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The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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CONSTITUTION AS CATALYST: DIFFERENT PATHS WITHIN AUSTRALASIAN ADMINISTRATIVE LAW

Cheryl Saunders*

This article originally was written in honour of the memory of Lord Cooke. At one level it seeks to identify the principal differences between judicial review in New Zealand and Australia and to explain how and why the Australian position is affected by the Australian Constitution. To this extent, the article also demonstrates that Australia is one of a growing number of states in which administrative law is constitutionalised to a significant degree, although in Australia this is a consequence of the organisation of public power, rather than the product of a right to administrative justice. More fundamentally, however, the article uses a comparison of judicial review in New Zealand and Australia as a case study through which to explore several themes in comparative public law. On the face of it, New Zealand and Australia are similar countries with broadly similar systems of public law that might be expected to converge further, given the close links between them and the effects of globalisation. In fact, however, their systems of judicial review have diverged, in matters of important detail, in response to contextual differences between the two countries, of which the Australian Constitution is only one. The article notes that this development in turn has implications for the methodology of the citation of foreign law in administrative law cases, although it should not affect the practice itself, which has enriched the law in both countries and should continue to do so.

I INTRODUCTION

This article originated as the Robin Cooke Lecture in 2011. I knew Lord Cooke a little, although not as well as I should have liked, and I was an admirer. He was a great common lawyer of the kind that I worry may disappear, combining breadth of vision of the common law as a whole with the high technique to apply and develop it in the context of particular cases. In preparing the lecture, I

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revisited his Hamlyn Lectures of 1996 on "The Turning Points of the Common Law".[1] I was struck by their perception and continuing relevance, as well as by the simplicity and engaging wit of his writing style.

The purpose of this article is to identify the somewhat divergent paths taken by the administrative law of New Zealand and Australia and to explore constitutional context as a possible explanation. Insofar as one of those paths involves the enthusiastic retention of jurisdictional error in Australia, in the face of its effective abandonment elsewhere, including in New Zealand, I am conscious that Lord Cooke may not have approved. Indeed, this is obvious from the observations in his final Hamlyn Lecture about the Australian decision in *Craig v South Australia*,[2] delivered the year before, as the foundations for what he described as the Australian "deviation" began to be laid in earnest.[3] On the other hand, as I hope to show, both the scope of jurisdictional error and the purposes for which it is used have evolved considerably in the 16 years since *Craig* was decided. Lord Cooke may well still have disapproved of the means, but I suspect that he would have approved the ends, or at least some of them.

In choosing this topic I was conscious also of the work of another great New Zealand lawyer, my long-time friend and colleague Mike Taggart. Mike published a characteristically hard-hitting and compelling article on Australian exceptionalism in administrative law as recently as 2008.[4] His contribution attracted a flurry of responses, partly in rebuttal, from distinguished Australians.[5] One of these was Sir Anthony Mason, who delivered the Cooke Lecture on a related by-product of the Australian Constitution in 2010.[6]

I do not intend here to go over old ground. The subject-matter of this article is different for at least two reasons. One is that there has been a suite of major administrative law decisions in the last few years, which not only are of interest in their own right but also provide major new insights into the internal logic of the Australian doctrine. Secondly, I take this opportunity to explore the impact of local context on the evolution of public law in different states and the consequences that flow

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1 Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997).

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

3 Lord Cooke of Thorndon "The Liberation of English Public Law" in *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997) 63 at 76.

4 See Michael Taggart "'Australian Exceptionalism' in Judicial Review" (2008) 36 FL Rev 1.

5 See for example Mark Aronson "Process, Quality, and Variable Standards: Responding to an *Agent Provocateur*" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 5; and Anthony Mason "Mike Taggart and Australian Exceptionalism" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 179.

6 Anthony Mason "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (2011) 9 NZJPIL 1.

from this aspect of comparative method for what might loosely be called the common law legal family. The similarities between Australia and New Zealand, generally and with particular reference to law, make the emerging differences in administrative law a useful case study for the purpose.

I begin by explaining more fully the relevance of this study from the standpoint of comparative method. In the next part, I outline the principal differences between the doctrinal building blocks of judicial review in Australia and New Zealand, with suitable caution about my depth of understanding of the latter. In the remainder of the lecture I explore the reasons for the divergence of these systems of judicial review, including the relevance of the Australian Constitution, before attempting to assess the outcome. I foreshadow that the description of the Constitution as a "catalyst" in the title was not chosen lightly and that the Australian scorecard is somewhat mixed.

II COMPARISON

Comparative public law has become fashionable and comparative method is beginning to attract corresponding attention.[7] Comparison has a familiar range of applied uses: to better understand others, to better understand oneself and to identify options to resolve problems and effect change. The context in which an institution, principle or practice is embedded is relevant to effective comparison. Context includes the rest of the legal system but may extend more widely to involve cultural considerations, including history, professional and political attitudes and the social and economic setting.[8] The convergence of public law that often is claimed to be a feature of our time is assumed to simplify the comparative process.[9] To the extent that convergence is occurring, however, it is partial and patchy and may, in some cases, be only skin deep.[10]

Assuming at least a degree of global convergence, the history of public law in common law countries reverses the trend. In the immediate aftermath of empire, administrative law was broadly homogenous throughout the Commonwealth and the potential relevance of local contextual

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7 Early sources include Ran Hirschl "The Question of Case Selection in Comparative Constitutional Law" (2005) 53 Am J Comp L 125; and Cheryl Saunders "Apples, Oranges and Comparative Administrative Law" [2006] Acta Juridica 423.

8 Roger Cotterrell "Law and Culture – Inside and Beyond the Nation State" (2008) 31 Retfærd Nordisk Juridisk Tidsskrift 23.

9 Mark Tushnet "The Inevitable Globalization of Constitutional Law" (2009) 49 Va J Intl L 985; and David S Law "Globalization and the Future of Constitutional Rights" (2008) 102 Nw U L Rev 1277.

10 Cheryl Saunders "The Impact of Internationalization on National Constitutions" in Albert Chen (ed) *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, Cambridge, 2013) (forthcoming).

difference typically was underestimated.[11] Whatever comparative insights may be drawn from the experience of this earlier period, homogeneity has diminished since, with the fragmentation of the common law into distinct national legal systems.[12] Divergence of the principles and practices of administrative law, whether through legislation or judicial interpretation, is inevitable in these circumstances. Arguably it is hastened by a parallel trend, towards the constitutionalisation of administrative law.[13]

This trajectory of common law public law offers an opportunity to comparative lawyers which, when examined from the other end of the telescope, presents a challenge for common law lawyers. The opportunity derives from the unusual pattern of similarity and difference in administrative law between common law states. The cultural differences are much as they always have been: relatively slight between some states, of which Australia and New Zealand are prime examples, and vast between others. In terms of law, however, all of these states still share a great deal.[14] They make similar assumptions about legal goals and values; they employ similar legal terms and concepts; they draw broadly on the same theorists, including AV Dicey; and they use similar legal techniques. And while doctrine now is diversifying, it is doing so from a common base. It should therefore be easier to isolate and evaluate different doctrinal paths to achieve any of the usual ends of comparative law.

The challenge is to grasp what these developments mean for relations within the common law legal family. The challenge applies with particular force to courts that have responsibility for developing the common law, typically with some reference to each other, although it is relevant to other legal actors as well. Doctrinal diversity in administrative law is still treated as something of an aberration, suggesting that, somewhere, there is a true path, if only it could be found. It may of course be right that some paths are superior to others and that a few prove to be a dead end. But

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11 On one view, this is the case in Lord Cooke's Hamlyn Lectures, which refer compendiously to turning points of "the common law": see Cooke, above n 1. Contrast however, Lord Bingham's point that "the common law never did flow in a single broad channel", while acknowledging the generally homogenising effect of the roles of the House of Lords and the Privy Council: Lord Bingham of Cornhill "The Break with the United Kingdom and the Internationalisation of the Common Law" in Peter Cane (ed) *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, Chatswood NSW, 2004) 82 at 82.

12 See Anthony Mason "The Break with the Privy Council and the Internationalisation of the Common Law" in Peter Cane (ed) *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, Chatswood NSW, 2004) 66 at 68–69.

13 Tom Ginsburg "Written Constitutions and the Administrative State: on the Constitutional Character of Administrative Law" in Susan Rose-Ackerman and Peter L Lindseth (eds) *Comparative Administrative Law* (Edward Elgar, Cheltenham, 2010) 117; and Cora Hoexter "The Constitutionalisation and Codification of Judicial Review in South Africa" in Christopher Forsyth and others (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford, 2010) 43.

14 This is evident from the various contributions made to Hugh Corder (ed) *Comparing Administrative Justice Across the Commonwealth* [2006] Acta Juridica 1.

difference sometimes is an appropriate or at least explicable response to local factors. And difference almost always is a creative force, capable of prompting reflection and new ideas. To a somewhat greater extent than before, therefore, common law courts now need to bring comparative techniques to bear in drawing on each other's experiences, but without exaggerating the implications of difference so as to dissipate the advantage of being able to derive insights from each other. I return to this point at the end.

III DIFFERENCES

Until somewhere towards the end of the 1960s, administrative law doctrine, such as it was, was much the same across Commonwealth countries. *Ridge v Baldwin* had an impact everywhere, extending the reach of judicial review beyond decision-makers of a quasi-judicial kind.[15] *Padfield v Minister of Agriculture, Fisheries and Food* had comparable influence, providing authority for the review of decisions of ministers on extended ultra vires grounds.[16] With hindsight, however, there were already signs of the divergence that by the 21st century is manifest. It may be that, as Mike Taggart observed, the degree of divergence is more marked in Australia.[17] In any event, in 2012 there are some characteristic features of Australian administrative law that are not shared with other Commonwealth countries, including New Zealand, to the same extent or in the same way. Let me identify five of these for the purposes of comparison.

First and famously, Australian case law has retained jurisdictional error as a category for analysing legal error by public decision-makers. In the absence of statutory authorisation, error of law is not a ground of review, unless it appears "on the record", which has not been generously defined.[18] But jurisdictional error is emerging as a broad church. It draws no distinction between types of decision-makers, with the exception of what appears to be a dwindling tolerance of legal error by inferior courts.[19] It encompasses a wide and growing range of grounds including breach of the rules of natural justice and, at least in some circumstances, irrelevancy.[20] It has been described as "conclusory" by one of Australia's leading administrative lawyers.[21] It now plays a central role in

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15 *Ridge v Baldwin* [1964] AC 40.

16 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

17 In addition to Taggart, above n 4, see the repeated references to Australian law as "out of step" in Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423, the quotation "out of step" is from footnote 29.

18 *Craig v South Australia*, above n 2, at 181.

19 *Kirk v Industrial Relations Commission* [2010] HCA 1, (2010) 239 CLR 531.

20 Mark Aronson, Bruce Dyer and Matthew Groves *Judicial Review of Administrative Action* (4th ed, Thomson Reuters, Sydney, 2009) at 14–15.

21 Mark Aronson "Jurisdictional Error without the Tears" in Matthew Groves and HP Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, Cambridge, 2007) 330 at 333.

Australian administrative law, not only as a species of error that grounds the issue of judicial review remedies but as marking out the territory that no privative clause can reach, whatever its terms.[22]

Secondly, Australian doctrine limits the appropriate scope of judicial review by drawing a sharp distinction between questions of lawfulness on the one hand and questions of merit on the other, understood to encompass considerations of policy, fact and the exercise of discretion within lawful parameters.[23] This restricted conception of the judicial role is argued to preclude adoption of a doctrine of substantive procedural unfairness,[24] extension of review of the rationality of the exercise of discretion beyond *Wednesbury* unreasonableness,[25] evaluation of the proportionality of decisions,[26] or review on the ground of mistake of fact, unless it is jurisdictional in character.[27] It is loosely linked to other limitations on review, including the absence of a developed common law right to reasons for decision[28] and standing requirements that still are restricted by comparison with the rules of standing elsewhere.[29] In the related context of statutory rights protection, it led the High Court in *Momcilovic v R* to suggest in passing that a legislature could not validly authorise a State court to interpret legislation in a way that "as nearly as possible" was compatible with protected rights, although in the face of a more conservative legislative prescription the question did not

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22 James Spigelman "The Centrality of Jurisdictional Error" (2010) 21 PLR 77.

23 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36 per Brennan J; and Pat Keane "Judicial Power and the Limits of Judicial Control" in Peter Cane (ed) *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, Chatswood NSW, 2004) 295.

24 See the discussion in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1, in particular per McHugh and Gummow JJ at [65]–[80]; and Anthony Mason "Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation" (2005) 12 AJ Admin L 103.

25 *Quin*, above n 23, at 36 per Brennan J; and *Minister for Immigration and Ethnic Affairs v Eshetu* [1999] HCA 21, (1999) 197 CLR 611 at 626 per Gleeson CJ and McHugh J.

26 Much of the discussion of proportionality in Australia has taken place in the context of constitutional, rather than administrative law: see for example the cases canvassed in Susan Kiefel "Proportionality: A Rule of Reason" [2012] 23 PL 85. There are no signs of its adoption in the administrative law context, although it is occasionally mentioned in passing, as in *Ministry for Immigration and Citizenship and SZMDS* (2010) 240 CLR 611 at [26] per Gummow ACJ and Kiefel J and at [127] per Crennan and Bell JJ.

27 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341 per Mason CJ; and Aronson, Dyer and Groves, above n 20, at 240–243.

28 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

29 The current test was stated in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493. While its application in practice has been somewhat relaxed since, standing continues to be invoked in defence in public law litigation, as argued in Patrick Keyzer "Standing to Raise Constitutional Issues Reconsidered" (2010) 22 Bond LR 4. For a comparison of the position in Australia with that in the United Kingdom see Aronson, Dyer and Groves, above n 20, at 773.

finally arise.[30] For the same reason, in *Momcilovic* the High Court denied that a declaration of inconsistent interpretation under s 36 of the Victorian Charter of Human Rights and Responsibilities 2006 (Vic) constituted federal judicial power.[31] Although the Court divided on whether a declaration could validly be made by the court of a State,[32] at least a majority rejected the possibility of appeal to the High Court.[33]

Thirdly, however, within the limits that are recognised for judicial supervision, no explicit doctrine of deference applies and there is no variable intensity discourse.[34] On the contrary, the High Court insists that, within this sphere, it has both the right and the responsibility to determine the lawfulness of executive action.[35] It acknowledges the potential relevance of the expertise of a primary decision-maker in relation to findings of fact although expertise is not lightly assumed and the conditions under which it may (but need not) affect an outcome are confined.[36] The Court has expressly rejected the relevance of a *Chevron* doctrine[37] for Australia, in relation to the interpretation of law.[38] And in *Kirk v Industrial Relations Commission* it drew attention to the danger of the development of "distorted positions" by "islands of power immune from supervision and restraint" in rejecting the applicability of a privative clause to challenged decisions of the Industrial Court of New South Wales.[39]

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30 *Momcilovic v R* [2011] HCA 34, (2011) 85 ALJR 957, at [50] per French CJ, [171] per Gummow J, [280] per Hayne J (agreeing with Gummow J), [545] per Crennan and Kiefel JJ and [684] per Bell J.

31 At [89] per French CJ, [178]–[179] per Gummow J, [280] per Hayne J (agreeing with Gummow J), [457] per Heydon J, [584] per Crennan and Kiefel JJ and [661] per Bell J. Crennan and Kiefel JJ concluded, however, that the making of the declaration was incidental to judicial power at [589].

32 French CJ, Crennan, Kiefel and Bell JJ upheld the validity of the conferral: at [96]–[97] per French CJ, [603] per Crennan and Kiefel JJ and [661] per Bell J. Gummow, Hayne and Heydon JJ were in disagreement on this point at [181]–[188] per Gummow J, [280] per Hayne J and [457] per Heydon J.

33 At [101] per French CJ, Gummow, Hayne and Heydon JJ on the grounds of the initial invalidity of the declaration and Bell J (by inference) at [661].

34 *Enfield City Corporation v Development Assessment Commission* [2000] HCA 5, (2000) 199 CLR 135; and Aronson, Dyer and Groves, above n 20, at 372 "'Anxious scrutiny' is not part of Australia's judicial review language".

35 *Enfield*, above n 34, at [43]; and *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 47 at [5] and [104].

36 *Enfield*, above n 34, at [45]–[47].

37 *Chevron USA Inc v Natural Resource Defence Council Inc* 467 US 837 (1984).

38 *Enfield*, above n 34, at [43]–[44].

39 *Kirk*, above n 19, at [99]. The point was reiterated by Heydon J in *Public Service Association of South Australia v Industrial Relations Commission of South Australia* [2012] HCA 25 at [73].

The fourth point concerns the centrality of statute in Australian administrative law in at least two related ways. First, there is an unresolved question, dating from an exchange between Mason and Brennan JJ in 1985 about whether procedural fairness and, by implication, the other review grounds, are sourced in the common law or implied by the common law from statute, by reference to the presumed intention of the legislature.[40] Subsequent judges have doubted in passing, from time to time, whether the distinction is significant.[41] Most recently it has been described as emanating from a "false dichotomy" and "unproductive".[42] These observations have all been made in the context of the obligation to accord procedural fairness in decision-making under statute, however. Somewhat surprisingly, the High Court has not yet needed to determine the reviewability of the exercise of inherent executive power on administrative law grounds.[43] There is a correspondingly limited Australian jurisprudence on the reviewability of other decisions at the cutting edge of public law: of a contractual nature, by private bodies in the exercise of a species of public power or involving some form of soft law.[44]

As a corollary, however, the technique of statutory construction is highly developed and sophisticated – some might even say arcane – in the context of administrative law.[45] References to the intention of Parliament are understood "as an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws."[46] Meaning is not derived from the "mental state of the legislators" but from the "application

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40 *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly … in the making of administrative decisions which affect rights, duties and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention

See also at 609–611 per Brennan J: "There is no free-standing common law right … to be accorded natural justice which exists independently of statute."

41 *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41, (2011) 243 CLR 319 [*Offshore Processing case*] at [74].

42 *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31 at [97].

43 There is supporting dicta in several cases, including *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50, (2005) 224 CLR 44 at 65 per McHugh, Gummow and Hayne JJ. While there is no High Court authority directly on point, the Full Court of the Federal Court has accepted the reviewability of inherent executive power on administrative law grounds: *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218 (FCA).

44 Aronson, Dyer and Groves, above n 20, at 146–150; and Taggart, above n 4.

45 This is illustrated clearly by the string of recent immigration cases considered below: *Offshore Processing case*, above n 41; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, (2012) 244 CLR 144 [*Malaysian Declaration case*]; and *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 [*ASIO case*].

46 *Zheng v Cai* [2009] HCA 52, (2009) 239 CLR 446 at [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ.

of rules of interpretation accepted by all arms of government in the system of representative democracy."[47] These include, although are not limited to, the primacy of "text, context and purpose."[48] Extrinsic materials have fallen into some disfavour, in what may be a reaction against their abuse.[49] Constructed intention is a key to determining whether breach of a statutory provision results in invalidity, thus also underpinning jurisdictional error.[50] Statutory construction also is affected by the looming presence of the Constitution, however – a dimension of the story to which I will return.

Finally, Australian doctrine is inhospitable to the influence of international law. The use of a treaty to inform a legitimate expectation, as in *Minister of State for Immigration v Ethnic Affairs v Ah Hin Teoh*, has fallen into disfavour, although it is hard to disentangle it from the disfavour that attends legitimate expectations more generally.[51] There is no suggestion that a relevant considerations analysis would be any more acceptable; on the contrary, *Teoh* may originally have been considered the milder alternative.[52] The interpretation of legislation by reference to international human rights standards is noticeably more restrained than by reference to common law rights, where the Court has espoused the principle of legality in a fairly robust form.[53] On the other hand, where international obligations are construed to contribute to the context of a complex statute, they may have a more substantive effect on the outcome of a legal dispute. The role played by the Convention Relating to the Status of Refugees in relation to the Migration Act 1958 (Cth) is a case in point.[54]

There is a sense in which Australian administrative law doctrine constitutes a package: an ostensibly narrow, although flexible, field for judicial review within most of which, however, the courts have the final word. The outcome can generally be imputed to the intention of the legislature,

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47 At [28].

48 *Malaysian Declaration case*, above n 45, at [7] and [50].

49 See for example the cautious treatment of extrinsic materials in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, (2010) 241 CLR 252 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

50 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 28.

51 *Minister of State for Immigration v Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273; and *Lam*, above n 24. In *Plaintiff S10*-2011, above n 42 at [65] per Gummow, Hayne, Crennan and Bell JJ, they observed that "the phrase 'legitimate expectation'....either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded".

52 *Teoh*, above n 51, at 292–293.

53 *Plaintiff S157/2002*, above n 35, at [29]–[30] per Gleeson CJ.

54 Convention Relating to the Status of Refugees 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954). In the *Offshore Processing case*, above n 41, the Court described the Migration Act 1958 (Cth) as containing "an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and Refugees Protocol": at [27].

albeit in the sense that "all arms of government in the system of representative democracy" are taken to understand the rules of interpretation that will be applied.[55] The whole prescribes roles for Parliament and courts in relation to legislation that are broadly similar to those once articulated by AV Dicey, in seeking to reconcile parliamentary supremacy and the rule of law.[56]

I seek to explain below how and why this particular Australian balance has been reached. First, however, I draw the obvious points of contrast with New Zealand, although diffidently. Unlike Australia, New Zealand has long since abandoned reliance on the distinction between jurisdictional and non-jurisdictional error for general analytical purposes and with it, the old conception of error of law "on the face of the record."[57] New Zealand has been more receptive to the reformulation of the grounds of review following the "Diplock/Cooke" classification than has Australia[58] and is also prepared at least to entertain the possibility of review on grounds that are not available in Australia including an approach to legitimate expectations that may allow limited substantive effect,[59] mistake of fact[60] and a somewhat broader conception of unreasonableness, shading into proportionality.[61] The standing rules in New Zealand are more generous than those in Australia[62] and reasons are more readily available pursuant to the common law.[63] New Zealand has accepted the reviewability of

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55 *Zheng v Cai*, above n 46, at 456, quoting *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at 401–412.

56 AV Dicey *Introduction to the Study of the Constitution* (8th ed, Macmillan and Co, London, 1915) at 268: "from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land." There is an echo in the High Court's repeated description of "judicial findings as to legislative intention" as "an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws": see *Zheng v Cai*, above n 46, at 455-456 and *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [43].

57 *Peters v Davison* [1999] 2 NZLR 164 (CA); and Taggart "Proportionality, Deference, Wednesbury", above n 17, at 464: "The 'record' from which once nonjurisdictional error had to sparkle like a diamond in the rough, has gone the way of the Dodo."

58 GDS Taylor (assisted by JK Gorman) *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) 435.

59 At 679–681; and Hanna Wilberg "Administrative Law" [2010] NZ L Rev 177 at 207–214.

60 Taylor, above n 58, at 702–711.

61 Taggart, above n 17, at 446–454.

62 Taylor, above n 58, at 208–209.

63 At 279–280.

decisions taken in the exercise of inherent executive power[64] and is somewhat more open to the influence of international law.[65]

It may be that, at the end of the day, the outcomes are not dramatically different in most cases. The more expansive grounds of review are used cautiously in New Zealand; standards of review are variable;[66] and New Zealand courts are somewhat more inclined to defer to expertise in appropriate cases.[67] Privative clauses that seek to oust review for serious legal error typically are as ineffective in practice in New Zealand as in Australia.[68] In both countries, courts seek to secure common law values in a characteristically common law way. But even if the ends are similar, the differences in means are significant. The means, in the sense of the principles applied and the remedies granted, are the tools that lawyers use. And if they vary so significantly, between these two rather similar countries, it is worth inquiring why.

IV EXPLANATIONS

At least part of the answer from the Australian end lies in the Constitution.

With hindsight, the Constitution has always had a general influence on Australian administrative law. Most obviously, it created a federation of a dualist kind, with the potential for quite different administrative law systems at the Commonwealth level and in each of the States.[69] At the same time however, by establishing the High Court as a final court of appeal from both Federal and State court systems in s 73, it laid the foundation for what now is settled doctrine: that there is a single Australian common law.[70] In this respect, the Constitution offered both means and incentive for the High Court to ensure that administrative law, to the extent that it depends on the common law, is harmonised across Australia as far as possible, given the different constitutional settings in the Commonwealth and State spheres. Famously, the Constitution provides no explicit rights protection,

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64 *Burt v Governor-General* [1992] 3 NZLR 672 (CA); and *Akatere v Attorney-General* [2006] 3 NZLR 705 (HC).

65 *Ye v Minister for Immigration*, [2009] NZSC 76, [2010] 1 NZLR 104; Taylor, above n 58, at 747–748; and Wilberg, above n 59, at 193–202.

66 Taggart, above n 17, at 446–454; and Taylor, above n 58, at 89–90 and 97.

67 *Unison Networks v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42; Wilberg, above n 59, at 189–193; and Taylor, above n 58, at 95.

68 Taylor, above n 58, at 66–72 and 77.

69 Dualism in this sense refers to the existence of distinct institutional structures in the Commonwealth and each State, as contemplated by the Commonwealth Constitution. In the context of administrative law, this leads at least to the situation in which original jurisdiction in judicial review is conferred on the courts of the polity concerned and any relevant legislation has application only to the decisions of the enacting polity.

70 Cheryl Saunders *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, Oxford, 2011) at 68–70.

laying the foundations for what has become a distinctive feature of Australian legal culture. On the other hand, by its very nature, an entrenched constitution offers protection to matters that come within its ambit, some of which, in Australia, pertain to administrative law.

There are three particular features of the Australian Constitution that underpin the constitutionalisation of Australian administrative law.

The first is the separation of federal judicial power. This principle of long standing was derived by the High Court from the structure of the chapters of the Constitution that establish the three branches of the Commonwealth government.[71] By definition, it therefore applies only to the Commonwealth although there are consequences for the States that are not relevant for present purposes.[72] Separation of powers in Australia precludes both the exercise of federal judicial power by bodies other than courts and the exercise of power that is not federal judicial power by federal courts.[73] The category of "judicial power" on which this turns is judicially defined, largely by reference to inherited common law notions,[74] although it is affected also by the requirement of a "matter" through the terms in which constitutional jurisdiction is conferred.[75] This has been held to require a constitutional controversy, with implications for the rules of standing, justiciability and the capacity of federal courts to provide "advice".[76]

Separation of powers, thus understood, is said to constitutionally constrain the grounds of judicial review by limiting courts to questions of law, ruling out considerations equated with "merits".[77] Equally significantly for present purposes, however, it also precludes bodies other than courts from finally determining the limits of their own authority and thus arrogating to themselves what is deemed to be an attribute of judicial power.[78] Herein lie some of the seeds of the preservation of the distinction between questions that are "jurisdictional" and others. This also provides an additional rationale for a distinction between inferior courts and other decision-makers.[79] And irrespective of the rest of the Constitution, this particular by-product of the separation of judicial power renders unconstitutional any attempt by Parliament to oust the

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71 *R v Kirby, ex parte Boilermakers' Society of Australia* [*Boilermakers' case*] (1956) 94 CLR 254.

72 These stem from the decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

73 This was the key finding in the *Boilermakers' case*, above n 71.

74 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

75 Sections 75, 76 and 77; the word "matter" also appears in s 73, dealing with the appellate jurisdiction of the High Court.

76 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; and *Croome v Tasmania* (1997) 191 CLR 119.

77 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 per Mason J.

78 *R v Hickman, ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 and 618 per Dixon J.

79 *Craig v South Australia*, above n 2, at 179.

jurisdiction of courts to determine the outer limits of the authority of decision-makers in the executive branch. To do so would amount to conferral of judicial power on a body that is not a court.

A second feature of the Constitution offers powerful support for all this. Section 75 confers certain heads of original jurisdiction directly on the High Court, as part of a scheme initially devised to distinguish federal from State jurisdiction. The most relevant head for present purposes is s 75(v), which gives the High Court jurisdiction over "matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." The clause owes its existence to concern about the implications of *Marbury v Madison* for the capacity of the High Court to issue mandamus in its original jurisdiction.[80] Certiorari, mysteriously, is absent, with consequences for the scope of constitutionally protected jurisdiction that have been mitigated in practice through judicial interpretation.[81] The other relevant clause for present purposes, s 75(iii), is much less prescriptive and, so far, less used. It confers jurisdiction on the High Court in "matters … in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party." It is not necessary for present purposes to canvass the technicalities that attend these heads of jurisdiction. Even on their face, it is obvious that they protect the supervisory jurisdiction of the High Court to some degree. In addition, insofar as the remedies that are protected under s 75(v) were historically linked to redress against errors of a jurisdictional kind, they offer an additional incentive to maintain the category of jurisdictional error.

While both these features of the Constitution preclude the operation of at least some privative clauses at the Commonwealth level, neither has any direct bearing on privative clauses in the State sphere. For decades, nevertheless, the High Court adopted the same interpretive approach to privative clauses under both Commonwealth and State law. In accordance with the 1945 authority of *R v Hickman*, a privative clause was to be treated as an indication of legislative intent that a decision of a body should not be impugned as long as it represented:[82]

> … a bona fide attempt to exercise its power, that … relates to the subject matter of the legislation and that … is reasonably capable of reference to the power given to the body.

Behind this formulation, in application to the Commonwealth, lay constitutional invalidity, while its application to the States depended on interpretive presumption alone. This underlying difference finally was exposed in 2003, in *Plaintiff S157/2002 v Commonwealth*, where the Commonwealth sought to persuade the Court that decision-making under the entire Migration Act

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80 *Marbury v Madison* 5 US 137 (1803); "A I Clark Papers" (C4/C15, University of Tasmania Archives, Hobart, 14 February 1898) as cited in John Williams "'With Eyes Open': Andrew Inglis Clark and our Republican Tradition" (1995) 23 FL Rev 149 at 169.

81 Aronson, Dyer and Groves, above n 20, at 44–45 and 800–801.

82 *Hickman*, above n 78, at 615 per Dixon J.

was shielded from review by a privative clause – save for the *Hickman* reservations, narrowly understood.[83] The argument failed: instead, *Plaintiff S157* was the death-knell of the *Hickman* principles. Their place has been taken by jurisdictional error, justified by reference both to the separation of powers and to the constitutionally protected jurisdiction in s 75(v). The final decision in the case turned on the interpretation of the privative clause as neither apt nor intended to oust review for jurisdictional error.[84] But this time, interpretation was designed to preserve constitutional validity and the constitutional fist in the interpretive glove was much more clearly exposed.

The gulf between the treatment of privative clauses in Commonwealth and State jurisdictions that necessarily followed *Plaintiff S157* did not last long. It was bridged within the decade by reliance on the third of the features of the Constitution to which I referred. Section 73 of the constitution provides for appeals to the High Court from the Supreme Courts of the States making the latter, in constitutional parlance, a "constitutional term". In 2010, faced with a privative clause in State legislation, the High Court interpreted the term to require that there be an apex court in each State, with supervisory jurisdiction over the lawfulness of decisions by executive bodies and inferior courts within the State exercisable, ironically, through a writ of certiorari[85] although, as a more recent decision makes clear, the principle extends to "all species of jurisdictional error" including those relieved by mandamus.[86] Once again, the touchstone was jurisdictional error. And so, on this central question, the administrative law of the Commonwealth and the States once more was broadly aligned, although the underlying constitutional reasoning is different.

This complicated story might, of course, have had a different ending. The Constitution does not mandate any of these outcomes in a linear fashion. Even if separation of powers is taken as a given, judicial power need not be interpreted to exclude merits review; the consequences of releasing a decision-maker from judicial review through the operation of a privative clause need not be equated with an exercise of judicial power; what now are termed the "constitutional writs" in s 75(v) need not retain their historical links with jurisdictional error – they are, after all, constitutional terms as well; and supervisory jurisdiction, defined by reference to jurisdictional error, need not have been identified as indispensable to the character of a Supreme Court.

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83 *Plaintiff S157/2002*, above n 35, at [43] per Gleeson J: "In essence, the argument is that the amendment of the Act which introduced [the privative clause] brought about a radical transformation of the pre-existing provisions. From that time, there were no 'imperative duties', and no 'inviolable limitations' on the powers and jurisdiction of decision-makers under the Act."

84 At [37] per Gleeson CJ, [83] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ and [163] per Callinan J.

85 *Kirk*, above n 19.

86 *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia*, above n 39, at [65] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

But these are plausible enough understandings of the text and context of this Constitution, in the light of previous authority. In that sense, in justification of the title of this piece, the Constitution is catalyst rather than cause. The choice of these understandings moreover, can be explained as a product of the context in which Australian public law operates as well, no doubt, as the serendipity of the form in which they have arisen in the Court. Context is hard to determine exhaustively for this purpose, but let me identify at least three aspects of it. First, it certainly includes the statutory administrative law reforms that were introduced in the Commonwealth sphere from the mid-1970s.[87] The procedural reform of judicial review has been overshadowed by the blossoming of the other review avenues that enjoy constitutional protection.[88] For present purposes, however, the systemic distinction between merits and judicial review introduced into Australian legal thought with the establishment of the Administrative Appeals Tribunal is highly significant. Secondly, the Australian preference for institutional checks and balances over direct protection of rights has raised the stakes for institutional effectiveness through separation of powers and lowered the incentive to explore techniques associated with a more rights conscious jurisprudence, of which proportionality is an example.[89] Thirdly, elements of political culture contribute to relevant context as well. These include, for example, a tendency for Australian governments to push their legal powers to the optimistic limit, in a manner exemplified by the Commonwealth argument in *Plaintiff S157* that "the Act might validly be redrawn to say, in effect, '[h]ere are some non-binding guidelines that should be applied' with the 'guidelines' being the balance of the statute."[90] A welcome balancing factor, equally cultural in character, is the unquestioned assumption that governments abide by the decisions of courts, however inconvenient these may be.

V EVALUATION

Whatever the explanation, the combination of complete judicial authority within a confined sphere for judicial action works reasonably well in Australia, with some spectacular exceptions,[91] to

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87 The primary elements were the Administrative Appeals Tribunal Act 1975 (Cth), the Ombudsman Act 1976 (Cth), the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the Freedom of Information Act 1982 (Cth).

88 In addition to s 75 of the Constitution, these include the jurisdiction of other federal courts that is derived from it, including Judiciary Act 1903 (Cth), s 39B. On the declining authority of the Administrative Decisions (Judicial Review) Act 1977 see Mark Aronson "Is the ADJR Act hampering the development of Australian Administrative Law?" (2004) 15 PLR 202.

89 Saunders, above n 70, at 185–187.

90 *Plaintiff S157/2002*, above n 35, at [101] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. Another argument, in similar vein, suggested that the Parliament might validly delegate to the Minister "the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia", subject only to this Court deciding any dispute as to the "constitutional fact" of alien status: at [101].

91 *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562 is an example.

protect common law values of fairness, accountability, liberty and the rule of law in circumstances that sometimes involve confrontation with the elected branches over initiatives that they hold dear. Three recent cases make the point, while also illustrating some of the approaches that I have described at work.[92] All three involve executive decisions about migration of an extraordinary kind.

The first, *Plaintiff M61/2010E v Commonwealth* (the *Offshore Processing* decision), was decided in 2010. At immediate issue were decisions claimed to be in breach of procedural fairness denying the application of asylum seekers for refugee status and thus the grant of a visa. But the applicants had arrived in Australia by way of Christmas Island, now statutorily "excised" from the Australian immigration zone.[93] The Migration Act 1958 denied the applicants the right to apply for a protection visa although the Minister might, if he so chose, allow them to do so; a power that he had no duty even to consider exercising.[94] The applicants' claim, instead, was processed in a manner argued by the Commonwealth to be "non-statutory", culminating in an informal variant of merits review by reviewers acting pursuant to contract, under the unfortunate business name of "Wizard People".[95] These arrangements were presumed to evade the normal procedures for both merits and judicial review. Their non-statutory character precluded merits review and complicated reliance on the established grounds for judicial review, while the contractual status of the decision-makers arguably removed them from the constitutionally protected jurisdiction of the High Court.

When the High Court eventually was seized of the case, in the exercise of its jurisdiction under s 75,[96] these difficulties were circumvented by a finding that the decision-making process was statutory after all, ancillary to the authority of the Minister, who on the facts had agreed to "consider" lifting the bar in all such cases, through the provision of the assessment and review procedures.[97] The decision-makers were obliged to accord procedural fairness, if only because the

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92 *Offshore Processing case*, above n 45; *Malaysian Declaration case*, above n 45; and *ASIO case*, above n 45.

93 Migration Amendment (Excision from the Migration Zone) Act 2001 (Cth); and Migration Act 1958 (Cth), s 5(1).

94 Migration Act, ss 46A and 195A.

95 The process is described in the reasons of the Court: Offshore Processing case, above n 45, at [45]–[52].

96 The Court was clearly seized of jurisdiction under s 75(iii), in a matter to which the "Commonwealth" was a party; derived jurisdiction under s 75(v) from analysis of Commonwealth action as proceeding from an exercise of statutory power under either s 46A or s 195A; and contemplated the possibility that jurisdiction might be found also in s 75(i), as a matter "arising under … [a] treaty", given the relevance of the Convention Relating to the Status of Refugees to the meaning and purpose of the legislation at [51]. It left for another day the question whether s 75(v) applies to circumstances where Commonwealth authority has been "contracted out".

97 At [9] and [62]–[71].

review process had the effect of prolonging the detention of the applicants.[98] Their failure to do so amounted to jurisdictional error attracting, on this occasion, the remedy of a declaration. The *Offshore Processing* decision effectively gave all refugee claimants on Christmas Island access to judicial review of determinations of their refugee status.[99]

The second decision, in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, involved an arrangement between Australia and Malaysia whereby up to 800 asylum seekers "irregularly arriving in Australia by sea" might be transferred to Malaysia, where their claims would be processed by the United Nations High Commissioner for Refugees.[100] The applicant M70 had arrived at Christmas Island and was about to be transferred to Malaysia pursuant to this Arrangement.[101] He applied to the High Court for an injunction and an order in the nature of prohibition to restrain the transfer. A central question in the case was the validity of a declaration by the Minister, pursuant to statute, that Malaysia was a country that, inter alia, "meets relevant human rights standards in providing … protection," thus triggering the power of removal.[102] The answer was complicated by the drafting of the section, which the Commonwealth argued conferred on the Minister "a power that has no express or implied preconditions to its exercise."[103] A majority of the Court held that the Minister had made an error of jurisdictional fact that invalidated the declaration and attracted the remedies of a declaration and an injunction.[104] The decision was bitterly criticised by the Government.[105] An attempt to amend the legislation to circumvent the Court's construction of

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98 At [76]. And at [73]: In the circumstances it was not necessary to determine "whether the exercise of non-statutory executive power is...limited by a requirement to accord procedural fairness." See also at [74]: Once again the relevance of the "root of the obligation" of procedural fairness was left in abeyance.

99 New procedures subsequently were put in place to take account of "the legitimate role of judicial review": Hannah Stewart-Weeks "Out of Sight but not Out of Mind: *Plaintiff M61/2010E v Commonwealth*"(2011) 33 Syd LR 831 at 840; and Department of Immigration and Citizenship "Changes to Refugee Status Determination" http://www.immi.gov.au/visas/humanitarian/_pdf/faq-changes-to-refugee-status.pdf.

100 *Malaysian Declaration case*, above n 45, at 147.

101 A second applicant, M 106 was a minor, whose case raised additional questions about the guardianship obligations of the Minister.

102 Migration Act, s 198A.

103 *Malaysian Declaration case*, above n 45, at 155.

104 *Malaysian Declaration case*, above n 45 per Gummow, Hayne, Crennan and Bell JJ and Kiefel J. French CJ found that the making of the declaration was a jurisdictional error, although not an error of jurisdictional fact. Heydon J dissented.

105 The Minister for Immigration described it as "profoundly disappointing": Chris Bowen, Minister for Immigration and Citizenship "High Court Decision Press Conference Canberra" (media conference, 31 August 2011). The Prime Minister stated that the decision "basically turns on its head the understanding of the law in this country": Dennis Shanahan "Struck down by bitter disappointment" *The Australian* (online ed, Australia, 2 September 2011).

it effectively failed in the House of Representatives where the Government has a precarious majority.[106]

The third and last decision for mention here is the most recent: the *ASIO* case.[107] The applicant M47 also had entered Australia through Christmas Island. His claim had been processed and he had been found to have a well-founded fear of persecution within the meaning of the Refugee Convention. He was nevertheless refused a protection visa, in the face of an adverse security assessment. As he could not be returned to his country of origin and no other state had so far been found that was willing to take him, he therefore faced indefinite immigration detention in Australia. A central issue in the challenge to the lawfulness of his detention[108] was the validity of the provision in a regulation prescribing an adverse Australian Security Intelligence Organisation assessment as a criterion for the grant of a protection visa.[109] By contrast with procedures elsewhere in the Migration Act 1958, such an assessment effectively was conclusive. A majority of the Court held that the regulation was invalid, requiring a new determination of the plaintiff's application for a protection visa, which now would be open to review by the Administrative Appeals Tribunal.[110] In the leading majority judgement, Hayne J observed "that the reasons…for adopting that construction stem almost entirely from considerations of the text and structure of the Act."[111]

I am less interested in the rights and wrongs of the reasoning in these cases, on which there is continuing discussion, than in the light that they throw on the context within which Australian administrative law works, as an element in shaping the Australian approach. All the ingredients that I identified earlier are present. All three cases deal with extreme legislative measures, designed to

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106 Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Cth). For an account of the tortuous history of Australian migration legislation, including this episode, see Janet Phillips and Harriet Spinks "Immigration Detention in Australia" (23 January 2012) Commonwealth Parliamentary Library 23 January 2012 http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/Detention.

107 *ASIO* case, above n 45.

108 Other key issues were whether and to what extent the Australian Security Intelligence Organisation was obliged to accord procedural fairness in making its assessment and whether in any event the plaintiff's continuing and apparently indefinite detention was in fact authorised by the legislation, given the interpretive principle of legality. These additional questions were not reached by the majority of the Court.

109 Migration Regulations 1994 (Cth), sch 4, item 4002, as applied by sch 2, cl 866.225(a). One of many complications in resolving the questions before the Court was the "textually unbounded" regulation making power in s 31(3) of the Act and what Hayne J characterised as "repeated reference elsewhere in the Act to decisions to refuse to grant a protection visa relying on one or more of the identified Articles of the Convention" at [171].

110 *ASIO case*, above n 45, per French CJ, Hayne, Crennan and Kiefel JJ. Gummow and Bell JJ would have found the applicant's detention unlawful. Heydon J dissented.

111 At [222].

minimise access to the courts although falling short of an explicit privative clause. In all three cases the lives and liberty of the applicants effectively are at stake. In none of these cases would the issue have reached the courts without the constitutionally entrenched jurisdiction. All were courageous decisions, while bearing all the usual hallmarks of the reasoning of the High Court: a highly legalistic analysis that ostensibly is reliant on the constructed intention of the legislature, with no overt and relatively little covert concern for deference. And in all three the decision of the Court was given immediate effect, despite its implications for government policy and political fortune.

So far so good, at least for supporters of judicial checks and balances. But the Australian approach faces challenges as well, some of which are peculiar to the Australian context and some of which have wider application.

The first is the most obvious: the difficulty of drawing a satisfactory boundary between jurisdictional and other legal errors, at least once the concept of "jurisdiction" begins to move beyond its original, narrow sense.[112] At the margin, which may be considerable, characterisation of an error as "jurisdictional" depends on the predilection of the court. The artificiality of the distinction has caused it to collapse elsewhere.[113] It has been preserved in Australia in response to a constructed constitutional imperative, the acceptance of which is convenient. But its ambit is expanding as it progressively absorbs significant questions of lawfulness. This is not quite a case of an ungarbed emperor, because the doctrine serves as a marker to judicial restraint, although in a conceptual rather than an absolute sense. But it is vulnerable to criticism as "chaotic, unprincipled and result-oriented," to quote Mike Taggart in another context,[114] although I am sure he would have been willing to train his guns on this.

Secondly, the equation of a constitutionally protected sphere of review with errors of a jurisdictional kind beyond which Parliaments may oust review is not as neat as it presently appears, at least in the Commonwealth sphere. Even leaving the still untapped potential of the Court's entrenched jurisdiction in cases to which the Commonwealth is a party, the s 75(v) jurisdiction also includes matters in which an injunction is sought against an officer of the Commonwealth. An injunction is not confined to jurisdictional error, at least under general law. The question of the scope of protected jurisdiction under this aspect of s 75(v) so far has been avoided. Sooner or later, however, the Court is likely to be confronted by a s 75(v) claim for an injunction to restrain action where the error is not jurisdictional in kind. An injunction may, of course, be withheld on discretionary grounds, but this is hardly a comprehensive solution.

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112 John Basten "Jurisdictional Error after *Kirk:* Has it a Future?" (2012) 23 PLR 94. Similar difficulties attend the increasingly important question of when a fact is "jurisdictional" in character.

113 Michael Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in Law* (Butterworths, Wellington, 1997) 189.

114 Taggart, above n 17, at 453 with reference to the "rainbow of review".

Thirdly, the course of reasoning that has prevailed in bringing Australian doctrine to its current stage is not fully adapted to the pathology of government decision-making in practice. The techniques and doctrine of judicial review in Australia are geared almost exclusively to decision-making under statute, which is decreasingly the norm. Administrative schemes relying solely on a very broad parliamentary appropriation are rife, to the point of attracting a special report by the Ombudsman on the problems such schemes present for both political and legal accountability.[115] Soft law is pervasive, not only in the form of policy documents but also, in the particular Australian context, in the form of agreements between spheres of government.[116]

All three of the cases examined earlier show that the Court may go to some lengths to provide decisions with a statutory setting and context, as long as there is legislation available for the purpose. In another recent development, the Court also has limited the scope of executive power to engage in certain types of spending schemes without legislative authority, the full ramifications of which are not yet clear.[117] Over time, however, it will become necessary for Australian doctrine to loosen its dependence on the constructed intention of a Parliament as the source of, for example, procedural fairness if that is, indeed, the present position. Absent a written constitution, justification for judicial review of the fairness of an exercise of inherent executive power might be found in the common law, as in England and New Zealand. The solution is more complicated in Australia, however, where it is now settled that executive power derives directly from the Constitution and is no longer dependent on the common law for its characteristics and scope.[118] It is of course open to the Court to find that, notwithstanding its constitutional source, an exercise of executive power attracts procedural fairness (and, potentially, other review grounds) in appropriate circumstances. But this is a significant doctrinal step for a court that generally prefers the appearance of

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115 Commonwealth Ombudsman *Executive Schemes* (Report No 12, 2009). A disappointing recent report of the Administrative Review Council (ARC) refused to recommend extension of the Administrative Decisions (Judicial Review) Act 1977 (Cth) to include judicial review of such schemes. The report also recommended, however, extension of the ambit of the Act to include matters against "officers of the Commonwealth" that might be taken to the High Court under s 75(v) of the Constitution. If this convoluted recommendation were accepted by the Government, executive schemes might become reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) in time, but only as a result of developments in judicial review, rather than initiative by the Parliament or, for that matter, by the ARC: Administrative Review Council *Federal Judicial Review in Australia* Report No 50 (2012).

116 Cheryl Saunders "Co-operative Arrangements in Comparative Perspective" in Nicholas Aroney, Gabrielle Appleby and Thomas John (eds) *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, Cambridge, 2012) 414.

117 *Williams v Commonwealth* [2012] HCA 23.

118 This is made clear in *Williams*, although there were signs of it beforehand. For an early observation to this effect see *Re Ditfort, ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369 per Gummow J:

> In Australia, … one looks not to the content of the prerogative in Britain, but rather to s 61 of the Constitution, by which the executive power of the Commonwealth was vested in the Crown.

incremental evolution. It may also raise some inconvenient ancillary questions about the extent of legislative control of the constitutionally conferred executive power.

One final challenge derives directly from the divergence of national legal systems in the common law world of the 21st century, of which Australia is an exemplar, and leads back to my earlier observations about comparative law. It is becoming increasingly difficult to ignore the implications of divergence for the easy reference to each other's jurisprudence that common law courts traditionally have made and which Lord Cooke characterised in his Hamlyn Lectures as offering "the best prospect of continuing to evolve clear and just common law principles."[119] There is nothing in our shared constitutional theory to preclude this practice as a matter of principle.[120] As systems diverge, however, there is a question about whether the whole panoply of comparative methodology needs to be brought to bear on it. The greater the purity of its adherence to comparative method, the less welcoming to external sources a legal system is likely to be. Insistence on comparative method also may disguise what is merely resistance to outside ideas, leading to the isolationism of which Mike Taggart warned.[121]

There are occasional worrying signs in Australian case law in this respect, although they should not be exaggerated.[122] Australian courts have historically referred freely and with benefit to the jurisprudence of other comparable countries, even in constitutional cases. They continue to do so without disputing the legitimacy of the practice and indeed, occasionally endorsing it. But references are thinning in some areas, including administrative law. And concern occasionally is expressed that Australian courts are unnecessarily denying the relevance of foreign experience on grounds of legal contextual difference.[123]

The diversification of common law legal systems has enhanced the difficulty of striking a balance between comparative method and what Kate O'Regan J once described as acquiring the "benefits of the learning and wisdom to be found in other jurisdictions."[124] In the short term it may make comparativism more controversial. The challenge is not confined to Australia, but potentially affects higher courts in all Commonwealth countries. The solution lies in reflection on the purposes

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119 Cooke, above n 1, at 4.

120 See Cheryl Saunders "Judicial Engagement with Comparative Law" in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar, Northampton, Massachusetts, 2011) 571.

121 Taggart, above n 4, at 30.

122 I have examined this question more fully in Cheryl Saunders "Judicial Engagement in the High Court of Australia" (High Court of Australia Public Lecture, Canberra, 20 June 2012) (forthcoming).

123 Adrienne Stone "Comparativism in Constitutional Interpretation" [2009] NZ L Rev 45. Professor Claudia Geiringer has made similar observations about some of the reasoning in *Momcilovic*, above n 30, in early discussions of the case with me.

124 *NK v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC) at [35].

for which the legal experience of others may be useful. Automatic adoption of a principle developed in one jurisdiction by another, for which understanding of context is most pressing, is only one such purpose. Even if this has been a common practice in the past (which I do not claim) it is likely to become more contested as systems diversify so that there is no longer a single, most meritorious, all-purpose common law solution. But this is by no means the only purpose of judicial interaction. Courts refer to each other's decisions for a range of other reasons: to assist to frame the legal problem, to expand understanding of the options, to test their own inclinations and to put their own approach into perspective, to name only a few. The methodological difficulty is less in each of these cases and eased further between legal systems with so much in common. And there is a great deal to be gained. It would be almost inconceivable, for example, for Australia to resolve the question of judicial review of decisions made in the exercise of inherent executive power without reference to common law experience elsewhere, even though the problem of how to explain review by reference to the Australian Constitution is one that is uniquely Australian.

VI CONCLUSION

One of the big contemporary questions in comparative public law is whether the pattern of similarity and difference between states is changing through convergence, prompted by internationalisation and globalisation.

My still anecdotal hypotheses on this question are these. Convergence undoubtedly is occurring to a degree, as public law systems are established or re-established and through subsequent cross-fertilisation. The extent of convergence is uneven across the world, with its greatest effect evident in aid-dependent countries, confronted by an array of international advisers, and in Europe, under the influence of regional integration. And where it occurs, convergence may be shallow. There is evidence of a growing similarity of institutions, principles and, occasionally, text. There may be substantial variation in the way in which all three operate in national contexts, however, if they operate at all. And it is unlikely that the whole substratum of theory and historical understanding that underpins public law accompanies the transfers through which convergence occurs. There are still open questions about the extent to which public law systems ultimately serve similar values and the implications of significantly different priorities between values.

Considered from this global perspective, the relationship between common law countries is atypical. In doctrinal terms they are diverging, although they employ similar analytical tools. The cultural contexts within which the legal systems operate differ, although to varying degrees; and these differences in any event have largely been ignored in the past. The underlying substratum of theory and history tends to be shared. In consequence, values are broadly shared as well.

My purpose here has been to use a case study to probe the legal relationship between common law countries more deeply in order to try to understand it better. The administrative law of Australia and New Zealand is useful for this end because of the considerable similarities between the two countries. To rehearse the findings briefly: there are obvious doctrinal differences between the two

countries although much else remains the same, at least for now. At one level, the Australian position can be explained by its dependence on the Constitution, which offers both a distinctive context and some protection for judicial review. A more complete explanation, however, requires consideration of the broader context as well. As often is the case with public law, moreover, over time it develops an organic character, in which the institutions and principles become interdependent, sustained by a more or less coherent internal logic.

The Australian case may be unusual in degree but divergence in response to local conditions is a phenomenon everywhere. All administrative law is constitutionalised to some extent although not necessarily as explicitly as in Australia. Any national system of administrative law is influenced by the rest of the legal system in which it is embedded and by the wider context in which it operates. A similar exercise in relation to New Zealand, for example, would identify the influence of the New Zealand Bill of Rights Act 1990 on the relative comfort of the courts with the concept of proportionality and the absence of an entrenched Constitution on the treatment of privative clauses. In Canada, the attraction of justifiability in administrative law seems clearly, at least to me, to be explicable by reference to experience with the limitations clause in the Canadian Charter of Rights and Freedoms.[125]

Doctrinal differences between common law legal systems are not new: Lord Cooke drew attention to the "contributions from the various jurisdictions" in his first Hamlyn lecture.[126] But the degree of divergence is now more marked and quickening. This is therefore a critical time for the long-standing common law habit of the cross-fertilisation of ideas. It is appropriate for courts that refer to each other's jurisprudence to pay heed to differences that are relevant to the purpose for which a reference is made. There is a danger, however, that taking this more comparative approach could cause the value of the opportunities for insight and self-reflection offered by judicial interaction to be lost. I want to think that this can be avoided and my argument is that it can, given the purposes for which judicial interaction is used and the continuing similarities between common law states. But it is not quite business as usual. And if differences grow, in kind as well as degree, it may be necessary to adapt further.

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125 David Dyzenhaus, Murray Hunt and Michael Taggart "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 OUCLJ 5.

126 Cooke, above n 1.