

ADMINISTRATIVE REDRESS IN AND OUT OF THE COURTS

Essays in Honour of
Robin Creyke and John McMillan

Editors

Greg Weeks

Australian National University

Matthew Groves

Deakin University

Foreword

Wayne Martin AC QC

Chief Justice of the Supreme Court of Western Australia
2006-2018

THE FEDERATION PRESS
2019

Contents

<i>Foreword by Wayne Martin AC QC</i>	v
<i>About the Contributors</i>	ix
<i>Table of Cases</i>	xi
<i>Table of Statutes</i>	xviii
1 The Iceberg of Australian Administrative Law: Justice Before and Beyond Judicial Review	1
<i>Matthew Groves and Greg Weeks</i>	
2 Three is Plenty	12
<i>Stephen Gageler</i>	
3 Attacks on Integrity Offices: A Separation of Powers Riddle	25
<i>Greg Weeks</i>	
4 The Courts and The Executive: A Judicial View	44
<i>John Basten</i>	
5 Review of Visa Cancellation or Refusal Decisions on Character Grounds: A Comparative Analysis	63
<i>John Griffiths</i>	
6 Administrative Law's Impact on the Bureaucracy	93
<i>Janina Boughey</i>	
7 More Reasons for Giving Reasons	117
<i>Janine Pritchard</i>	
8 Failure to Disclose: What are the Consequences When Open Government Founders?	136
<i>Judith Bannister</i>	
9 Ombudsman Litigation: The Relationship between the Australian Ombudsman and the Courts	155
<i>Anita Stuhmcke</i>	
10 Ombudsmen and Crime Busters: Ships Passing in the Night	178
<i>Mark Aronson</i>	

11	State Tribunals and the Federal Judicial System <i>Graeme Hill</i>	195
12	Tribunals: Evidence, Satisfaction and Proof <i>Linda Pearson</i>	217
13	Does One Rotten Apple Spoil the Whole Barrel? Bias in Multi-Member Decision-Making <i>Matthew Groves</i>	235
14	The Uncertainty of Certainty in Legislation <i>Dennis Pearce</i>	255
	<i>Index</i>	271

Chapter 2

Three is Plenty

Stephen Gageler

Professors Robyn Creyke and John McMillan, in the tradition of Professor Harry Whitmore,¹ have consistently treated the province of administrative law as extending to the whole of public administration and have consistently treated the function of administrative law as being to contribute to the overall quality of public administration. There has never been a scholarship which has confined its attention to judicial review of administrative action or which has analysed judicial review of administrative action narrowly in terms of doctrine. The perspective of each has been broad. The approach of each has been pragmatic in the sense that each has been concerned more with practical results than with theories and abstract principles.

Professor McMillan published in the *Federal Law Review* in 2010 an article entitled 'Re-thinking the Separation of Powers',² which might be thought from its title to have departed from that characteristic pragmatism. Superficial reading of the article might even be thought to confirm that departure. The article was introduced with the observation that '[c]onstitutional theory and doctrine are important to our understanding and experience of government' and concluded with the suggestion that it was then, in 2010, 'time to supplement the doctrine of the separation of powers with other theories that are attuned to the more sophisticated framework developed in Australia over the last thirty years for resolving disputes, holding government to account and securing the rule of law'.³

Between the introduction and the conclusion, the article drew attention to the infrequency of judicial review of administrative action in practice and to the general decline in recourse to litigation as a means of resolving civil disputes. The article traced the growth of non-judicial accountability bodies created by Commonwealth legislation commencing with the introduction of the package of administrative law reforms of the mid-1970s – reforms which established, in accordance with recommendations of the Kerr Committee in 1971,⁴ the Administrative Appeals Tribunal⁵ and which created the office of the Ombudsman⁶ – and concluding with the then recent creation of the office

1 See S Gageler, 'Whitmore and the Americans: Some American Influences on the Development of Australian Administrative Law' (2015) 38 *UNSW Law Journal* 1316.

2 J McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423.

3 *Ibid*, 423, 443.

4 Commonwealth Administrative Review Committee, *Report* (1971).

5 *Administrative Appeals Tribunal Act 1975* (Cth).

6 *Ombudsman Act 1976* (Cth).

of the Australian Information Commissioner.⁷ The article also outlined the emergence in Australia and elsewhere of overarching theories attempting to explain the generic role of those and similar bodies. Three theories were mentioned. One was the theory that, together with a range of other governmental and non-governmental institutions, the non-judicial accountability bodies formed a 'national integrity system'. Alternative versions of the national integrity system proposed by that theory depicted the institutions diagrammatically either as intertwining and mutually reinforcing like the twigs in a bird's nest⁸ or as standing strong and in parallel with the legislature, the executive and the judiciary like the columns of a Greek temple.⁹ Another was the theory, which originated in the United States in 2000 with Professor Bruce Ackerman¹⁰ and which was taken up in Australia in 2004 by Chief Justice James Spigelman,¹¹ that the non-judicial accountability bodies collectively formed a distinct 'fourth branch of government', adding to the pre-existing legislative, executive and judicial branches. Somewhat less developed theoretically was the understanding that non-judicial accountability bodies and the judiciary together formed a single 'administrative justice system'.¹²

Underlying Professor McMillan's concentration on theory, however, was a characteristically pragmatic agenda. Theory was treated as important not for its own sake or because it influenced the perception of practice but because it influenced practice itself. The postulated problem to which the article was attempting to find a solution was that the theory of separation of powers had been so persistent and pervasive in Australia that it had created a tendency to assume that the judiciary alone secures 'the rule of law' and that no other body can be effective in doing so. Re-thinking the theoretical basis of the doctrine of separation of powers was necessary to counter that tendency so as to stimulate 'fresh thinking about the adequacy of existing arrangements for controlling government misconduct, meeting community expectations, and linking independent oversight agencies to each other and to the parliament'.¹³

Not spelt out in the article was exactly what Professor McMillan meant when he referred to the 'rule of law'. The expression is as ambiguous as it is rich.¹⁴ Plainly, Professor McMillan was not using that expression in the relatively narrow sense first used by Albert Venn Dicey to refer to the subjection of officers and agencies of government to the law as administered by common law courts. Equally plainly, he was not

7 *Australian Information Commissioner Act 2010* (Cth).

8 AJ Brown et al, *Chaos or Coherence: Strengths, Opportunities and Challenges for Australia's Integrity Systems* (National Integrity Systems Assessment, Final Report, December 2005) i, 14-18, 28, 111.

9 J Pope (ed), *Confronting Corruption: The Elements of a National Integrity System* (Transparency International, 2000) 35-37.

10 B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 691-6. The idea that administrative agencies more generally might form a fourth branch of government is considerably older in the United States and Australia: W Bondy, *The Separation of Governmental Powers* (1896) 79-81; G Sawyer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 177.

11 J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724.

12 See eg, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009) 1, 3, 12, 35.

13 McMillan, above n 2, 443

14 See now L Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) chs 2-3.

using the expression in the broad substantive sense in which it has come to feature in some human rights discourse.

Implicitly, Professor McMillan was using the ‘rule of law’ to refer to a conception of the relationship between those who govern and those who are governed, founded on the understanding that the former exercise authority that is legally bounded by the explicit or implicit terms on which it is conceded to them by the latter through the democratic process. In an earlier paper, he had explained his conception of the ‘rule of law’ this way:

The focus of the rule of law is upon controlling the exercise of official power by the executive government. The foundational principle is that agencies and officers of government, from the Minister to the desk official, require legal authority for any action they undertake, and must comply with the law in discharging their functions. Government is not above the law, but is subject to it. This contrasts with the position of members of the public: they too are subject to the law, but are free to engage in any activity that is not specifically prohibited. Unlike government, individuals need not point to a source of law in order to move and operate in the world.

Because of that essential difference between government and the governed, the relationship between the two is a key element of the rule of law. ... Administrative law plays a ... role, by prescribing as a condition of the validity of executive action that it is authorised, performed by an authorised officer, made for an authorised purpose, not based on impermissible considerations, and takes account of the adverse impact that official action can have on those to whom it applies.

Some definitions of the rule of law go much further, and stipulate minimum standards of fairness and justice that legal rules must conform to. It is unnecessary ... to enter that debate. Suffice to say that the rule of law, on any definition, is concerned at one level or another with safeguarding individual liberty and integrity against government oppression.

For that safeguard to be a reality there must be a legal mechanism by which the rule of law can be upheld. Specifically, there must be a forum to which disputes can be taken about the validity of government action. The forum – or dispute resolution body – must have sufficient independence, integrity and professionalism that it can reach an unbiased decision that will be accepted by others and implemented. Support and respect for the dispute resolution body should permeate government and society.¹⁵

In proposing the need to re-theorise separation of powers in order to counter a tendency to assume that the judiciary alone secures the ‘rule of law’, Professor McMillan was tapping into the essentially democratic justification for judicial review of administrative action which Professors Louis Jaffe and Edith Henderson had identified in the 1950s as informing the approach of common law courts since their emergence from the constitutional ferment of the 16th century, being the subordination of the executive to the will of the legislature as interpreted by the judiciary in light of reason and the common law.¹⁶ That justification had been drawn on, for example, by Justice Brennan in 1982¹⁷ when he wrote, in language subsequently adopted by Chief Justice Gleeson in 2003,¹⁸

15 J McMillan, ‘The Ombudsman and the Rule of Law’ (2005) 44 *AIAL Forum* 1, 2-3.

16 LL Jaffe and EG Henderson, ‘Judicial Review and the Rule of Law: Historical Origins’ (1956) 72 *Law Quarterly Review* 345.

17 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

18 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31].

that '[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action' and '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'.

Professor McMillan was not questioning that justification for judicial review so far as it went. He was seeking to counter what he saw as the deleterious effect of its hegemonic tendency. He was looking at the possibility of doing so through a theory which would explain the trust that can in practice be reposed in the independence, integrity and professionalism of a range of bodies other than the judiciary, each capable of providing a forum for the resolution of disputes about the propriety of governmental action.

My purpose is to reflect on Professor McMillan's agenda. To explain where I am going, I agree that institutional theory is important to institutional practice and that the theory of separation of powers has been and remains a powerful influence on institutional perceptions and a significant constraint on institutional design. I doubt whether separation of powers is in contemporary practice a significant impediment to the creation and operation in Australia of national non-judicial accountability bodies meaningfully able to contribute to upholding the rule of law in the sense he has used that expression. To the extent that the theory of separation of powers might create a problem of perception, I question both the practical extent of that problem and whether the solution is not to be found in better understanding that theory instead of superimposing another theory on it.

Political scientist Professor MJ Vile commenced his seminal work on constitutionalism and the separation of powers, published in 1967, by recording that the central concern of Western institutional theorists had long been with 'the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote'. 'Of the theories of government which have attempted to provide a solution to this dilemma', Professor Vile noted, 'the doctrine of the separation of powers has, in modern times, been the most significant, both intellectually and in terms of its influence upon institutional structures'. Separation of powers, he then wrote, 'stands alongside that other great pillar of Western political thought – the concept of representative government – as the major support for systems of government which are labelled "constitutional"'.¹⁹

The history of separation of powers, as Professor McMillan's argument in 2010 implicitly recognised, has been one of practice informing theory and of theory informing practice. Theory has mattered, and its influence has been profound.

Recognisably distinct governmental institutions exercising recognisably distinct governmental powers emerged in the constitutional settlement which ended the English revolution of the 17th century. The significance of the division of powers within that structure was the subject of analysis by the English philosopher John Locke as that constitutional settlement was taking shape.²⁰ But it was the famous reflection on the relationship between the Parliament, the King and the common law courts

19 MJC Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press, 1967) 1-2.

20 J Locke, *Two Treatises of Government* (Awnsham Churchill, 1690) 364-7.

under those constitutional arrangements by the French political philosopher, Baron de Montesquieu, in the middle of the 18th century that gave rise to the theory of the separation of powers which, together with the concept of representative government, provided the intellectual foundation for the constitutional settlements that were to emerge from the revolutions to occur in the American colonies and in France towards the end of the 18th century.

Political liberty, Montesquieu declared, was to be found only where there was no abuse of governmental power, and to prevent abuse of governmental power it was in the nature of things necessary that governmental power should be divided. In every government there are three sorts of power – that of enacting laws, that of executing public resolutions, and that of trying the causes of individuals – and there would be ‘no liberty’ but ‘an end of every thing’ were the same man or the same body to exercise any two or more of them.²¹ Montesquieu’s theory has been criticised on the grounds that it glossed the complexity of the contemporary constitutional arrangements it purported to explain and that the philosophical arguments on which it was founded were tautologies.²² The impact of the theory, however, cannot be gainsaid.

The immediate attraction of Montesquieu’s theory lay partly in its simplicity, partly in its apparent ability to explain the actual functioning of government in England at the time, and partly in its appeal to individual liberty. Taken up by Sir William Blackstone in the course of explaining the ‘rights of persons’ under English law,²³ and developed in particular by James Madison in the *Federalist Papers*,²⁴ Montesquieu’s tripartite separation of powers came within barely 50 years of its first articulation to be reflected in the structure of the written Constitution of the United States. Article I provided for what was described as ‘legislative powers’ to be vested in a Congress. Article II provided for what was described as ‘executive power’ to be vested in a President. Article III provided for what was described as ‘judicial power’ to be vested in one Supreme Court and in such inferior courts as the Congress might from time to time ordain and establish.

The formal structure of the first three articles of the Constitution of the United States was adopted in the framing of the Australian Constitution a century later. Chapter I commences by stating that ‘[t]he legislative power of the Commonwealth shall be vested in a Federal Parliament’. Chapter II commences by stating that ‘[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General’. Chapter III commences by stating that ‘[t]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called 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’. Sir Robert Garran, who as a young man had been secretary to the drafting committee which had been responsible

21 Montesquieu, *The Spirit of the Laws*, tr T Nugent (4th ed, 1766) vol 1, book XI, ch 6, 222 [trans of: *De l'esprit des lois* (1748)].

22 See, eg, J Waldron, ‘Separation of Powers in Thought and Practice?’ (2013) 54 *Boston College Law Review* 433, 451-4.

23 Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) book 1, 142, 154-5, 240, 244. See H Dipple, ‘Blackstone’s Commentaries and the Origins of Modern Constitutionalism’ in W Prest (ed), *Re-interpreting Blackstone’s Commentaries* (Hart Publishing, 2014) 199.

24 See C Rossiter (ed), *The Federalist Papers* (Penguin, 1961) esp 300-8 (No 47).

for the final version of the Constitution, would later say that this was nothing more than 'a draftsman's neat arrangement, without any hint of further significance.'²⁵ Examination of the historical record tends to bear him out.²⁶ But it did not end up being seen that way entirely.

Apparent from the detail of Chapter II is that the framers of the Australian Constitution did not intend by the adoption of the tripartite structure of the Constitution of the United States to create a rigid separation between the legislative power to be vested in the Parliament and the executive power to be exercisable by the Governor-General. To the contrary, they intended to facilitate 'responsible government' in the sense in which that expression had been coined by Lord Durham in his report on the affairs of British North America in 1839 and in the sense in which government of that description had come to be established and experienced in each of the federating Australasian colonies in the second half of the 19th century. The experience of responsible government, as Lord Durham had anticipated²⁷ and as Sir Samuel Griffith had explained in his notes on the draft Constitution,²⁸ was that moderation in the exercise of executive power was secured politically by means of 'actual government' being reposed in executive officers who were to remain in office only for so long as they enjoyed the confidence of a popularly elected legislature. To that end, the Constitution was framed to allow the Governor-General to be advised by a Federal Executive Council and to appoint, as its members and as officers to administer such departments of State of the Commonwealth as the Governor-General in Council might establish, Ministers of State who were to hold office for no longer than three months unless they became Senators or Members of the House of Representatives.²⁹

The notion that the structural arrangement of Chapters I and II of the Constitution operated to preclude the exercise by officers or agencies of the Executive Government of legislative power delegated by the Parliament was seriously considered but rejected by the High Court in 1931. Justice Dixon then said this:

When they adopted the distribution of powers which they found in the Constitution of the United States, the framers of the Constitution of the Commonwealth of Australia were, of course, by no means unaware of the significance given to the distribution and of the consequences flowing from it. But an independent consideration of the provisions of the Commonwealth Constitution unaided by any such knowledge cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution, the doing of that which can be done in virtue only of the possession of such a power. The arrangement of the Constitution and the emphatic words in which the three powers are vested ... combine with the careful and elaborate provisions constituting or defining the repositories of the respective powers to provide

25 RR Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 194.

26 See N Aroney, et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 556.

27 CP Lucas (ed), *Lord Durham's Report of the Affairs of British North America* (Clarendon, 1912) vol 2, 263, 298-9, 327.

28 Quoted in J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 703-4.

29 Section 64 of the Constitution.

evidence of the intention with which the powers were apportioned and the organs of government separated and described.³⁰

The suggestion, however, was resisted. ‘It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth’, Justice Dixon went on to say, but ‘[t]he existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law’ according to which ‘much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorised.’³¹

Writing extra-judicially five years later, Sir Owen Dixon gave the following candid assessment of the policy choice which the High Court had made:

The failure of the doctrine of the separation of the powers of government to achieve a full legal operation here is probably fortunate. Its failure to do so may be ascribed perhaps to mere judicial incredulity. For it seemed unbelievable that the executive should be forbidden to carry on the practice of legislation by regulation – the most conspicuous legal activity of a modern government. What otherwise might have been treated as a rigid requirement of the supreme law has been given the appearance of the mere categories of a draftsman. Legal symmetry gave way to common sense.³²

Any notion that an exercise of non-statutory executive power by an officer or agency of the Executive Government might lie beyond the scope of legislative control by the Parliament was dispelled by the High Court in 1990. ‘Whatever the scope of the executive power of the Commonwealth might otherwise be’, the Court then unanimously declared, ‘it is susceptible of control by statute.’³³ ‘Such is the theoretical dominance of the legislature in Australia’, Sir Harry Gibbs had said in 1987, ‘that it has never even been suggested that legislation might infringe the executive power.’³⁴

Nor has it ever been suggested that the structural arrangement of Chapters I and II of the Constitution inhibits the Parliament from creating agencies, with responsibilities for executing Commonwealth laws, which sit outside of Chapter II. Quasi-autonomous national government organisations were a feature of Australian public administration from the outset.³⁵ There has never been any suggestion that the Parliament cannot create agencies with oversight of the exercise of executive functions which are answerable directly to the Parliament. The office of the Auditor-General, established in 1901,³⁶ is the paradigm.

30 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 96.

31 *Ibid*, 101-2.

32 O Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 606.

33 *Brown v West* (1990) 169 CLR 195, 202.

34 H Gibbs, ‘The Separation of Powers – A Comparison’ (1987) 17 *Federal Law Review* 151, 156.

35 G Sawyer, ‘Ministerial Responsibility and Quangos’ (1983) 42 *Australian Journal of Public Administration* 73.

36 *Audit Act 1901* (Cth). See further *Auditor-General Act 1997* (Cth)

The impact of Chapter III of the Constitution has been singularly different. Chapter III was held by the High Court in 1918 to prevent the conferral by the Parliament of the judicial power of the Commonwealth other than on a court,³⁷ and in 1956 to prevent the conferral by the Commonwealth on a court of any function that is not within or incidental to the judicial power of the Commonwealth.³⁸ The Privy Council boldly proclaimed in 1957 their doubt whether, 'had Locke and Montesquieu never lived nor the Constitution of the United States ever be framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached.'³⁹ But it is impossible to construe the Constitution on the assumption that Locke and Montesquieu had never lived or that the Constitution of the United States had never been framed, as Justice Windeyer remarked in 1970,⁴⁰ and ascription of the separation of the judicial power of the Commonwealth that had by then come to be acknowledged in the case law to the text and structure of the Constitution is contradicted not only by the course of our constitutional history but by the text and structure of the Constitution itself.

Chapter IV of the Constitution contains within it a provision which states, in terms as categorical as anything contained in any of the preceding three chapters, that '[t]here shall be an Inter-State Commission',⁴¹ which is to be constituted by members appointed for a period of seven years but otherwise having the same security of tenure as any court created by the Parliament,⁴² which is to have 'such powers of adjudication and administration' as the Parliament might deem necessary for the execution and maintenance of provisions of the Constitution relating to trade or commerce,⁴³ and from which an appeal on a question of law is to lie to the High Court.⁴⁴ The Commission was in fact brought into existence in 1912 by Commonwealth legislation which attempted to confer on it jurisdiction to adjudicate a matter arising as to a contravention by any State of any provision of the Constitution relating to trade or commerce.⁴⁵ Constitutional theory triumphed over the constitutional text in 1915, however, when the High Court by majority, as Professor Colin Howard would later put it, decided that the constitutional provision mandating the establishment of the Inter-State Commission 'did not mean what it said'.⁴⁶ The thought of 'a curiously anomalous body which might at once be an executive department and a Court of law'⁴⁷ having jurisdiction to determine that legislative or executive action was unconstitutional was too much for the majority to contemplate. The powers of 'adjudication' which the Parliament had the option of conferring on the Commission did not extend to 'judicial' powers to determine rights and liabilities such as might be conferred on a court under Chapter III but were instead limited to 'quasi-judicial' powers of an administrative

37 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

38 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

39 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 540.

40 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 389-90.

41 Section 101 of the Constitution.

42 *Ibid*, s 103.

43 *Ibid*, s 101.

44 *Ibid*, s 73(iii).

45 *Inter-State Commission Act 1912* (Cth).

46 C Howard, *Australia's Constitution: What It Means & How It Works* (Penguin Books, revised ed, 1985) 40.

47 *New South Wales v Commonwealth* (1915) 20 CLR 54, 109.

nature such as might be conferred on the Commissioner of Patents or the Collector of Customs. In short, Chapter III trumped Chapter IV. Channelling Professor HW Arthurs,⁴⁸ Dr Oscar Roos has put it in stronger terms in saying that ‘legal pluralism’ lost out to ‘legal formalist ideology’.⁴⁹ The jurisdiction purportedly conferred on the Commission was invalid. Mortally wounded, the Inter-State Commission lingered on as a purely investigatory and advisory body for another few years then faded away. It was resurrected as an investigatory and advisory body by Commonwealth legislation in 1983, in an event triumphantly proclaimed by Professor Michael Coper to be the second coming of the fourth arm.⁵⁰ But, as an example of what can happen to a body that does not have the constitutional protection of a fourth arm of government, it was dissolved and its functions were subsumed into those of the newly created Industry Commission in 1989.⁵¹

In spite of as much as because of the text and structure of its first four Chapters, the separation of powers that has prevailed under the Australian Constitution has accordingly been the separation of the judicial power of the Commonwealth. And, perhaps ironically, given the minimal separation of legislative and executive power, the degree of separation of judicial power under the Australian Constitution has been considerably more extreme than that which has been understood since the bedding down of the role of administrative agencies during the era of the ‘New Deal’ to prevail under the Constitution of the United States. We do not in Australia have ‘Administrative Law Judges’ or ‘Chapter I Courts’.

Assignment of the conclusive determination of a controversy about existing legal rights in a compulsory process exclusively to the judicial power has meant that the separation of the province of judicial power of the Commonwealth has in practice had profound consequences for the structuring of dispute resolution processes across a range of subject-matters of Commonwealth concern⁵² as well as for the viability of a self-contained system of military justice.⁵³ But while it would be going too far to say that the separation of the judicial power of the Commonwealth has not had any impact on the structuring of non-judicial accountability bodies of the kind to which Professor McMillan was referring in his 2010 article, it would be wrong to describe that impact as a practical impediment to their creation or operation. The separation of judicial power

48 HW Arthurs, ‘*Without the Law*’: *Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985).

49 O Roos, ‘Justice Barton and the Demise of the Inter-State Commission in the *Wheat Case* (1915)’ in A Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 20, 29.

50 M Coper, ‘The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission’ (1989) 63 *Australian Law Journal* 731.

51 See generally S Gageler, ‘Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution’ (2017) 28 *Public Law Review* 205; A Bell, ‘The Elusive Promise of the Inter-State Commission’ in J Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 34.

52 See, eg, *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530; *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1; *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

53 See, eg, *Lane v Morrison* (2009) 239 CLR 230.

has historically stood in the way neither of the discipline of Commonwealth officers⁵⁴ nor of the administrative review of their administrative actions. The Kerr Committee in 1971 proceeded comfortably on the assumption that ‘the Commonwealth Parliament has the necessary legislative power to provide for the making of administrative decisions on matters falling within the heads of legislative power committed to it by the Constitution and to provide for a review of those decisions either by the courts or by administrative tribunals.’⁵⁵

The Parliament having power to impose duties or visit liabilities on the Commonwealth or its agencies, I do not understand it ever to have been suggested that the separation of the judicial power of the Commonwealth prevents the Parliament from imposing a statutory duty or visiting a statutory liability of that nature by reference to an opinion formed by a non-judicial body that a Commonwealth officer or Commonwealth agency has acted in breach of some legal obligation or administrative requirement.

Professor McMillan’s concern in his 2010 article was accordingly not with the real though relevantly limited constraining effect that the doctrine of separation of powers under the Australian Constitution might have on institutional design. The gravamen of his concern was rather with what he perceived to be the potentially inhibiting effect of the theoretical justification for the separation of the judicial power of the Commonwealth on recognition of the worth of non-judicial accountability bodies.

What was described as long ago as 1910 by Professor Harrison Moore as the ‘great cleavage’⁵⁶ between the judicial power and the legislative and executive powers of the Commonwealth was then and for a long time afterwards explained at least principally to be a concomitant of the federal nature of the Constitution. The separateness of the judicial power of the Commonwealth was explained primarily by reference to the need for that power to be available to determine justiciable controversies between the Commonwealth and the States concerning the operation of the Constitution itself.⁵⁷ There were only rare allusions to the libertarian legacy of Montesquieu.⁵⁸

Beginning in the 1970s, gaining pace in the 1990s, and continuing into the 2000s, the separateness of the judicial power of the Commonwealth came more prominently to be justified by the need for that power to be available to determine controversies between the Commonwealth and an individual about the legality of Commonwealth administrative action. Drawing directly on Montesquieu and Blackstone, the separation of the judicial function came to be identified as serving liberty, and liberty itself came to be recognised as a constitutional objective.⁵⁹ Correspondingly, drawing on the tradition of courts enforcing the ‘rule of law’ which Professors Jaffe and Henderson had

54 *R v White; Ex parte Byrnes* (1963) 109 CLR 665.

55 Commonwealth Administrative Review Committee, *Report* (1971) 21 [60].

56 WH Moore, *The Constitution of the Commonwealth of Australia* (Charles F Maxwell, 2nd ed, 1910) 101.

57 See, eg, *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 267-8, 276.

58 See, eg, *R v Davison* (1954) 90 CLR 353, 381.

59 See, eg, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 390; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 579-80; *Polyukovich v Commonwealth* (1991) 172 CLR 501, 606; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11-12.

traced to the 16th century, judicial review of administrative action came increasingly to be seen as the means by which a court performed a constitutional duty of holding the executive to account for an exercise of power reposed in it by the legislature.⁶⁰ Four members of the High Court in 2000 adopted as appropriate description of the Australian constitutional setting language of Professor Jaffe to the effect that ‘there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures.’⁶¹

The emergence of the ‘individual liberty’ justification for the separation of judicial power and with it the ‘rule of law’ justification for the undertaking in the exercise of separated judicial power of judicial review of administrative action was accompanied by a reinvigoration of the constitutionally entrenched original jurisdiction of the High Court in matters in which writs of mandamus or prohibition or injunctions are sought against officers of the Commonwealth, culminating in recognition in 2003 of that jurisdiction operating as a minimum guarantee of judicial review of administrative action for jurisdictional error.⁶² That constitutionally entrenched original jurisdiction came in that process to be described as providing ‘the mechanism by which the Executive is subjected to the rule of law’⁶³ or as ‘the means by which the rule of law is upheld throughout the Commonwealth.’⁶⁴

Although he couched his argument in terms of separation of powers, it was against the emergence of that much enlarged justification for the separation of judicial power and for judicial review of administrative action that Professor McMillan in 2010 was principally reacting. Its field of vision was, to him, too narrow, and its blinkered approach, to him, carried the capacity to ride roughshod over a complex and delicate set of institutional arrangements which were in practice serving to enhance executive accountability outside the court system.

Potential to impact negatively on recognition of the worth of non-judicial accountability bodies no doubt lay in some of the judicial rhetoric that had been employed. To describe the independence of the judiciary as ‘the bulwark of the constitution against encroachment whether by the legislature or by the executive’⁶⁵ or as ‘the bulwark of freedom,’⁶⁶ for example, might be thought to diminish non-judicial accountability bodies were the definite article in each description to be understood to suggest exclusivity and thereby to imply that the judicial branch of government can and does provide the first and only line of defence against executive overreach. Hyperbole can have collateral consequences and courts are not immune from overstatement in the language they employ to explain their own role.

60 See, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6.

61 LL Jaffe, *Judicial Control of Administrative Action* (Little Brown, 1965) 321, quoted in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153 [43].

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

63 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 415 [64].

64 *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145, 147 [3].

65 For example, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 13, quoting *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 540-1.

66 For example, *Nicholas v The Queen* (1998) 193 CLR 173, 231 [142], quoting *R v Quim; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11.

Looking beyond the judicial rhetoric, however, I find it difficult to share Professor McMillan's motivating concern. That is for reasons which go beyond the mere fact that I am a judge.

With the amplified justification for the separation of the judicial power of the Commonwealth and for the judicial review of Commonwealth administrative action came also a sharpening of the focus of judicial review and a reigning in of its potential ambitions. As Professor Peter Cane has explained in his recent comparative study, in Australia (unlike in the United States), dilution of judicial power has been resisted (like in England), but dilution of judicial power had been resisted by narrowing the province of judicial power (unlike in England).⁶⁷ The corollary of the constitutional underpinning of judicial review of administrative action has been that the separated judiciary has relinquished any claim to be the monopoly provider of 'administrative justice'.⁶⁸

In language first used by Justice Brennan in 1990 and repeated many times since, the jurisdiction of a court exercising judicial review of administrative action has come to be accepted to be limited to declaring and enforcing the law which determines the limits and governs the exercise of the administrator's power. Curing administrative injustice or error might sometimes be the consequence of judicial review of administrative action but could never be its purpose.⁶⁹ And in the context of remembering 'that the judicature is but one of the three co-ordinate branches of government', a court exercising judicial review of administrative action has come to be enjoined to remember 'that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual', that the court was 'not equipped to evaluate the policy considerations which properly bear on such decisions' and that the 'adversary system [was not] ideally suited to the doing of administrative justice'.⁷⁰

To recognise judicial review of administrative action for jurisdictional error as a constitutional baseline is not to oppose the creation, or to disparage the operation, of any non-judicial body capable of providing a convenient forum for the resolution of a dispute about the propriety of executive action including on grounds which might be thought to overlap with legal grounds which might warrant judicial review. Indeed, an established basis for a court to exercise discretionary restraint in the judicial review of administrative action is where the applicant for judicial review has an adequate alternative remedy.

When that limited and essentially residual character of judicial review of administrative action is borne in mind, what ought to be apparent is that the separated judicial branch of government has neither the mandate nor the means nor the determination to act in competition with, or in diminution of, non-judicial accountability bodies charged with what might be described as the "extra-legal" components of integrity.⁷¹

67 P Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) esp 475-501.

68 Cf R Creyke 'Administrative Justice – Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705.

69 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

70 *Ibid*, 37.

71 L Burton and G Williams, 'The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers' (2012) 38(3) *Monash University Law Review* 1, 24.

Moreover, it seems to me that the constitutional entrenchment of a minimum guarantee of judicial review of administrative action for jurisdictional error, when properly understood, has the potential to enhance recognition of the worth of non-judicial accountability by providing an answer to the inevitable question of who guards the guardians. To adapt language used by Justice Dixon when he famously introduced the ‘rule of law’ into Australian constitutional discourse, history, and not only ancient history, shows that threats to institutions designed to enhance governmental accountability can come from within.⁷² The availability of judicial review can provide a level of assurance that a non-judicial accountability body will confine itself within the scope of the statutory functions it is authorised to perform. Perhaps more subtly, but nevertheless importantly, the availability of judicial review can guard against the risk that is faced by any person or body exercising specialised functions of developing what Professor Jaffe once described as ‘distorted positions’.⁷³

The reality is that, as Professor McMillan himself as rightly done much to publicise,⁷⁴ non-judicial accountability bodies have proliferated during the same period as the ‘individual liberty’ justification for the separation of judicial power and the ‘rule of law’ justification for judicial review of administrative action have come to be articulated. The importance of theory I accept and theorisation about the roles of non-judicial accountability bodies and their relationship to each other and to other arms of government I encourage.⁷⁵ What I question is the need for that theorisation to occur in Australia as an antidote to the constitutional separation of the judicial power of the Commonwealth.

72 Cf *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187.

73 LL Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70 *Harvard Law Review* 953, 963, quoted in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 570 [64].

74 See, eg, J McMillan and I Carnell, ‘Administrative Law Evolution: Independent Complaint and Review Agencies’ (2010) 59 *Admin Review* 30.

75 A helpful survey of theoretical perspectives is found in AJ Brown, ‘The Integrity Branch: A “System”, an “Industry”, or a Sensible Emerging Fourth Arm of Government?’ in M Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 301.