

How the Australian Constitutional Context Shapes the Role of the Judicial Branch of Government

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Introduction

The subject-matter of this presentation was suggested to me by your Chief Justice, Dame Helen Winkelmann. Her intention, I suspect, was to encourage me to engage in rare self-reflection. Doing my best to fulfil my brief to explain how the constitutional context in Australia shapes the role of the judicial branch of government in Australia, I will divide my presentation into three parts. First, I will outline the Australian constitutional context. Second, I will refer to some of the most pertinent structural implications of that constitutional context. Third, I will reflect on some of the consequences of those implications for how the judicial branch of government functions in Australia.

I will attempt to do all of that from a comparative perspective, taking as my starting-point Chief Justice Winkelmann's illuminating Lucinda Lecture, delivered at Monash University Law School last year. In that lecture, her Honour described constitutional development and divergence in Australia and New Zealand in terms of "continental drift".¹

As is implicit in that description, there was a time when our constitutional arrangements were essentially aligned. If we compared the constitutional arrangements in Australia and New Zealand at the end of the nineteenth century (and if we passed over the then latent or suppressed significance of the Treaty of Waitangi), we would have seen little difference between them.

* Chief Justice of Australia. This is a slightly revised version of a lecture given at the New Zealand All Courts Conference on 20 July 2026. My thanks to Tristan Taylor and Tiger Lin for their assistance in its preparation.

¹ Winkelmann, "Continental Drift: Constitutional Development and Divergence in New Zealand and Australia" (Lucinda Lecture, Monash University, 21 August 2025).

Spanning the continent of Australia were five separate British colonies. The island of Tasmania was another. New Zealand was yet another British colony. All seven of these colonies were co-ordinate parts of the one British Empire. All owed allegiance to the one Imperial Crown. Like the colonies of Tasmania, Victoria, Queensland and South Australia, the colony of New Zealand had even earlier been part of the colony of New South Wales.

Each of these seven British colonies by the end of the nineteenth century enjoyed essentially the same measure of self-government in the distinctive British colonial form then known as “responsible government”. Each had its own flexible colonial constitution derived from an empowering Act of the Imperial Parliament. Each had its own bicameral legislature which was empowered in accordance with its colonial constitution to make laws for the “peace, order and Good Government of the Colony”. Each had an executive government headed by a Governor who was appointed to represent the Imperial Crown but who in practice acted on the advice of local Ministers who had the confidence of the popularly elected lower house of the legislature. Each had its own locally constituted and appointed judiciary, at the apex of which was its own Supreme Court.

Overarching these geographically siloed parallel colonial judicial hierarchies was common provision for appeals from colonial Supreme Courts to the Privy Council in London. The policy of the Privy Council at the time and for a long time to come was that the law in all parts of the British Empire was to be as nearly as possible the same. The seven colonial Supreme Courts in Australia and New Zealand were thereby induced by the prospect of correction on appeal to produce standardised judicial outcomes by a standardised judicial methodology.

What then happened to break from this picture of colonial antipodean harmony and conformity? What happened, to use Chief Justice Winkelmann’s language, was that Australia had a “constitutional moment”. On 1 January 1901, the “people” of the Australian colonies, having agreed by referenda to “unite in one indissoluble Federal Commonwealth”, were as a matter of

law “united in a Federal Commonwealth under the name of the Commonwealth of Australia” by paramount force of the *Commonwealth of Australia Constitution Act 1900* (Imp) enacted by the Imperial Parliament and signed into law by Queen Victoria.

In that constitutional moment and by paramount force of that Imperial Act: the new polity of the Commonwealth of Australia came into existence; the Australian Constitution, as agreed to by the people of each former colony and as set out in the schedule to that Imperial Act, took effect; each former colony was transformed into a “State”;² the “people” of each State also became the “people” of the Commonwealth;³ and the Australian Constitution and laws thereafter to be made by the Commonwealth Parliament under the Australian Constitution were declared to be “binding on the courts, judges, and people of every State and of every part of the Commonwealth”.⁴

New Zealand had not been ignored in the build-up to that constitutional moment. It had been invited to join. A placeholder was even kept for it in the reference to “the States” in the Imperial Act. The placeholder is still there to be seen in the unamended text.⁵ New Zealand made a decision not to join; choosing instead, in the language of Chief Justice Winkelmann (echoing historian James Belich) to “go it alone”.⁶

The constitutional choice New Zealand then made was to continue the model of colonial constitutionalism that had previously existed. According to Chief Justice Winkelmann, the constitutional development of New Zealand has not since involved New Zealand having an equivalent constitutional moment of its own.

² Section 6 of the *Commonwealth of Australia Constitution Act 1900* (Imp).

³ Section 3 of the *Commonwealth of Australia Constitution Act 1900* (Imp).

⁴ Section 5 of the *Commonwealth of Australia Constitution Act 1900* (Imp).

⁵ See covering clause 6 of the Australian Constitution.

⁶ Winkelmann, “Continental Drift: Constitutional Development and Divergence in New Zealand and Australia” (Lucinda Lecture, Monash University, 21 August 2025), referring to Belich, *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Allen Lane, 2001) at 46.

So, what has the judicial branch of government in New Zealand missed out on? Asking the same question another way, what has it avoided?

The Australian constitutional context

Here I turn to outline the Australian constitutional context so far as it bears on the structure and functioning of the judicial branch of government in Australia. The Australian constitutional context is inherently complex. I will do my best to make my outline of it no more complicated than necessary. I will not attempt to explain the constitutional status of the Australian Capital Territory and the Northern Territory.

Nor will I chronicle the evolution of Australian nationhood after 1901 beyond noting that Australia adopted the *Statute of Westminster 1931* (Imp) in 1942 with retrospective effect to 1939,⁷ just slightly before New Zealand did in 1947,⁸ and that the final vestiges of colonial constitutional ties between Australia and the United Kingdom – relevantly including the last remnants of appeals from Australian courts to the Privy Council – were permanently removed by the *Australia Act 1986* (Cth). I will observe only that, if Australia could be said to have had a second constitutional moment after 1 January 1901, it would have been on 3 March 1986, just over 40 years ago, when the *Australia Act* entered into force. The Australian Constitution had become binding in Australia in 1901 because it had been enacted to be higher law in Australia by the Imperial Parliament. The Australian Constitution has remained binding as higher law in Australia since 1986 for the simple reason that it has remained “the constitutive instrument that creates the Commonwealth and defines the structure and powers of the organs of government”.⁹

The unquestioned status of the Australian Constitution as higher law means first that the Australian Constitution prevails over inconsistent Commonwealth and State legislative and

⁷ See *Statute of Westminster Adoption Act 1942* (Cth).

⁸ See *Statute of Westminster Adoption Act 1947* (NZ).

⁹ *First Report of the Constitutional Commission* (1988), vol 1 at 187. See also Zines, “The Sovereignty of the People” in Coper and Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91 at 93.

executive action and second that in so prevailing the Australian Constitution is judicially enforceable. Critically, it is because of the status of the Australian Constitution as higher law that “[i]t is emphatically the province and duty”¹⁰ of the judicial branch of government to say what the Australian Constitution means and to say whether the limits it sets on the powers of the legislative and executive branches of government of the Commonwealth and of the States have been exceeded.

The explanation I have just given of the constitutional function of the judicial branch of government in Australia is an adaptation of the explanation famously given by Chief Justice Marshall of the justification for the judicial review of legislative action under the Constitution of the United States in the great case of *Marbury v Madison*.¹¹ Chief Justice Marshall’s explanation of the justification for the judicial review of legislative action was known to the framers of the Australian Constitution and its application in the context of the Australian Constitution has always been regarded as “axiomatic”.¹² I will return to it later when I come to reflect on the Australian approach to the judicial review of executive action.

What the Australian Constitution has to say about the existence and structure of the judicial branch of government is, to put it shortly: quite a lot. Again, I will stick to the main outline, seeking to avoid unnecessary complexity.

As a federal constitution, the Australian Constitution draws a clear and rigid distinction between State courts (including State Supreme Courts), on the one hand, and federal courts (including the High Court of Australia which it refers to as the “Federal Supreme Court”) on the other hand. On the one hand, it assumes that State courts (including State Supreme Courts) will continue to exist by force of State legislation enacted by State Parliaments under former colonial constitutions which have been transmogrified into and sustained as State Constitutions by force

¹⁰ *Marbury v Madison* (1803) 5 US 137 at 177.

¹¹ (1803) 5 US 137 at 177.

¹² *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262.

of the Commonwealth Constitution.¹³ On the other hand, it not only requires the Commonwealth Parliament to establish the High Court of Australia (something which occurred with the enactment of the *Judiciary Act 1903* (Cth)) but also empowers the Commonwealth Parliament by Commonwealth legislation to create other federal courts (which currently comprise the Federal Court of Australia which was established in 1976 and Divisions 1 and 2 of the Federal Circuit and Family Court of Australia which were reconstituted in 2021).¹⁴

That said, a unique aspect of Australian federalism is that the Australian Constitution provides for the functional integration of State courts and federal courts into a unified national judicial branch of government. It does so in two complementary ways. The first is in the provision that it makes for the “judicial power of the Commonwealth” to be vested not only in the High Court and in such other federal courts as the Commonwealth Parliament creates but also in such courts, including State courts, as the Commonwealth Parliament chooses to invest with such “federal jurisdiction”.¹⁵ The second is in the provision that it makes for the High Court to have appellate jurisdiction, to hear and determine appeals from any other federal court or court exercising federal jurisdiction or from the Supreme Court of any State whether or not that Supreme Court is exercising federal jurisdiction.¹⁶ With the abolition of appeals to the Privy Council in 1986, the constitutionally entrenched appellate jurisdiction of the High Court became a constitutionally entrenched ultimate appellate jurisdiction.

Of some further importance in describing the Australian constitutional context is that, in addition to its constitutionally entrenched ultimate appellate jurisdiction, the High Court has constitutionally entrenched original jurisdiction in specified categories of justiciable controversies. One of those categories is expressed in terms of any matter “in which the Commonwealth, or a

¹³ See ss 106, 107 and 108 of the Australian Constitution.

¹⁴ See s 71 of the Australian Constitution.

¹⁵ See ss 71 and 77(iii) of the Australian Constitution.

¹⁶ Section 73 of the Australian Constitution.

person suing or being sued on behalf of the Commonwealth, is a party”.¹⁷ Another is expressed in terms of any matter “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”.¹⁸ Those constitutionally entrenched categories of original jurisdiction of the High Court are not infrequently invoked to provide a swift and final judicial determination of the constitutional and statutory validity of Commonwealth legislative or executive action.

The one further feature of the Australian constitutional context which I will mention as bearing on the functioning of the judicial branch of government in Australia is the absence of an Australian bill of rights. This was not an unthinking omission on the part of the framers of the Australian Constitution but rather a considered choice. Explaining that choice, Professor Harrison Moore in 1901 identified the “great underlying principle” of the Australian Constitution to have been “that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power”.¹⁹ Although statutory charters of rights along the lines of the *Bill of Rights Act 1990* (NZ) have since been enacted in Victoria,²⁰ the Australian Capital Territory²¹ and Queensland,²² as Chief Justice Winkelmann noted in her Lucinda Lecture, “to this day Australia has no national human rights framework document”.²³

Structural implications

The structural implications of these and other aspects of the Australian constitutional context have been hammered out in the jurisprudence of the High Court over more than a century of intense constitutional disputation.

¹⁷ Section 75(iii) of the Australian Constitution.

¹⁸ Section 75(v) of the Australian Constitution.

¹⁹ Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) at 329.

²⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

²¹ *Human Rights Act 2004* (ACT).

²² *Human Rights Act 2019* (Qld).

²³ Winkelmann, “Continental Drift: Constitutional Development and Divergence in New Zealand and Australia” (Lucinda Lecture, Monash University, 21 August 2025).

Bearing most significantly on the institutional competence and institutional design of the judicial branch of government in Australia at the Commonwealth level is undoubtedly the separation of the judicial power of the Commonwealth from the legislative and executive powers of the Commonwealth.

First, the separation of the judicial power of the Commonwealth has been interpreted since 1915 to prohibit the conferral by the Commonwealth Parliament of judicial power on a person or body that is not a court.²⁴ Second, the separation of the judicial power of the Commonwealth has been interpreted since 1956 to prohibit the conferral by the Commonwealth Parliament on any court of any function that is not within judicial power or incidental to judicial power.²⁵ In 1996 a derivative implication was recognised as precluding a State Parliament from conferring on a State court a function or power that would substantially impair the court's institutional integrity and thereby impair its capacity to exercise such judicial power as might be invested in it by the Commonwealth Parliament.²⁶

"Judicial power" has always been understood to defy exhaustive definition but to include at its core what has been described as the "unique and essential function" of the judicial branch of government. That is the function of "the quelling of ... [justiciable] controversies [including those between the executive and the individual as to life or liberty] by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion".²⁷

This constitutionally required separation of Commonwealth judicial power can be seen, for example, in the design of the system of review of administrative decisions made under Commonwealth legislation introduced by the *Administrative Appeals Tribunal Act 1975* (Cth) and

²⁴ *New South Wales v The Commonwealth* (1915) 20 CLR 54. In 2018 a derivative implication was recognised as precluding a State Parliament from conferring judicial power with respect to any matter of a description in s 75 or s 76 of the Constitution on a person or body that is not a court: *Burns v Corbett* (2018) 265 CLR 304.

²⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 289. See also *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152.

²⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. See also *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40].

²⁷ *Fencott v Muller* (1983) 152 CLR 570 at 608. See also *Rizq v Western Australia* (2017) 262 CLR 1 at 23 [52].

continued by the *Administrative Review Tribunal Act 2024* (Cth). The function of the Tribunal is confined to the strictly administrative function of standing in the shoes of an administrative decision-maker and remaking the decision on the merits. The function of the Federal Court is confined to the strictly judicial function of hearing and determining an appeal from the Tribunal on a question of law.²⁸

A concern to uphold the same constitutionally required separation of Commonwealth judicial power underlay the scepticism expressed by members of the High Court in a case in 2011 about the consistency of the “dialogue” model of human rights adjudication with the Australian Constitution and, in particular, about the capacity of the Supreme Court of Victoria to issue a declaration of inconsistent interpretation under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) when adjudicating a matter in the exercise of federal jurisdiction.²⁹

Underpinning the capacity of the High Court to engage in the judicial review of Commonwealth executive action is its constitutionally entrenched original jurisdiction to which I have referred in any matter “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. The existence and scope of that jurisdiction has been understood since at least 1945 to render it “quite impossible” for the Commonwealth Parliament “to impose limits upon the ... 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 [the High Court] of authority to restrain the invalid action of the ... body by prohibition”.³⁰ The constitutionally entrenched jurisdiction was described more expansively in the High Court in 2003 as “a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them”, it then being explained that “[t]he centrality, and protective purpose, of the jurisdiction ... in that regard places significant barriers in

²⁸ See previously s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) and now s 172 of the *Administrative Review Tribunal Act 2024* (Cth).

²⁹ *Momcilovic v The Queen* (2011) 245 CLR 1.

³⁰ *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616.

the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action”.³¹

Since 2010 a functionally similar implication has been recognised to arise at the State level. The constitutional entrenchment of the appellate jurisdiction of the High Court to hear and determine an appeal from a State Supreme Court has been understood to combine with recognition of a “defining characteristic” of a State Supreme Court having been and remaining its power to determine and enforce “the limits on the exercise of State executive and judicial power by persons and bodies other than [the Supreme Court]” exercisable through “the grant of prohibition, certiorari and mandamus (and habeas corpus)”³² to render it “equally impossible for a State Parliament to impose limits upon the administrative or 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 the Supreme Court of that State of authority to declare and enforce the limits it has set”.³³

The combined effect of these implications as to the constitutionally entrenched original jurisdiction of the High Court to review Commonwealth executive action and the constitutionally entrenched jurisdiction of a State Supreme Court to review State executive action is that it can now confidently be said in Australia that “all power of government is limited by law” and that “[w]ithin the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies”.³⁴ Within the Australian constitutional context, there can be no “islands of power immune from supervision and restraint”.³⁵

³¹ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [104].

³² *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [98]-[99].

³³ *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 100 [35].

³⁴ *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

³⁵ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99].

Functional implications

That brings me to the final, more reflective and somewhat shorter part of my presentation. How might the constitutional context and these structural implications be thought to have affected the actual functioning of the judicial branch of government in Australia?

Undoubtedly, the constitutional context has contributed to the distinctive – a New Zealander would say “exceptionalist”³⁶ – Australian approach to the judicial review of administrative action which can be seen in retrospect to have developed into a fairly consistent body of doctrine over the last century and to have been strongly and repeatedly articulated over the last 40 years. The canonical description of the province and function of a court undertaking the judicial review of administrative action in Australia is now taken to be that given by Sir Gerard Brennan when a Justice of the High Court in a case decided in 1990. The description drew directly on the explanation, to which I have earlier referred, given by Chief Justice Marshall in *Marbury v Madison* of the province and function of a court undertaking the judicial review of legislative action.

Sir Gerard Brennan said this:³⁷

“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.”

The explanation continued:

“The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.”

³⁶ Taggart, “‘Australian Exceptionalism’ in Judicial Review” (2008) 36 *Federal Law Review* 1.

³⁷ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

That was, and unapologetically remains, the conception of judicial review of administrative action which prevails in Australia. It is a conception that is at once narrow, strong and constitutionally grounded. Applied to the judicial review of a purported exercise of executive authority conferred by statute, the judicial review of administrative action is all about ensuring compliance with the express and implied legislated limits of that executive authority in the same way that judicial review of legislative action is all about ensuring compliance with the express and implied constitutional limits of legislative authority. The two forms of judicial review involve the consistent application by the judicial branch of government of the same root distinction “between acts that are unauthorised by law and acts that are authorised”.³⁸

Maintenance of that root distinction between acts that are unauthorised by law and acts that are authorised is why the traditional concepts of “jurisdictional error” and resultant “invalidity” have remained central to the understanding of judicial review of administrative action in Australia. As explained in the High Court just five years ago:³⁹

“The constitutionally entrenched jurisdiction of a court to engage in judicial review of [a decision made by an executive officer whose decision-making authority is conferred by statute], where that jurisdiction is regularly invoked, is no more and no less than to ensure that the decision-maker stays within the limits of the decision-making authority conferred by the statute through declaration and enforcement of the law that sets those limits. To say that the decision is affected by jurisdictional error is to say no more and no less than that the decision-maker exceeded the limits of the decision-making authority conferred by the statute in making the decision. The decision for that reason lacks statutory force.”

Moving beyond judicial review, the Australian Constitution has come to be recognised over the past 40 years since the abolition of appeals to the Privy Council to provide the framework within which the common law of Australia, including the common law of statutory interpretation,

³⁸ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 [25], quoting Selway, “The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues” (2002) 30 *Federal Law Review* 217 at 234.

³⁹ *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 520-521 [29].

must be developed and with which the common law of Australia must conform.⁴⁰ Concepts and principles of statutory interpretation (including the concept of “legislative intention” and the so-called “principle of legality”) have come to be conceived of and explained at a high level as expressions of the “constitutional relationship” between the legislative and judicial branches of government.⁴¹

The acceptance of the Constitution as the source of the authority of the common law of Australia has also had the consequence that notions of “common law constitutionalism” that can be found in some academic⁴² and judicial writing⁴³ in the United Kingdom, and in several judgments of Sir Robin Cooke in New Zealand,⁴⁴ have not gained traction in Australia.⁴⁵

More generally, it can fairly be observed that the Australian constitutional context has intensified certain innate tendencies of the judicial mind that are perhaps more evident in Australia than in some other jurisdictions including New Zealand. One is an acceptance of complexity. Another is a propensity to approach a range of novel legal issues rather conservatively – the circumscribed nature of the judicial power that is being exercised operating to circumscribe the perception of the legitimate scope of the judicial role.

Conclusion

The Australian experience can be seen as exhibiting one of the characteristics identified by Albert Venn Dicey in the late nineteenth century as an indicium of federalism. “Federalism”, wrote

⁴⁰ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 and *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 566 [44].

⁴¹ *Zheng v Cai* (2009) 239 CLR 446 at 455 [28].

⁴² eg Woolf, “Droit Public – English Style” [1995] *Public Law* 57; Laws, “Law and Democracy” [1995] *Public Law* 72; Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001); Poole, “Questioning Common Law Constitutionalism” (2005) 25 *Legal Studies* 142.

⁴³ See *R (Jackson) v Attorney General* [2006] 1 AC 262 at 302-303 [102] and *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 at 910-913 [42]-[51].

⁴⁴ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121.

⁴⁵ *Momcilovic v The Queen* (2011) 245 CLR 1 at 46 [43] fn 217, [562]; *South Australia v Totani* (2010) 242 CLR 1 at 29 [31]; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14]; cf *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.

Dicey, means “legalism”, which he defined in part to mean “the predominance of the judiciary in the constitution”.⁴⁶

Without question, the constitutional context in Australia has shaped and will continue to shape the role of the judicial branch of government in Australia. To explain exactly how is not easy. Faithful to the brief given to me by your Chief Justice, I have done my best to provide you with an approximation.

⁴⁶ Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) at 175.