

Public Law - An Australian Perspective

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Introduction

Taxonomical disputes can arouse passions among lawyers out of proportion if not inversely proportional to the significance of their subject matter. The term 'Public Law' is a taxonomic term which does occasion debate about its scope and content. I will avoid entering into any debate on that question in this jurisdiction. My working definition for the purposes of this presentation is: that area of the law which is concerned with the scope, content and limits of official power, be it legislative, executive or judicial. So public law encompasses constitutional law and administrative law. In the Australian setting of written Commonwealth and State Constitutions, it is informed by the principle that there is no such thing as unlimited official power. There is therefore, no such thing as a power to make laws on any topic and for any purpose. There is no such thing as an unfettered discretion. Official discretions conferred by statute must be exercised consistently with the scope, objects and subject matter of the statute.

Public law in Australia is manifested in the following ways:

1. By judicial review of the validity of legislation in direct or collateral challenges to:
 - A law of the Commonwealth Parliament on the basis that the law is not within its legislative competency as defined in the Constitution or otherwise transgresses constitutional prohibitions or guarantees;
 - A law of the State Parliament on the basis that the law is a law with respect to a subject matter exclusively within Commonwealth

legislative competency or otherwise transgresses constitutional prohibitions or guarantees.

2. Judicial review of Commonwealth and State Executives and executive authorities for jurisdictional error under constitutional or prerogative writs and, on wider grounds, pursuant to judicial review statutes.¹

Reform of the procedural and substantive law relating to judicial review of administrative action was undertaken by the Commonwealth Parliament with the introduction in 1975 of what was known as the Administrative Law Package. That package comprised the *Administrative Decisions (Judicial Review) Act 1975* (Cth), the *Administrative Appeals Tribunal Act 1975* (Cth), the *Ombudsman Act 1976* (Cth) and the *Freedom of Information Act 1982* (Cth).

These opening remarks should be placed in the larger context of the history and nature of Australia's constitutional arrangements their legal character and effect.

The Australian constitutional context

To understand public law in Australia, it is necessary to have some awareness of its constitutional context and the concept of parliaments of limited powers which is part of that context. The Constitutions of the Commonwealth of Australia and of its constituent States and Territories are a product of an historical evolution.

The British colonising history of Australia which shaped our State and Commonwealth Constitutions began with the taking of the possession of the eastern part of the continent by James Cook in 1770.² In 1788, Governor Philip, as the embodiment of the authority of the British Crown, annexed that part of the continent as the Colony of New South Wales. In 1825, the Colony of Tasmania was separated

¹ The extent to which statutory authorities exercise powers under private law in their capacities as juristic persons sometimes requires nice distinctions to be drawn. The contracting out of government services to private organisations also gives rise to debated questions about the limits of public law.

² See generally, Richard Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 4th ed, 1977) ch 1.

out from New South Wales.³ Western Australia was created as a colony by Imperial Statute in 1829.⁴ South Australia was created as a province in 1834 by Imperial Statute.⁵

In 1850, the Imperial Parliament enacted the *Australian Constitutions Act 1850* (Imp) following a report by a committee of the Privy Council in 1849. That Act provided for the separation of Victoria from New South Wales and that separation took effect in January 1851. In 1854, Tasmania enacted a *Constitution Act* and established its own bi-cameral legislature.⁶ In 1855, similarly worded Constitutions were established in New South Wales and Victoria. Responsible government was adopted within the framework of those Constitutions as a matter of convention. Queensland was created out of New South Wales by Letters Patent in 1859. An Order in Council in that year created a Constitution for Queensland in terms similar to that of the New South Wales Constitution of 1855. In 1855, a *South Australian Constitution Act* was passed by the South Australian legislature, which itself had been set up in 1842. Western Australia achieved self-government in 1893, again with a Constitution supported by Imperial Statute. The Constitutions of the Australian colonies in the late nineteenth century all derived their legal authority directly or indirectly from Acts of the Imperial Parliament. Each of the colonies was self-governing. Each had also established its own court system with a Supreme Court at its apex.

In the 1890s, Conventions of representatives of the colonies came together to discuss and draft an Australian Federal Constitution. The Conventions were held in 1891 and, after a gap, in 1897 and 1898. In March 1898, the delegates adopted a revised Constitution Bill. Ultimately, each of the colonies which were to become the States submitted the proposed Bill to popular referenda in 1899. The Bill was approved by electors in New South Wales, Victoria, South Australia and Tasmania. Queensland approved it in September 1899. Western Australia did not proceed to referendum at that time. The five approving colonies submitted the Bill to the

³ This occurred by Order in Council pursuant to s 44 of the *New South Wales Act 1823* (Imp) which authorised separation of Van Diemens land from New South Wales.

⁴ 10 Geo IV No 63.

⁵ 4 & 5 WM IV C 95.

⁶ 18 Vic No 17.

Imperial Parliament requesting that it bring it into force as the Constitution of the newly formed Commonwealth of Australia. Western Australia held its referendum in July 1900 and requested the Queen to include Western Australia as an original State of the Commonwealth in the Proclamation of the Constitution.

In September 1900 Queen Victoria signed a Proclamation which established the Commonwealth as and from January 1901.

The authority of the Constitution

It was readily accepted that the formal legal authority of the Constitution on 1 January 1901 derived from the legislative power of the Imperial Parliament. Andrew Inglis Clark, a leading Convention delegate, described it as contained in a written document which is an Act of the Imperial Parliament of the United Kingdom of Great Britain and Ireland.⁷ It was seen by a leading constitutional lawyer at the time, Professor Harrison-Moore, as 'first and foremost a law declared by the Imperial Parliament to be "binding on the Courts, Judges and people of every State and of every part of the Commonwealth".⁸ Sir Owen Dixon, a former Chief Justice of the High Court generally regarded as Australia's greatest jurist, said of it:

It is not a supreme law purporting to obtain its force from the direct expression of a peoples' inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's dominions.⁹

Dixon attached to this characterisation of the Constitution a consequence for interpretation. The organs of government are simply institutions established by law. This contrasted with the position in the United States where they are agents for the people who are the source of the power.¹⁰

⁷ Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, First published 1901, (1977 repr) 14.

⁸ William Harrison-Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, 2nd ed, 1977 repr) 66.

⁹ Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

¹⁰ See, eg, *Eastlake v Forest City Enterprises Inc* 426 US 668, 672 (1976)

In 1901, the Constitution was seen to be legally binding because of the status accorded to British Statutes as an original source of the law and because of the supremacy accorded to those statutes.¹¹

The acceptance in 1901, and for a considerable time thereafter, of the Imperial Parliament as the source of legal authority for the Constitution is hardly surprising. It was in accord with the way in which the constitutions of the Australian colonies had evolved. Their legal legitimacy derived from pre-existing Imperial Acts of general application or from specific Acts giving legal force to a constitution which had been submitted to the Imperial Parliament by the colonists. All to a greater or lesser extent however evolved from local movements for self-government.

Australia's evolution to independent nationhood

It is widely accepted that Australia did not become an independent nation in the full sense of that term upon the creation of the Commonwealth on 1 January 1901. Rather, it came into existence and entered the 20th century as a self-governing colony of the United Kingdom. Indeed the United Kingdom Parliament had continued power to legislate for Australia. Australia remained subject to paramount British legislation.

Australia lacked executive independence in the conduct of its foreign relations at the time of federation. Such relations were carried on through the British government. Eventually that executive independence was recognised for all Dominions at an Imperial conference held in 1926. The resolutions passed at that conference were sufficient 'to secure the independence of Dominion executives, in the conduct of both domestic and foreign affairs'.¹²

Legislative independence from Great Britain did not come to pass until the adoption by the Australian Parliament in 1942, retrospective to 1939, of the *Statute of Westminster 1931* (UK). That was a British statute which gave effect to the wishes of Dominions to lift fetters on their legislative powers imposed by an Imperial Act

¹¹ Geoffrey Lindell, 'Why is Australia's Constitution Binding?' (1986) 16 *Federal Law Review* 29, 32-33.

¹² George Winterton, 'The Acquisition of Independence' in Robert French, Geoffrey Lindell & Cheryl Saunders (eds) *Reflections on the Australian Constitution* (Federation Press, 2003) 84-85.

known as the *Colonial Laws Validity Act 1865* (UK).¹³ The Statute of Westminster also affirmed the powers of Dominion parliaments to make laws having extraterritorial effect. It repealed the *Colonial Laws Validity Act 1865* in relation to Dominion laws. That Act continued to apply to the States of Australia until 1986.

Even after the Statute of Westminster it remained theoretically possible for the United Kingdom Parliament to make laws affecting Australia. Independence granted to the Dominions at the national level by the Statute of Westminster, did not apply to the Australian States.

The final severance of the legislative and executive umbilical cord between Australia and the United Kingdom did not occur until 1986 with the passage of the *Australia Act 1986* (UK) by the United Kingdom Parliament and the corresponding Australia Acts of the Commonwealth and the State Parliaments. It was then also that the last vestige of judicial dependence disappeared. For until 1986 a litigant in a State Supreme Court could seek leave of that Court to appeal to the Privy Council in England against decisions of the Supreme Court. Although such appeals were not permitted where they involved matters arising under the Constitution or involving its interpretation, there were, for many years, effectively two final appellate courts for Australia, the High Court and the Privy Council.

The shape of the Commonwealth Constitution

The Commonwealth Constitution, which is s 9 of the *Commonwealth of Australia Constitution Act*, has eight chapters which deal with the following topics:

Chapter I – The Parliament

Chapter II – The Executive Government

Chapter III - The Judicature

Chapter IV – Finance and Trade

¹³ Paradoxically, the *Colonial Laws Validity Act* was enacted to overcome objections taken by Justice Boothby in the Supreme Court of South Australia to local laws said to be merely inconsistent with Imperial law. Justice Boothby's persistent objections led to his removal from that Court.

Chapter V – The States

Chapter VI – New States

Chapter VII – Miscellaneous

Chapter VIII – Alteration of the Constitution

The first three Chapters are key to an understanding of the constitutional dimension of public law in Australia

Section 1 in Chapter I of the Constitution vests the law making power of the Commonwealth in 'the Queen, a Senate, and a House of Representatives'. Section 51 of the Constitution sets out the majority of subjects upon which the Parliament of the Commonwealth is authorised to make laws. There are 39 heads of power in that section.

Chapter II of the Constitution deals with the Executive Government. The key provision of that Chapter is s 61, which provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

By convention the Governor-General acts upon the advice of the Australian Ministers of the Crown through the Federal Executive Council which is established under s 62 of the Constitution. The section locates the effective executive power in the Ministers of the Crown.

Chapter III of the Constitution deals with the federal judicature. Each colony which became a State already had in place a court system. Those court systems continued after Federation and continue today. By s 71 the judicial power of the Commonwealth is vested in the High Court of Australia, such other federal courts as are created by the Parliament and such other courts (ie courts of the States) as are

invested with federal jurisdiction. The High Court is the final appellate court for all Australian jurisdictions.¹⁴

The Constitution was not written on a tabula rasa. It took effect in a society operating upon certain assumptions about the rule of law and basic freedoms reflected in the general law inherited from England. That general law, which has over the years evolved and been modified, still provides the setting in which the Commonwealth and State Constitutions, and constitutional institutions, operate and in which statutes are interpreted.

The separation of legislative and executive from judicial powers in Australia is sharp. In a leading decision, the *Boilermakers' Case*, which affirmed that separation, the Privy Council said that:

In a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive.¹⁵

The separation of legislative and executive power however is qualified, in Australia, by the doctrine of responsible government under which Ministers of State are required to be Members of Parliament, are accountable to the Parliament and may effectively be removed from office by a vote of no confidence passed by the Parliament. It is also qualified by the common practice of delegating legislative power to the Executive in relation to the making of regulations and other legislative instruments. Nevertheless, the general separation of powers subsists. The High Court said in 1996:

The Constitution reflects the broad principle that, subject to the Westminster system of responsible government, the powers in each category – whose character is determined according to traditional British conceptions – are vested in and are to be exercised by separate organs of government. The functions of government are not separated because the powers of one branch could not be exercised effectively by the repository of the powers of another branch. To the contrary, the separation of functions is designed to provide checks and balances on the exercise of power by the

¹⁴ Constitution, s 71.

¹⁵ *Attorney-General for the Commonwealth v The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529, 540.

respective organs of government in which the powers are reposed.¹⁶
(footnotes omitted)

The executive power of the Commonwealth

Section 61 of the Commonwealth Constitution provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

As the Governor-General appoints Ministers of the Crown this means that executive power can be exercised by Ministers and other officials acting on their behalf. Generally the executive power is exercised pursuant to statutory authority. There has, however, been a debate about the extent to which s 61 confers power to act without statutory authority.

There is as yet no complete account of the scope and content of the executive power. It includes the following elements:

- powers necessary or incidental to the execution or maintenance of a law of the Commonwealth;¹⁷
- powers conferred by statute;¹⁸
- powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;¹⁹

¹⁶ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 10-11.

¹⁷ *R v Kidman* (1915) 20 CLR 425, 440-441 (Isaacs J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464 (Gummow J).

¹⁸ *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 101 (Dixon J); *Davis v Commonwealth* (1988) 166 CLR 79, 108 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 55 [111] (French CJ), 121 [343]-3[44] (Hayne and Kiefel JJ).

¹⁹ *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J); *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J), 505 (Jacobs J); *Davis v Commonwealth* (1988) 166 CLR 79, 93-94 (Mason CJ, Deane and Gaudron JJ), 108 (Brennan J).

- powers attributable to the capacities which the Commonwealth has in common with legal persons;²⁰
- the inherent authority which derives from the character and status of the Commonwealth as a national government.²¹

The executive power has had only limited consideration in the High Court. There have been two decisions made on it recently, one in 2009 – *Pape v Federal Commissioner of Taxation*²² and *Williams v Commonwealth*²³ delivered on 20 June 2012. Two important propositions have emerged from those decisions. The first is the requirement under the Constitution for parliamentary appropriation before the Executive can expend money out of Consolidated Revenue is a necessary condition of authority to spend and not a source of substantive power to do so. In *Pape*, the necessary substantive power was supported by the inherent authority of the Commonwealth deriving from its status as a national government enabling it to respond to a short term national finance challenge flowing from the Global Financial Crisis. In *Williams*, the Court held, by majority, that executive power did not, absent statutory authority, extend to the expenditure of public money for the provision of chaplaincy services in State schools. A number of the Justices rejected the proposition that the Executive can enter into contracts and expend money with respect to any subject matter about which the Commonwealth Parliament could make a law even if it has not done so.

²⁰ *New South Wales v Bardolph* (1934) 52 CLR 455, 509 (Dixon J); *Davis v Commonwealth* (1988) 166 CLR 79, 108 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [126] (French CJ). As noted in *In re KL Tractors Ltd* (1961) 106 CLR 318, 335 (Dixon CJ, McTiernan and Kitto JJ): 'The word "powers" here really means 'capacity', for we are dealing with the 'capacity' or a 'faculty' of the Crown in right of the Commonwealth.'

²¹ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397 (Mason J); *R v Duncan*; *Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *Davis v Commonwealth* (1988) 166 CLR 79, 93-94 (Mason CJ, Deane and Gaudron JJ), 110-111 (Crennan J); *R v Hughes* (2000) 202 CLR 535, 554-555 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63 [133] (French CJ), 87-88 [228], 91-92 [242] (Gummow, Crennan and Bell JJ), 116 [328]-[329] (Hayne and Kiefel JJ).

²² (2009) 238 CLR 1.

²³ (2012) 86 ALJR 713; 288 ALR 410.

The judicial power to review legislation in the High Court

Political scientists and the constitutional lawyers may debate whether economic and political factors have been of greater significance to Federal/State relations in Australia than decisions of the High Court. However, the power of the High Court on judicial review to determine whether laws enacted by the Commonwealth Parliament or by State Parliaments are valid under the Constitution has been of major significance.

As observed earlier, the judicial power of the Commonwealth is vested, by s 71 of the Constitution, in the High Court of Australia and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. Through the *Judiciary Act 1903* (Cth) the Parliament has invested the High Court and the Federal Court and the courts of the various States with jurisdiction in matters arising under the Constitution, or involving its interpretation.²⁴ The use of the State Supreme Courts in particular to exercise jurisdiction in federal matters reflected the standing which they had at the time of federation.

There is no provision of the Constitution which expressly confers upon the High Court or upon any other court the power to declare legislation of the Commonwealth or of the States unconstitutional. Nevertheless, the Australian Constitutional Convention Debates and Records indicate that most, if not all, of the delegates assumed that the courts would be able to declare Commonwealth and State legislation unconstitutional.²⁵

As the late Professor Geoffrey Sawer wrote it was certain from the beginning that the Australian courts would have the power of judicial review, including the power to hold Acts of Parliament void for unconstitutionality. He said:

The Australian Constitution does not in specific terms confer this power on the courts, but it has many provisions which are unintelligible unless such a power was intended; for example, the reference to courts and judges as bound by the Constitution (covering Clause 5), the provision for cases

²⁴ *Judiciary Act 1903* (Cth) s 39B.

²⁵ James Thomson, *Judicial Review in Australia: The Courts and the Constitution*, (Thesis Publications NSW, 1988) 166-167.

involving *inter se* questions (s 74) and the provision for High Court jurisdiction in matters arising under the Constitution or involving its interpretation (s 76).²⁶

The High Court asserted, early in its existence and without elaborate exposition, its power to declare legislation invalid.²⁷ In the exercise of that power and its necessary premise, the power to interpret the Constitution, it has had a significant influence upon the relationship between the Commonwealth and the States under the Constitution.

The constitutional jurisdiction of the High Court to review Commonwealth executive action

Of particular significance in the public law context is s 75(v) of the Constitution. It confers on the High Court jurisdiction in any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Certiorari is not included in the remedies which define the jurisdiction but may be granted as the exercise of a power in aid of that jurisdiction. The jurisdiction under s 75(v) applies to cases of jurisdictional error which encompass vitiating errors of law, including want of procedural fairness. Chief Justice Gleeson described s 75(v) as providing in the Constitution a 'basic guarantee of the rule of law'.²⁸ The section was inserted into the Constitution at the suggestion of a Tasmania delegate, Andrew Inglis Clark, one of the principal architects of the Constitution. He did so with a view to avoiding a deficiency in original jurisdiction to judicially review action which had been identified in the United States Constitution by Chief Justice Marshall in *Marbury v Madison*.²⁹ Because it is a constitutional provision the original jurisdiction it confers on the Court cannot be removed by statute. It is thus proof against attempts to exclude review of Commonwealth executive action for jurisdictional error.

²⁶ Geoffrey Sawer, *Australian Federalism in the Courts*, (Melbourne University Press, 1968) 76.

²⁷ *D'Emden v Pedder* (1904) 1 CLR 91; *Commonwealth v New South Wales* (1906) 3 CLR 807.

²⁸ The Hon Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 67.

²⁹ 5 US 137 (1803).

Its strength was tested against a statutory privative provision in an important case decided by the High Court in 2003.³⁰ The statutory provision, s 474 of the *Migration Act 1958* (Cth) ('the Migration Act'), provided that any decision under that Act characterised as a 'privative clause decision' was final and conclusive, must not be challenged, appealed against, reviewed, quashed or called in question in any court, and that it was not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. The definition of 'privative clause decision' was that of an administrative character made, proposed to be made, or required to be made, under the Migration Act.

The Court held that s 474 did not prevent the judicial review of decisions that involved jurisdictional error. Decisions of that character were not privative clause decisions because they were not decisions made 'under the Act'. Section 474 being so construed, was held to be valid because it did not purport to oust the jurisdiction conferred by s 75(v) of the Constitution because it did not protect decisions that involve jurisdictional error from review.

Chief Justice Gleeson in his judgment in *Plaintiff S157/2002* quoted from a judgment of his predecessor, Chief Justice Brennan:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.³¹

The protected supervisory jurisdiction of the State Supreme Courts

The jurisdiction of State Supreme Courts to review decisions of tribunals and other authorities within their States for jurisdictional error has also been held by the High Court, in a decision delivered in 2010,³² to be protected. The case in which the question arose concerned an application to the Court of Appeal of the Supreme Court of New South Wales for orders in the nature of certiorari and prohibition against the

³⁰ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

³¹ *Ibid* 492 [31] citing *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70.

³² *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

Industrial Court of New South Wales arising out of a prosecution for contraventions of the *Occupational Health and Safety Act 1983* (NSW). Section 179 of that Act was a privative clause in similar terms to the privative clause in the Migration Act which was considered by the High Court in *Plaintiff S157*. In the joint judgment of six of the Justices of the High Court, their Honours noted that privative provisions had been a prominent feature of the Australian legal landscape for many years. Their operation, however, was affected by constitutional considerations. As the plurality put it:

although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decisions of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework for the Australian judicial system.³³

It was an accepted doctrine that at the time of Federation, the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision. So much flowed from the decision of the Privy Council in *Colonial Bank of Australasia v Willan*.³⁴ The Privy Council there said:

There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queens Bench will grant a certiorari.

It is fundamental to the rule of law that in the exercise of official power there is no such thing as an unfettered discretion. Any Commonwealth law conferring a discretionary power is limited by the requirement that it must be a law with respect to one of the heads of legislative power conferred by the Constitution. A statute conferring unlimited power on an official would be unconstitutional because an unfettered power would not know constitutional limits. While the laws of the States and Territories are not confined to specific heads of power, as are those made by the Commonwealth Parliament, they are subject to such limits as are imposed by the Constitution on the legislative competency of the States and also by the legislative supremacy of Commonwealth laws imposed by s 109 of the Constitution. Both

³³ Ibid 579 [93] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
³⁴ [1874] LR 5 PC 417.

Commonwealth and State laws are affected by interpretive principles which prevent, as a matter of internal logic, the creation of unfettered discretions.

The nature and limits of judicial review

The principal object of judicial review is to ensure that when official action affecting the subject is challenged in the courts, it has been taken within the boundaries of constitutional, statutory or executive power and to set it aside and require its reconsideration if it has not. Judicial review may apply to first line decision-making such as that of a minister or the minister's delegate. It may apply to a tribunal which has made a decision in the exercise of an administrative review function. There are some species of judicial review which have the character of a factual merits review. Examples are statutory 'appeals', so-called from administrative decision-makers to the Federal Court in the exercise of its original jurisdiction. Appeals from the Commissioner of Taxation, the Commissioner of Patents and the Registrar of Trade Marks fall into that category. The review by the Federal Court of decisions of magistrates, acting administratively, about eligibility for extradition, although confined to the materials before the magistrates, has a merits review aspect in that it is not confined to review for error of law or failure to follow necessary procedures.

Statutory merits review apart, the principle limitation of judicial review function was described by Brennan J in *Attorney-General (NSW) v Quin*:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.³⁵

The general parameters of administrative law

Every statutory power is confined by its own logic. Its exercise must relate to the subject matter, scope and purpose of the legislation which gives rise to it. This

³⁵ (1990) 170 CLR 1, 35-36 approved in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.

has a constitutional dimension, for the subject matter, scope and purpose of a statute are the attributes by which its constitutional legitimacy can be assessed. As Justice Kirby has rightly said, 'No Parliament of Australia could confer absolute power on anyone'.³⁶

The framework of constitutional and administrative law requires that public statutory power be exercised:

1. lawfully – meaning that official decisions are authorised by statute, prerogative or by the Constitution;
2. in good faith – which requires that official decisions be made honestly in the sense that they are made without bad faith, and may extend to conscientious consideration of the statutory task;
3. rationally – which requires at least that official decisions comply with the logical framework of the grant of power under which they are made;
4. fairly – which requires that, subject to specific statutory provisions, official decisions are made fairly, that is impartially in fact and appearance and with a proper opportunity to persons affected to be heard.

These are, in a sense, common law principles which order the exercise of public power.

When statutory power affects private rights to property or common law freedoms such as freedom of speech or movement, the common law will provide some interpretive protection against undue incursions to the extent that the words of the statute allow. These considerations have found their way into many decisions of the High Court and recently in relation to property rights. In *Wurridjal v Commonwealth*³⁷ one of the questions for decision was whether the just terms

³⁶ *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 503-504 [69]-[70]. See also *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 171.

³⁷ (2009) 237 CLR 309.

guarantee in s 51(xxxi) of the Constitution that relates to the acquisition of property applied to the Territories as well as to the States. A relevant consideration in holding that it did apply and in overruling the 1969 decision of the Court in *Teori Tau*³⁸, was the existence of a common law principle predating federation by a very long time that private property should be immune from interference other than on just terms. In the decision of the Court in *R & R Fazzolari Pty Ltd v Parramatta City Council*³⁹ it was helpful to refer to the same presumption in the interpretation of a statute authorising a compulsory acquisition of land for urban redevelopment. The presumption dates back to the writings of Blackstone and was stated early in the history of the High Court by Griffith CJ in *Clissold v Perry*.⁴⁰ He referred to:

a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest.⁴¹

Here it may be said the common law applies to minimise so far as the words of parliament allow, the effect of public power on private rights and freedoms.

The exercise of public power is also affected by private law principles such as the common law duty of care in relation to authorities exercising statutory functions. The conferring of discretionary powers on a statutory body may give rise in particular circumstances to a duty of care on the part of that body. In *Crimmins v Stevedoring Industry Finance Committee*⁴² the Court held that the Australian Stevedoring Industry Authority owed a common law duty to a waterside worker to take reasonable care to protect him from reasonably foreseeable risk of injury arising from his employment by regulated stevedores. That was a case in which a private law principle applied to the discharge of a public law function.

Conclusion

I have attempted in these remarks to offer a broad account of Australian public law. There are no doubt features which will be familiar to Scottish practitioners and

³⁸ *Teori Tau v Commonwealth* (1969) 119 CLR 564

³⁹ (2009) 237 CLR 603.

⁴⁰ (1904) 1 CLR 363.

⁴¹ *Ibid* 373.

⁴² (1999) 200 CLR 1.

others which reflect different historical traditions. The most significant points of difference arise out of the nature of Australia's written Constitution and the limits it imposes on legislative and ultimately upon administrative powers.