Press, 2017) at 73.

## **Boundaries of executive power**

In one aspect of great importance in public law, statutory interpretation is not just a reflection of the relationship between the legislature and courts, but controls the boundaries of most executive power. The relationship between the courts and the executive thus turns upon questions of statutory interpretation, but the context gives the exercise a different flavour.

Here concepts of fairness, logicity, rationality and reasonableness are deployed, often as constraints on powers conferred by statute, but without any specific anchor in the statutory language. Their content is often treated as largely self-evident, but that view is not entirely plausible; the proper limits of judicial review are frequently (and properly) contested on issues of principle. Thus, while it is statute that defines the boundaries of most exercises of executive power, and it is courts that police those boundaries, the courts draw on non-legislated sources, albeit sources which can be varied by legislation, within constitutional limits.

There seems little doubt that over recent decades the courts have adopted, and then abandoned, a series of principles designed to identify when boundaries have been breached. Each of those principles worked as a constraint upon the role of the courts in conducting judicial review. Accordingly, as such principles are abandoned, there is scope for judicial review to expand.

If that sounds a rather bleak and unprincipled view of the world, I will try to explain what I have in mind. I will also suggest how (rather than why) we are undergoing this process. Finally, I will suggest where we may arrive in due course, a place which may indeed be some improvement on the principles of judicial review articulated in the mid-1970s, especially as set out in the list of grounds in s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), resulting from the reports in the formulation of which Harry Whitmore played an instrumental role.

## **The dissolution of fixed standards**

Central to the exercise of identifying a set of grounds of judicial review was the merits/law dichotomy. The grounds are expressed in various ways, but all (even

*Wednesbury* unreasonableness) depended ultimately on exceeding legal boundaries or, in terms favoured by some British jurisprudence, “ultra vires”.

Thirty years ago we understood that the availability of judicial review turned upon a distinction between the merits of a decision and the law applied. As Brennan J stated in *Attorney General (NSW) v Quin*,<sup>20</sup> perhaps a little guardedly, “[t]he 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.” That proposition found its source in the fact that where a statute conferred a specific function on a government agent, with no appeal or review on the merits, it did not invest any equivalent power in a court.

The distinction is similar to that drawn between fact-finding and law, where “merits” encompass not only findings of primary facts, but also inferences drawn from those facts and their characterisation in accordance with legal principle. In that paradigm, manifest unreasonableness is strictly confined as a ground of review because it contains the potential to open up the merits of the decision for judicial reconsideration. Similarly confined is the requirement that a tribunal give “proper, genuine and realistic consideration” to the case before it.<sup>21</sup> However, the use in the joint reasons in *Minister for Immigration and Citizenship v Li*<sup>22</sup> of “reasonableness”, rather than “manifest unreasonableness”, and the discounting of *Wednesbury* because of the patent circularity of its descriptive language, has tended to loosen the shackles of that restraint.<sup>23</sup>

There was, of course, a second mechanism by which fact-finding might be reviewed. That too depended upon an exercise in statutory construction whereby legislation was understood to identify a particular fact as a precondition to the engagement of an administrative power. Whilst the administrator would obviously determine for himself or herself whether the fact existed, that decision was reviewable by the court not simply asking if it were a finding open to the officer or tribunal, but by asking whether the

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<sup>20</sup> (1990) 170 CLR 1 at 36.

<sup>21</sup> *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164; [2010] HCA 48 at [30].

<sup>22</sup> (2013) 249 CLR 332; [2013] HCA 18 at [66] and [68] (Hayne, Kiefel and Bell JJ).

<sup>23</sup> Cf Gageler J in *Li* at [98].

finding was correct. It was the opinion of the court as to the existence of the fact which determined the availability of the statutory power.

It appears to have been in the area of planning and environmental controls that the courts have been most willing to identify particular criteria as “jurisdictional”. Examples of this approach are *City of Enfield* (to which I will return), *Australian Heritage Commission v Mount Isa Mines Ltd*<sup>24</sup>, *Timbarra Protection Coalition Inc v Ross Mining NL*<sup>25</sup> and *Woolworths Ltd v Pallas Newco Pty Ltd*.<sup>26</sup> The limited operation of this concept was significantly expanded by the treatment of decisions based on the “satisfaction” of the decision-maker as involving a kind of jurisdictional fact which could be reviewed on grounds including unreasonableness, arbitrariness and absence of probative evidence.<sup>27</sup>

An interesting example of the potential awkwardness of identifying a factual judgment as a condition precedent to the engagement of a power is to be found in the facts of *Hickman*.<sup>28</sup> The case concerned an industrial award made under national security regulations concerning contractors carting coal from a colliery to a bulk depot. The question was whether the contractors and their employees were engaged in the coal mining industry. Dixon J noted:<sup>29</sup>

“The question raised is one which, it might be thought, would turn upon the common understanding, among people concerned with the coal industry and particularly with industrial matters, of the manner in which the words ‘coal mining industry’ are ordinarily applied. It may be that no such common understanding of the expression exists. If, however, the application of the words is established by usage, you would expect to find it evidenced by awards, determinations, reports and other papers dealing with the industrial side of coal mining. But we have not been referred to any such documents. On the contrary, we have been left to ascertain as best we may what is the denotation of the very indefinite expression ‘coal mining industry.’ It is, I think, unfortunate that it has become necessary to submit such a question to judicial decision. From a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not

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<sup>24</sup> (1997) 187 CLR 297; [1997] HCA 10.

<sup>25</sup> (1999) 46 NSWLR 55, [1999] NSWCA 8.

<sup>26</sup> (2004) 61 NSWLR 707; [2004] NSWCA 422.

<sup>27</sup> *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; [1999] HCA 21.

<sup>28</sup> *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598; [1945] HCA 53.

<sup>29</sup> *Hickman* at 613-614.



according to the legal rules of construction and the analytical reasoning upon which the decision of a court of law must rest.”<sup>30</sup>

In this area the separation of powers doctrine operates at one remove. That is illustrated by *Quin* (the challenge of a State magistrate who was not reappointed after Courts of Petty Sessions were reconstituted as the Local Court), a case arising under State law. The requirement that the courts not intervene in the merits of administrative decision-making turned on the statutory power of appointment conferred on the Governor (although the majority of the Court did not speak with one voice). Statutes conferring decision-making powers on officers and tribunals generally do not permit the exercise of those powers by supervising courts. The legal scope of a power is, in principle, separate from the exercise of the discretion it confers.

That does not necessarily mean that all questions of law are beyond the remit of the decision-maker. Thus, in Australia, where jurisdictional error is not equated with all errors of law, there is, in principle, room for the legislature to confer on administrative tribunals unreviewable powers to determine legal questions. In the United States that distinction is relied upon to allow bodies exercising broad administrative discretions to determine, within the limits of reasonableness, the scope of their discretionary powers. That is commonly called “*Chevron*-deference”, although the US courts have developed at least two distinct principles. In part it reflects the fact that there is a fine line between a licensing authority which says, “We have no power to license a body which has a history of tax fraud”, and an authority which says, “As a discretionary matter we will not issue a licence to such a body.” It is legitimate to ask: When can it be necessary or appropriate to draw such a distinction? Why draw a bright-line distinction between a question of law and a question of fact?

The separation of powers doctrine, Janus-like, looks in two directions. Those who wish to emphasise the irreducible function of the courts as deciding what the law is rely on *Marbury v Madison*; Brennan J in *Quin* cited the same passage to emphasise the limits of the judicial function.<sup>31</sup> What those approaches have in common is an assumption that there is a reasonably clear dividing line. It is that assumption which has been qualified, though perhaps not fully rejected, in more recent years.

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<sup>30</sup> Nevertheless, he later held that the question was one of law: *Hickman* at 617-618.

<sup>31</sup> See also *City of Enfield* at [44].

These days a finding of fact, even to the effect that a witness is implausible and his or her evidence is not to be accepted, may be reviewable on a range of bases, at least according to the Full Court of the Federal Court in cases such as *CQG15 v Minister for Immigration and Border Protection*<sup>32</sup> and *Haritos v Commissioner of Taxation*.<sup>33</sup> Thus the statement by McHugh J in *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*,<sup>34</sup> that a finding on credibility is “the function of the primary decision maker *par excellence*”, is no longer conventional thinking. However, one may note that in *Haritos* the Full Court drew a distinction between disbelief of a witness and assessing whether certain expert evidence was corroborative of unsupported assertions by officers of the tax-payer, the latter exercise being labelled as “to supervise the legality of the fact finding process of the Tribunal.”<sup>35</sup>

Conceptually unsatisfying as they were, the categorical grounds of judicial review provided stability and were reasonably accessible to busy lawyers and judges. They also provided a reasonably reliable structure within which officials and tribunals could work. The search for more coherence and more precise boundaries led to challenges, a process triggered by the Commonwealth’s attempt to pare back the grounds of review available in migration matters in the Federal Court.<sup>36</sup>

On one view, the challenge to the categorised grounds obtained a significant boost from the reasoning in *Kirk v Industrial Court of New South Wales*,<sup>37</sup> resisting any limitation on the jurisdiction of a State Supreme Court which would tend “to create islands of power immune from supervision and restraint.” Fact-finding could always have been described in such terms; was everything to be reviewable? *Kirk* did not suggest such a radical proposition, but the abandonment of the categories, which it did allow, to be replaced by a critical concept of “jurisdictional error”, appeared to involve a departure from the known taxonomy, without a stable alternative standard.

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<sup>32</sup> [2016] FCAFC 146 at [36]-[44] (McKerracher, Griffiths and Rangiah JJ).

<sup>33</sup> (2015) 233 FCR 315; [2015] FCAFC 92 at [216]-[219] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ)

<sup>34</sup> [2000] HCA 1; 74 ALJR 405 at [67].

<sup>35</sup> *Haritos* at [218].

<sup>36</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [76]-[84] (McHugh, Gummow and Hayne JJ); see also *Abebe v The Commonwealth* (1999) 197 CLR 510; [1999] HCA 14.

<sup>37</sup> (2010) 239 CLR 531; [2010] HCA 1 at [99].

That is not to suggest that concern with the old categorical approach is (or was in 2010) novel or misplaced. As Harry Whitmore noted in an article published in 1967, of a view expressed 40 years earlier:<sup>38</sup>

“The most well-known statement of the difficulty is that by Professor Dickinson to the effect that ‘Matters of law grow downward into roots of fact and matters of fact reach upward without a break, into matters of law. The knife of policy alone effects an [artificial] cleavage where the court chooses to draw the line’.”

### **How has this been happening?**

I do not propose to speculate about social and economic factors as drivers of legal change, although I have no doubt that causal connections can be demonstrated and some such forces underlie the points of tension which arise on fault lines of developing legal principle. Rather, I want to focus on the points of tension, where courts appear to resist according an unqualified legislative function to the Parliament. There are three overlapping areas of tension which may be identified as (i) privative clauses, (ii) the principle of legality and (iii) deference. While my focus has been on the third, it is useful to look at all three in the order stated.

#### **(i) privative clauses**

The first and strongest point of tension may be seen in the courts’ resistance to statutory privative clauses which seek to protect administrative decision-making from judicial review. There is a general view that the High Court has satisfactorily resolved this point of tension, and by a conventional method. The method is enforcement of the constitutional limits on legislative power. In the Australian federation no Parliament has unlimited power; sovereignty is distributed and hence limited. A privative clause in a federal statute could never be valid if read literally, because it purports to limit that element of judicial power conferred by s 75(v) of the Constitution on the High Court. In *Kirk* a similar justification was found by treating the supervisory jurisdiction of State Supreme Courts as an essential characteristic, and thereby unable to be reduced by State legislation.

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<sup>38</sup> H Whitmore, “O! That Way Madness Lies: Judicial Review for Error of Law” (1967) 2 Fed L Rev 159 at 160.

Yet the result is not entirely satisfactory, for two reasons. First, it identifies as the criterion of the irreducible supervisory jurisdiction, “jurisdictional error”, a concept which, like *ultra vires*, suffers from deeply unclear parameters. Secondly, once the result is identified, courts will tend to ignore the conventional view of what a privative clause was seeking to achieve. That involved, as explained by Dixon J in *Hickman*,<sup>39</sup> the need to reconcile provisions of a statute which appeared to define the boundaries of the authority being conferred on a public officer or tribunal, with a provision excluding review of his or her decisions. The three basic criteria insisted on in *Hickman* were a compromise, allowing a privative clause to be constitutionally valid, while placing basic limitations on the power conferred. By replacing these criteria with the term “jurisdictional error”, the reconciliation of provisions conferring specific powers with a provision denying judicial review, and thus the usual mechanism for enforcing limits on powers, the exercise in statutory interpretation is side-stepped; but it is not helpfully replaced. Further, as Dixon J expressly recognised in *Hickman*, in a passage which we would see as a classic application of *Project Blue Sky* reasoning, the privative clause may yet deny invalidity:<sup>40</sup>

“It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution. ... It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition. But where the legislature confers authority subject to limitations, and at the same time enacts such a clause as is contained in reg 17, it becomes a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity. In my opinion, the application of these principles to the Regulations means that any decision given by a Local Reference Board which upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid.”

*Kirk* says a privative provision cannot deprive a State Supreme Court of its supervisory jurisdiction to set aside decisions made in excess, or want, of statutory authority; it

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<sup>39</sup> *Hickman* at 616.

<sup>40</sup> *Ibid.*

does not deprive such provisions of any effect at all. There is still an exercise in statutory interpretation in each case, of the kind envisaged by *Project Blue Sky*.

**(ii) the principle of legality**

My second point of tension is a principle of statutory interpretation, now known as the “principle of legality”. The label is misleading, to the extent it is not meaningless. One might think it refers to the need for all government action to be justified by a legal source of authority. It does not mean that at all. Rather it refers to a presumption that legislation will not impair or remove fundamental rights or freedoms or otherwise impinge on basic principles governing the administration of the law without a clear statement to that effect. The principle derives from a passage in a late 19<sup>th</sup> century text, *Maxwell on Statutes*, adopted by O’Connor J in 1908 in *Potter v Minahan*.<sup>41</sup>

The presumption was once taken to refer to common law rights generally, but at a time when legislative interference with the common law was relatively muted. The time has long since passed, if it ever existed, when individual rights and freedoms constituted a zone of freedom based on judge-made law into which legislation adapting and modifying such rights did not intrude; such intrusions are the daily fare of a modern legislature.

The Americans refer to the same idea as “the clear statement rule”, a much more apt expression, although it is a broad principle, not a narrower “rule”. The clear statement principle operates with different levels of strength in different circumstances. For example, recasting common law principles governing claims in tort for employment and motor vehicle accidents are readily accepted. The powers of compulsory interrogation of persons suspected of, or charged with, crimes are subject to more intense scrutiny because of their capacity to intrude on institutional protections accorded to criminal accused. However, sometimes the reluctance of courts to give effect to the apparent breadth of an intrusive power has led to the designation of a “super-strong clear statement rule”.<sup>42</sup> As explained by the Hon Robert French, picking up an idea once proposed by Prof Jeffrey Goldsworthy, this may be seen as a principle

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<sup>41</sup> (1908) 7 CLR 277 at 304; [1980] HCA 63.

<sup>42</sup> William Eskridge Jr & Philip Frickey, “Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking” 45 Vand L Rev 593 at 597, 611-612 (1992).

of statutory interpretation imposing a “manner and form” requirement on the legislature.<sup>43</sup> (Goldsworthy has since abandoned this idiom.) There is no doubt that the principle identifies a point of tension between the legislature and the courts.

One may readily accept every application of the principle in recent High Court judgments, but remain troubled as to its content and the standard sought to be applied. As Professor Gummow has noted, when considering the common law as a restraint on the constitutional powers of the Commonwealth, “it would be unwise to carry into constitutional discourse an undue romanticism about the common law; not all the rules of the common law as understood in 1900 would today be considered as particularly attractive or civilised”.<sup>44</sup> After referring to a number of authorities dealing with statutory interpretation, which would now be grouped within the principle of legality, he continued:<sup>45</sup>

“Nevertheless, there is missing here, as well as in the constitutional sphere just mentioned, the means of distinguishing between those ‘bad’ elements of the common law which may be a ‘mischief’ to be removed by legislation construed with that in mind, and a heightened scrutiny of legislation impinging on the ‘good’ elements. Why is a statute abrogating the common law rules respecting contribution between tortfeasors looked at through different spectacles to those worn when construing a law abrogating legal professional privilege?”

### (iii) deference

That brings me to my third point of tension; the question of deference. This idea clearly operates at a higher level of generality than my last two examples. Both the rewriting of privative clauses and the clear statement principle are areas where the courts view legislation with a degree of scepticism, approaching at times a rejection of the authority of the legislation to do what it apparently seeks to do. In short, the antithesis of deference. Let me explain a little further what deference may mean in this context.

It may seem strange to leave until so late in the piece a discussion of the joint judgment in *City of Enfield*. That, after all, is traditionally understood to be the strongest statement on the part of the High Court as to the irrelevance of any concept of deference in Australian law. In fact, the focus of the reasoning was primarily elsewhere

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<sup>43</sup> French, n 6 above, at 827.

<sup>44</sup> Gummow, n 17 above, at 176 (citation omitted).

<sup>45</sup> Ibid at 177.

and the rejection was qualified. What was in issue was whether it was the Court or the planning authority which was required to determine whether the proposed development involved a “special industry”, being one likely to emit fumes and smells or discharge foul liquid. The criterion was one which mandated a particular outcome.<sup>46</sup> It was not in dispute that the Court should, as the trial judge, DeBelle J, had done, satisfy itself as to a jurisdictional fact. The challenge was to the finding of the Full Court that the trial judge should defer “in grey areas of uncertainty to the practical judgment of the planning authority”,<sup>47</sup> something which the judge had not done, but the Full Court said he should have done. The High Court accepted that there had been submissions directed to the doctrine of “deference” as identified in *Chevron USA Inc v Natural Resources Defense Council Inc*,<sup>48</sup> but noted that “*Chevron* is concerned with competing interpretations of a statutory provision not, as here, jurisdictional fact-finding at the administrative and judicial levels.”<sup>49</sup>

Putting aside the point of construction which identified the nature of the industry as a precondition to the exercise of power, much of what *Enfield* had to say about deference was conventional thinking. It noted the debate in the United States as to the scope of constructional choices which may be available to an administrative agency; it noted Australian authority supporting a circumscribed approach to judicial review;<sup>50</sup> and it cited a number of examples from the fields of trademarks and industrial relations allowing for bodies with knowledge of a particular industry or activity to set standards. The reasoning concluded:<sup>51</sup>

“If, at the end of the day, DeBelle J had been in doubt upon a particular factual matter, it would have been open to his Honour to resolve that doubt by giving weight to any determination upon it by the Commission.”

As a label, “the doctrine of deference” was eschewed, but not all the principles underlying it.<sup>52</sup>

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<sup>46</sup> *City of Enfield* at [28].

<sup>47</sup> *City of Enfield* at [38].

<sup>48</sup> 467 US 837 (1984).

<sup>49</sup> *City of Enfield* at [40].

<sup>50</sup> *City of Enfield* at [44].

<sup>51</sup> *City of Enfield* at [50].

<sup>52</sup> *City of Enfield* at [44].

## The functions of the judiciary

In the past, it may be suggested, the role of the courts in public law owed more to principles of restraint based on experience than to logical coherence. The oft-cited, but qualified, statement of the importance of distinguishing review of the legality of decision-making from review of merit determinations in *Quin* was a statement of judicial restraint. The same approach was reflected in (i) the confined ground of *Wednesbury* unreasonableness, (ii) a strict approach to the “no evidence” ground and (iii) the limited availability of jurisdictional facts. The lifting of such restraints has led to a greater focus on the fact-finding exercise undertaken by executive officials and tribunals. Sometimes the vehicle is said to be procedural unfairness.

It is not necessary for present purposes to stay to consider the social and political forces which have led to these changes. No doubt there has been a massive increase over several decades in government regulation and also in the degree to which we are all dependent on government for various services and levels of personal security. That situation is unlikely to change except to increase levels of regulation which, for example, remain skeletal in cyberspace, in which many people spend much of their lives and upon which all of us depend; it is also likely to increase as changes in economic circumstances, for example as the social dislocation caused by global free trade, and the mechanisation of current employment require those adversely affected to seek government protection through various kinds of services.

It is valuable, however, to focus on the consequences of these changes for the inter-relationship of the various arms of government.<sup>53</sup> One important consequence of the breakdown in the distinction between legality and merits may be seen in the increased demand that courts review the whole of the record before an administrative officer or tribunal, a demand to which the courts increasingly accede. It also requires a practical recognition that a reviewing court is often not well placed to assess particular functions undertaken by an administrative tribunal. In this regard, it seems to me likely that the courts will have to develop a structured approach to the intensity of the scrutiny to which they subject administrative decisions. That exercise may have been stifled, or

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<sup>53</sup> Similar concerns were raised more than 20 years ago by John McMillan, “Recent Themes in Judicial Review of Federal Executive Action” (1996) 24 Fed L Rev 347.



at least retarded, by what many saw as the rejection of any element of judicial deference to other arms of government in undertaking judicial review in *City of Enfield*. However, as Gageler has argued, the use of that language in American case law has sometimes been misunderstood and the term itself misapplied.<sup>54</sup> As he further explained, the underlying principle was identified by Fullagar J in the *Communist Party Case*, by reference to “the respect which the judicial organ must accord to opinions of the legislative and executive organs.”<sup>55</sup> Gageler continued:<sup>56</sup>

“What Fullagar J referred to as ‘respect’, others have referred to as ‘deference’. The standard dictionary definition of deference includes two alternative meanings. One meaning is respectful regard for the judgment or opinion of another. Another meaning is respectful acknowledgement of the authority of another. The two meanings point to two different forms of deference. Neither meaning equates deference to servility, much less to an abdication of duty.”

In Canada, the courts review administrative decision-making at one of two levels, described as “correctness” review and “reasonableness” review. Anything which may be described as the legal criterion of engagement of a power (or a jurisdictional fact) must be determined according to the correctness test. That is, it is for the court to determine whether the power was engaged. In all other respects, review is limited to the imprecise standard of unreasonable decision-making.

## Conclusions

Although I have not engaged with this issue, the somewhat hesitant moves by the High Court towards proportionality reasoning suggest that a more flexible approach to reasonableness review may be gaining acceptance. If that is so, it will tend to erode judicial restraint and increase uncertainty as to the scope of judicial review. These issues need to be openly addressed. However, there is no ‘one size fits all’ theory of the proper scope of judicial review. It makes no sense to adopt the same level of scrutiny for high volume decisions relating to social security benefits, or even visa applications, and for decisions relating to access to nationally significant infrastructure. (These are examples on a broad spectrum.) Whether we follow the Canadian approach of identifying particular levels of scrutiny, or some form of a sliding

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<sup>54</sup> Gageler, n 9 above.

<sup>55</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263; [1951] HCA 5.

<sup>56</sup> Gageler, n 9 above at 152.

scale, it will be necessary to pay attention to the proper limits of the judicial function and concepts invoked by such terms as deference and margin of appreciation.

If courts are thought to be over-reaching, the legislatures will respond. It will not be by bald privative clauses, but probably by increased attention to specific “appeal” provisions, designed to replace judicial review.

In his 1967 article, Harry Whitmore said:<sup>57</sup>

“It is arguable that the critics have over-emphasized the uncertainties of judicial review for jurisdictional error, and the lack of logic inherent in the concept; but whether jurisdictional error is truly a meaningless category or not, it seems likely that its importance will decline as it is supplanted to some degree by the even more flexible and uncertain concept of review for error of law.”

Although he may have misjudged the mechanism, Harry accurately identified the trend. He saw the operation of the law and the role of the courts with an acute understanding of administrative decision-making. I am sure he would see the need for on-going consideration of current practices, with a keen eye on the practical consequences of any reforms.

To risk a prediction, I would not be surprised if legislatures increasingly opt for standard provisions similar to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), allowing appeals for errors of law (or jurisdiction). Discussing s 44, in *Haritos* a five-judge bench of the Full Court of the Federal Court said:<sup>58</sup>

“The correct approach, in our opinion, is to ask directly the question whether the appeal is on a question of law, without being diverted by whether or not the appeal raises a mixed question of fact and law. As the High Court said in *Owens*,<sup>59</sup> the purpose of limiting an appeal to a question of law is to ensure that the merits of the case are dealt with not by the Federal Court but by the Tribunal. This distribution of function is critical to the correct operation of the administrative review process. ... [O]n an appeal under s 44 the appellate body should not usurp the fact-finding function of the Tribunal. But such fact-finding is an entirely different exercise from the evaluation of the fact-finding process of the Tribunal (as fact-finder) to decide upon its legality.”

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<sup>57</sup> Whitmore, above n 35 at 159-160 (citations omitted).

<sup>58</sup> *Haritos* at [194].

<sup>59</sup> *Repatriation Commission v Owens* (1996) 70 ALJR 904; noted 187 CLR 704.

Such an approach has 30 years of statutory interpretation behind it; it has at least an air of certainty as to its scope; although it may be broader than judicial review, it side-steps the apparently fragile boundaries of judicial review, and, importantly, the jurisdiction can be conferred on courts other than the Supreme Court. It will not, of course, avoid the need to distinguish errors of law from other errors, nor will it specify how the courts should apply it in different areas of decision-making. Perhaps legislatures will come up with a more sophisticated approach, such as one specifying the consequences of failing to comply with particular statutory requirements. As was noted in *Project Blue Sky*, that exercise is usually left to the courts. However, statutes do now specify such consequences occasionally, but not commonly nor always consistently.<sup>60</sup>

Thank you for your patience, no doubt born of deference to my assigned role tonight.

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<sup>60</sup> Some legislation is exceptional in this regard: see, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 5(4), 22(4), 23(6), 32(6), 44(3), 45(4), 48(3), 50(3), 53A(5), 54B(7), 54C(2), 60H(3), 67(6), 71(3), 72(2), 73(3), 83(2), 92(2), 93(3), 96(2), 100A(2C), 100B(2), 100P(2) which state that non-compliance will not invalidate a sentence or order; s 101A then provides that “[a] failure to comply with a provision of this Act may be considered by an appeal court in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence.”