"Executive Power – An Australian Perspective"

The Hon Justice Michelle Gordon AC*

2024 Public Law Conference

Centre de Droit Public, Public Law Centre, University of Ottawa

July 2024

Pre-edited version. Publication of edited version forthcoming.

I. Introduction

1. Increasing attention is being given in Australia to the content and exercise of executive power. That is unsurprising when we recognise how many decisions made by elements of what we refer to generally as "government" affect individual rights, privileges and liberties.

2. Australian consideration of executive power is inevitably framed by a written national constitution, which focuses on the institutions of government and creates a federal system of government but makes no express positive provision for individual rights or freedoms. It is also framed by the *Constitution* providing for the separation of powers and an entrenched jurisdiction in the High Court of Australia to grant named forms of relief against an officer of the Commonwealth (of the executive), thereby "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".[1]

3. An enduring issue in Australian public law (and I suggest elsewhere) is whether public law principles and doctrine develop in ways that respond sufficiently to changes in the practice and administration of government.

---

* Justice of the High Court of Australia. This is an edited version of the lecture given on 3 July 2024 in Ottawa. The author acknowledges the considerable assistance of Desiree Thistlewaite and Alice Maxwell in its preparation. Errors and misconceptions remain with the author.

1 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [104]. cf *Reference Re Supreme Court Act* [2014] 1 SCR 433 at 472 [91], 473 [94]; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

There can be no doubt that the way in which governments work has changed over the last fifty years.

4. In this paper, I consider some of the key principles governing the content and exercise of executive power, including its intersection with judicial review, before examining how certain changes to government decision-making and practice are challenging and redefining the way in which the political and judicial branches of government interact.

II. The source and content of executive power

5. Principles governing the content and exercise of executive power have received more attention in recent decades. That is perhaps unsurprising in Britain. As the editors of the ninth edition of *De Smith's Judicial Review* record, "[j]udicial review has developed to the point where it is possible to say that no power – whether statutory, common law or under the prerogative – is any longer inherently unreviewable".[2]

6. Even so, to an Australian eye, debate about executive power has not always been assisted by British constitutional and parliamentary thinking being expressed in ways which personify the polity, or the executive, in "the Crown".[3] As F W Maitland warned his students in 1888, "the Crown" "is a convenient term" but one with which the user "should never be content", for it ultimately says nothing of who can exercise the power or say what is its source.[4] Overlay these difficulties with reference to the "capacities" of the Crown and "prerogative" powers (as "the residue of powers which remain vested in the Crown"[5]) and the field for debate may too readily shift to comparisons between the

---

2 Hare, Donnelly and Bell, *De Smith's Judicial Review*, 9th ed (2023) at [1-035] (footnote omitted). cf *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 585; *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374. See generally Sapienza, *Judicial Review of Non-Statutory Executive Action* (2020).

3 As to the concept generally, see *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2024] HCA 16.

4 Maitland, *The Constitutional History of England: a course of lectures* (1911) at 418. See also *M v Home Office* [1994] 1 AC 377 at 395.

5 *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at 139 [47].

powers (or "capacities") of a natural person and the content of, and limitations upon, executive power.

7. In *R (Miller) v Secretary of State for Exiting the European Union* ("*Miller (No 1)*") it was observed that "consistently with Parliamentary sovereignty, a prerogative power however well-established may be curtailed or abrogated by statute".[6] Executive powers having their source in statute or the common law are equally susceptible to statutory curtailment or abrogation.

8. It is also well accepted in Australia that executive power is "susceptible of control by statute".[7] In the recent High Court decision, *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, which reaffirmed that principle, I set out why that is so under the Australian *Constitution*, and I made the further point that "it is always necessary first to identify the source of a power which is said to be executive power. It is not sufficient to state that the power is 'non-statutory executive power' or 'common law executive power'. Each phrase assumes but does not demonstrate the existence of the asserted power".[8]

III. Judicial review: adjudicating the limits of executive power

Reviewable error: merits versus legality

9. "It is ... the province and duty of the judicial department to say what the law is".[9] The corollary is that it is the courts who are charged with the responsibility of identifying and enforcing the lawful limits of executive power. Whenever a court is asked to review a decision made by the executive, there will be a question about the ambit of this supervisory function.

---

6 *Miller (No 1)* [2018] AC 61 at 139 [48].

7 *Brown v West* (1990) 169 CLR 195 at 202; *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 10 at 225 [22], 231 [65]; 408 ALR 381 at 391; 399.

8 *Davis* (2023) 97 ALJR 10 at 231 [67]; 408 ALR 381 at 399.

9 *Marbury v Madison* 5 US 87 (1803) at 111; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35.

10. In Australia, discussion of the scope of judicial review often begins with what Brennan J said in his reasons in *Attorney-General (NSW) v Quin*:[10]

> "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 ... 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."

11. This passage in *Quin* has often been referred to in later decisions of the High Court. It is as well, however, to go on to notice how Brennan J explained and justified these principles in later passages of his reasons which have not so often been quoted. These later passages not only show the roots of the doctrine but also reveal why the High Court has not embraced notions of "legitimate expectation".[11]

12. The distinction between legality and merits, as Brennan J explained, entails 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*".[12] Hence, "[i]n 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".[13]

---

10 (1990) 170 CLR 1 at 35-36. See also *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at 618 [29]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1013 [27].

11 See, eg, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 334-336 [28]-[31], 343 [61].

12 *Quin* (1990) 170 CLR 1 at 36 (emphasis added).

13 *Quin* (1990) 170 CLR 1 at 36.

13. It can be accepted, as Brennan J did in *Quin*,[14] that the distinction between merits and legality is imperfect. But the idea that is captured by this distinction appeals to a doctrine of separation of powers, which is itself not hard-edged. It has long been accepted that in distributing the functions of government among separate organs, the framers of the Australian *Constitution* "were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed".[15] Rather, the Australian *Constitution* "by requiring a distinction to be maintained between powers described as legislative, executive and judicial ... us[es] terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the *Constitution* was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise".[16]

14. In this constitutional setting, the distinction between merits and legality "recognises the autonomy of the three branches of government within their respective spheres of competence and ... recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power".[17] Attention to those limits is important because, as Brennan J said, "[i]f judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk".[18]

15. Justice Brennan's rejection of treating "legitimate expectations" as founding a right to the exercise of power to fulfil the expectations

---

14 *Quin* (1990) 170 CLR 1 at 36 ("The merits of administrative action, *to the extent that they can be distinguished* from legality", emphasis added).

15 *R v Davison* (1954) 90 CLR 353 at 380-381.

16 *Davison* (1954) 90 CLR 353 at 381-382; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 291 at 276 [141]; *Garlett v Western Australia* (2022) 96 ALJR 888 at 923 [170]; 404 ALR 182 at 221.

17 *Quin* (1990) 170 CLR 1 at 38.

18 *Quin* (1990) 170 CLR 1 at 38.

likewise depended on separation of powers. The basis for that rejection was captured in two sentences:[19]

> "[I]f the relevant power be such that it may lawfully be exercised according to the repository's view of what is appropriate, a court which orders the repository not to disappoint an expectation legitimately held by an individual would be assuming to direct the exercise of the power. That theory *would effectively transfer to the judicature* power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or would strike down any exercise of the power which did not."

16. This understanding of the limits of judicial review is more easily adopted and applied when there is a developed system of independent merits review of administrative decisions, as there is in Australia at federal, State and Territory levels.[20] The corollary of Australia's understanding of the separation of powers is that, at the federal level, merits review of administrative decisions is conducted by a Tribunal separate from the courts (although the President of that Tribunal has always been a federal judge). Members of the State administrative review tribunals have followed generally similar models. Members of the tribunals (federal, State and Territory) are generally appointed on terms that provide less security of tenure than judges have. And the jurisdiction of tribunals of this kind can be excluded or confined. But important as these considerations may be, it is easier for the courts to maintain and apply the principles governing judicial review if it is known that there are usually other means of obtaining merits review.

Difficulties in application

17. Very often it will be plain that a court may decide whether what has been done was lawful but may not itself re-exercise the relevant

---

19 *Quin* (1990) 170 CLR 1 at 39 (emphasis added). Justice Brennan was uniquely aware of Australia's system of independent merits review, having been the first President of the Administrative Appeals Tribunal (a federal merits review body).

20 See, eg, *Administrative Appeals Act 1975* (Cth); *Victorian Civil and Administrative Tribunal Act 1998* (Vic); *Civil and Administrative Tribunal Act 2013* (NSW); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT).

decision-maker's power. I have in mind, for example, challenges to the lawfulness of a search warrant.[21] Sometimes, however, and *R (Miller) v Prime Minister* ("*Miller No 2*")[22] about prorogation of Parliament stands as an example, there may be lively debate about whether the courts can or should review the decision which is challenged.

18. What sets apart cases in which the courts may review a decision and those where the courts cannot? One way of expressing the difference is that in the former, there is no dispute that the court is determining the lawfulness of what was done. In the latter, it may be said that there are only *political* limits to what can be decided, or, and this may be the same point in other words, there are only political remedies for those aggrieved by a decision.[23] Often, arguments which assert that a decision is of the second kind are expressed by saying that one or more of the issues which the party challenging the decision's validity seeks to raise is not "justiciable". Often, however, this assertion hides much more than it reveals.

19. In *Miller No 2*, those who denied that the decision to prorogue Parliament was justiciable made much of the fact that the power of prorogation is a prerogative power.[24] Importantly, the Supreme Court of the United Kingdom in *Miller No 2* began from the premise that "every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie".[25] That the Prime Minister was accountable to Parliament did not entail that the issue was

---

21 See, eg, *Smethurst v Australian Federal Police* (2020) 272 CLR 177.

22 [2020] AC 373.

23 *Thomas v Mowbray* (2007) 233 CLR 307 at 334 [28]; Groves, Aronson and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 848 [14.60].

24 *Miller (No 2)* [2020] AC 373 at 382 (whilst accepting that the exercise of power is not immune from review simply by virtue of its prerogative source). Australian lawyers tend to speak of "non statutory executive power" rather than "prerogative" powers. But both forms of expression will often be used as statements of conclusion rather than any particularly useful identification of the nature or content of the power in issue.

25 *Miller (No 2)* [2020] AC 373 at 404 [38].

non-justiciable.[26] As the Court said, "[t]he fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts".[27] Nor was it conclusive that the dispute arose from political controversy.[28] Rather, as the Court went on to say, when considering an exercise of prerogative power it is necessary to distinguish between two different issues – first, whether a prerogative power exists and, if it does, its extent; and second, whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis".[29]

20. The Court located the question of "justiciability" as lying within the second of these issues.[30] It framed the question as "not whether the power exists, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise *within its legal limits* is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review".[31] This second question was said to "depend on the nature and subject matter of the particular prerogative power being exercised".[32]

21. The Court did not reach this second question. Rather, the Court decided that the case was justiciable because the standard to be applied

---

26 *Miller (No 2)* [2020] AC 373 at 402 [33].

27 *Miller (No 2)* [2020] AC 373 at 402 [33] referring to *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 572-573 and its references to Wade & Forsyth, *Administrative Law*, 7th ed (1994) and *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Amall Businesses Ltd* [1982] AC 617, 644. A reason underlying that position was that the effect of prorogation was to prevent the operation of ministerial accountability to Parliament during the period Parliament stands prorogued.

28 *Miller (No 2)* [2020] AC 373 at 401 [31].

29 *Miller (No 2)* [2020] AC 373 at 403 [35].

30 *Miller (No 2)* [2020] AC 373 at 403 [35].

31 *Miller (No 2)* [2020] AC 373 at 403 [35] (emphasis added).

32 *Miller (No 2)* [2020] AC 373 at 403 [35] citing *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

was whether the prorogation had the effect of frustrating or preventing, without reasonable justification, Parliament's ability to perform its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[33] This was held to be the standard which determined the limit of the prerogative power to prorogue and hence, its application was a question which concerned the *extent* of the power to prorogue.[34] And the Court decided that in this case the advice to prorogue Parliament was not lawful. On the evidence put before the Court, the advice had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account;[35] and "[i]t [wa]s impossible to conclude … that there was any reason – let alone a good reason – to advise Her Majesty to prorogue Parliament for five weeks".[36]

22. I want to say something further about the Court's proposition that a separate issue of justiciability may arise in a case where a prerogative power has been exercised within its legal limits.[37] If it is concluded that a particular exercise of executive power, whether statutory or non-statutory, was *within* its legal limits, it is not clear to me what would be the basis for judicial review of the decision. More particularly, if advice to prorogue was not lawful, how could any further question of justiciability arise. On what basis would the judicature decline to declare that what was done was unlawful? And if the advice was lawful, how and why would the source of the power in issue (as prerogative not statutory) present a further question described as "justiciability"? What would be the ground of judicial review?

23. Locating issues of justiciability in a question described as *subsequent* to a decision that the power has been exercised lawfully would appear to be sharply at odds with received doctrine in Australia. On its face, the proposition appears to assume that the court asked to review the decision would be invited to decide whether the decision to advise prorogation was the correct or preferable advice to give.

---

33 *Miller (No 2)* [2020] AC 373 at 407 [50].

34 *Miller (No 2)* [2020] AC 383 at 407-408 [52].

35 *Miller (No 2)* [2020] AC 383 at 408 [55]-[56].

36 *Miller (No 2)* [2020] AC 383 at 410 [61].

37 *Miller (No 2)* [2020] AC 383 at 403 [35].

IV. Changes in the practice of government

24. It is against this background that changes over recent decades in the way in which government operates must be considered.

25. The American historian, Professor Gary Gerstle,[38] has written that "[i]n the last hundred years America has had two political orders: the New Deal order that arose in the 1930s and 1940s, crested in the 1950s and 1960s, and fell in the 1970s; and the neoliberal order that arose in the 1970s and 1980s, crested in the 1990s and 2000s, and fell in the 2010s".[39] In his view, a distinctive program of political economy stood at the heart of these two political orders. "The New Deal Order was founded on the conviction that capitalism left to its own devices spelled economic disaster [and] had to be managed by a strong central state able to govern the economic system in the public interest. The neoliberal order, by contrast, was grounded in the belief that market forces had to be liberated from government regulatory controls that were stymieing growth, innovation and freedom".[40] It is not necessary to consider whether the same analysis of political orders and political economic programs is aptly applied to nations other than America. In particular, it is not necessary to consider whether the neoliberal order has come to an end, whether in America or elsewhere.

26. What is presently important is that many of us have lived through times where government withdrew from the direct provision of many public services and utilities like transport, water, and power, and corporatized, and then privatised, the entities that had provided these and other services. We have seen government business enterprises sold or closed as small or at least smaller government was seen as self-evidently desirable. And therefore we have seen more frequent "contracting out" of the provision of services to the public or some section of the public.

---

38 Professor of American History Emeritus at the University of Cambridge.

39 Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (2022) at 2.

40 Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (2022) at 2.

Private prisons are a striking example of this phenomenon.[41] Much of the provision of what were traditionally public services provided by government are now provided for by government making contracts with private entities, many of which are entities formed for private profit.[42] The references in our *Constitution* to "State banking",[43] "State insurance",[44] "railways of the State"[45] speak to other times.

27. How then, if at all, does public law intersect with the making and enforcement of contracts governments make for the provision of services to the public or a section of the public? How does public law intersect with "public-private partnerships" where a corporation builds, at its expense, a court house used by the State's judicial system under an arrangement whereby the State pays the developer a fee for each day a court room is used, or a corporation builds a prison and is paid for each prisoner it accommodates or a corporation agrees to provide rolling stock and operate a public transport system? Who can complain if the contract is not performed according to its terms? What relief would be available? To whom would the relief be directed? What rules govern the letting of the contract?

28. This century, the High Court has twice examined issues about government contracting for the provision of chaplaincy services in schools. In *Williams v The Commonwealth*, the Court held that the making of the relevant agreement (and the making of payments under the agreement) were beyond the executive power of the Commonwealth;[46] in *Williams v The Commonwealth [No 2]*, where a regulation was made purporting to authorize the Chaplaincy Program as a program for which grants might be made, the Court found the regulation to be beyond the legislative powers

---

41 See also the arrangements at issue in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

42 Some government contracts are made with charities or other not-for profit entities but most are with listed or unlisted profit-making corporations. Ultimate control of those entities will in some cases lie in a foreign jurisdiction.

43 *Constitution*, s 51(xiii).

44 *Constitution*, s 51(xiv).

45 *Constitution*, s 51 (xxxiii).

46 *Williams v The Commonwealth* (2012) 248 CLR 156.

of the Commonwealth and further held that the making of payments for the purposes of the program was beyond the executive power of the Commonwealth.[47]

29. Self-evidently, those two cases do not exhaustively deal with, or resolve, all issues that may arise from the making, performance or termination of government contracts.

30. Five other aspects of executive power in Australia should be mentioned. I will list them before dealing with some in more detail.

Statutory offices or bodies created that exercise public power

31. First, in the last forty or fifty years, we have seen many statutory offices or bodies created which exercise public power. Directors of Public Prosecutions are an obvious example, but those offices (federal and State) were not established in Australia until the 1980s.[48] And there are many other statutory bodies which exercise important investigative and regulatory public power – bodies like the Australian Securities and Investments Commission[49] and the Australian Competition and Consumer Commission,[50] established in the 1970s or 1980s. All these bodies are to some degree independent of immediately direct political control.[51] That is seen as one of their chief virtues. There may remain a residual power of ministerial direction, but that power has rarely been used.[52] Many of these bodies (including those named) publish many forms of soft law – prosecution guidelines, regulatory guides and the like.[53] And in some

---

47 *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416.

48 See *Director of Public Prosecutions Act 1983* (Cth); *Director of Public Prosecutions Act 1982* (Vic).

49 And its legislative predecessors, such as the National Companies and Securities Commission.

50 Formerly the Trade Practices Commission.

51 See, by way of context, *Competition and Consumer Act 2010* (Cth), s 29(3).

52 See eg *Australian Securities and Investments Commission Act 2001* (Cth), s 12; *Competition and Consumer Act 2010* (Cth), ss 28, 29.

53 Gordon, "Corporate Governance – Big Ideas and Debates?" Harold Ford Memorial Lecture, delivered 24 May 2023 at 36.

cases, the body may have powers that are at least close to regulation-making powers.

32. Australian courts have not yet been required to examine the consequences of creating offices or bodies exercising public power which are not immediately politically accountable. Nor has the High Court been asked to consider whether the decisions of a private body are amenable to public law remedies because they exercise public functions. Separation from immediate political control has been treated as a complete answer to criticism of individual decision-making.

33. Issues which have been emerging in the United States over the last decade or so about the regulatory power of the Administrative State[54] and its intersection with the courts have not arisen in Australia in the forms we are seeing spoken of in the United States. There are two likely explanations for this.

34. First, US law has required that the judiciary afford deference to the executive in interpreting the law. For 40 years,[55] the *Chevron* doctrine in the US[56] provided that a court can or perhaps should defer to the interpretation a federal agency or regulatory authority to at least some aspects of a statute administered by that agency or authority if the statute is susceptible of several constructions (and each may be seen to be "a reasonable representation of congressional intent").[57] *Auer* deference[58] - which requires courts to refer to agency interpretations of ambiguous regulations - remains the law in the US.[59] These doctrines, and more general notions of "deference", have never been accepted in Australia because they are inconsistent with the function and duty of the judicial

---

54 Fisch, "Overseeing the Administrative State" (2024) 47 *Seattle University Law Review* 1 (forthcoming) at 4-8, available at https://ssrn.com/abstract=4750279.

55 On 28 June 2024, the Supreme Court delivered its decision in *Loper Bright Enterprises v Raimondo* 603 US (2024), which overturned the *Chevron* doctrine.

56 See *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).

57 *Chevron* 467 US 837 (1984) at 842-844.

58 See *Auer v Robbins* 519 US 452 (1997).

59 *Kisor v Wilkie* 588 US 558 (2019) at 563.

branch to determine the limits of the powers given by statute to administrative decision-makers.[60] There has therefore been no need to craft limits to the field within which the courts may defer to an agency whether by excising "major questions"[61] or otherwise. Second, in contrast to the US, courts in Australia have not had to confront circumstances in which agencies formerly controlled by experts in the agency's field of regulation can be said to have become less independent of party politics.[62]

35. All that said, however, there may be some other important questions in Australia and elsewhere (not addressed here) that emerge from the establishment of independent bodies which are not immediately politically accountable and yet exercise public power.

Intersection between the political branches of government and the permanent public service

36. The second major development in the way in which government is practiced is the (very great) change in the ways in which the political branches of government intersect with the permanent public service. The chief causes and manifestations of this change have been the rise of the Minister's private office with its political advisers, the public service's increasing reliance on external consultants, and not just the disappearance of the officials of the Public Service but also the disappearance of much corporate memory within Departments of State. Each change is connected to the others.

Automated decision-making

37. Third, we have barely begun to grapple with the effects of automated decision-making, and its implications for procedural fairness

---

60 *Enfield City v Development Assessment Commission* (2000) 199 CLR 135 at 151-156 [39]-[50], 158 [59]; *Brown v Tasmania* (2017) 261 CLR 328 at 480 [486].

61 See, eg, *West Virginia v Environmental Protection Agency* 142 S Ct 2587 (2022). There are currently reserved before the United States Supreme Court two cases considering the Chevron doctrine. Oral argument was heard on 17 January 2024: *Loper Bright Enterprises Inc v Secretary of Commerce* (Docket No. 22-451) and *Relentless Inc v Department of Commerce* (Docket No. 22-1219).

62 Fisch, "Overseeing the Administrative State" (2024) 47 *Seattle University Law Review* 1 (forthcoming) at 17-24, available at https://ssrn.com/abstract=4750279.

and the rule of law.[63] This is an area deserving of separate consideration by others.

Executive exercising judicial power, or at least seeking to

38. Fourth, there have been many cases in recent decades where it is alleged that a law giving the executive power to impose deleterious consequences on individuals or groups of individuals is invalid on the ground that the law seeks to permit the Executive to exercise judicial power. They include laws giving Ministers (or the Police) power to declare organisations (for example "outlaw motorcycle gangs") unlawful,[64] and laws giving a Minister power to strip a person of citizenship or cancel a visa permitting a non-citizen to remain in the country.[65]

Legislation seeking to isolate decision-making from judicial review

39. Fifth, there has been an ever-increasing tendency for the political branches to promote legislation which tries, as far as possible, to isolate Ministerial or Departmental decision-making from judicial review.[66]

V. The fourth and fifth – not the only, the first or the last

40. I want to direct particular attention to the fourth and fifth areas. Inevitably I see them through the lens of an Australian judge, but I think that there may be more generally applicable points that emerge.

Laws empowering the executive to impose detriments on individuals

41. I want to consider this development by looking at the issues which have emerged in decisions of the Supreme Court of the United Kingdom and the High Court of Australia in cases about executive powers to revoke citizenship. The two cases I will deal with are *R (Begum) v Special*

---

63 Huggins, "Executive Power in the Digital Age: Automation, Statutory Interpretation and Administrative Law", in Boughey and Burton Crawford, *Interpreting Executive Power*, 1st ed (2020) at 112.

64 See, eg, *Kuczborski v Queensland* (2014) 254 CLR 51; *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38.

65 See, eg, *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; *Jones v Commonwealth of Australia* (2023) 97 ALJR 936; 415 ALR 46; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899; 415 ALR 1.

66 See, generally, *Plaintiff S157* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

Immigration Appeals Commission[67] in the Supreme Court of the United Kingdom and *Benbrika v Minister for Home Affairs*[68] in the High Court of Australia. My purpose is not to comment on the reasoning in either case. The reasons speak for themselves. Rather, I want to use both cases to show what kinds of question may arise in judicial review of decisions where the statutory criterion for the exercise of the relevant power is the "public interest" or the "public good".

42. Shamima Begum was born and brought up in the United Kingdom. When she was 15 she travelled to Syria where she married an ISIL fighter and lived in Raqqa, the capital of ISIL's self-declared caliphate. She was later detained by opposing forces and was held in a camp in Syria.[69] Her litigation concerned two statutory decisions of the Home Secretary. First, a decision depriving Ms Begum of her British citizenship on the basis that deprivation would be conducive to the public good due to the threat she was assessed to pose to national security (the "deprivation decision"). Second, a decision refusing Ms Begum leave to enter the UK in order to participate in the appeal she had made against the deprivation decision (the "Leave to Enter decision").[70] The Supreme Court upheld both decisions.[71]

43. In its reasons, the Court considered the nature of an appeal to the Special Immigration Appeals Commission ("the Commission") against such decisions, the jurisdiction and role of the Court of Appeal in an appeal against the Commission's decision in the Leave to Enter appeal, and the role of the Divisional Court in a judicial review of SIAC's deprivation decision.

44. For present purposes, however, I focus upon the first of these – the Court's discussion of an appeal to the Commission against the deprivation decision. The legislative provisions for such an appeal said

---

67 [2021] AC 765.

68 (2023) 97 ALJR 899; 415 ALR 1.

69 *Begum* [2021] AC 765 at 765, 781 [16].

70 *Begum* [2021] AC 765 at 777 [1], 772 [4].

71 *Begum* [2021] AC 765 at 814 [137].

nothing about "the grounds on which an appeal ... may be brought, the matters to be considered, or how the appeal is to be determined".[72]

45. After reviewing several decisions in cases arising under provisions of other Acts,[73] the Court held that appellate courts and tribunals:

- "cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so";[74] and
- "are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he [or she] has taken into account some irrelevant matter or has disregarded something to which he [or she] should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions ... in the context of statutory appeals".[75]

46. The first of these points is entirely consistent with what was said by Brennan J in the High Court of Australia in *Quin*. But that was said in the context of judicial review, not an "appeal". And taken together, the two propositions I have identified in *Begum* confine an "appeal" against a decision to revoke citizenship to grounds that would found judicial review. That confinement is emphasised by the expressed need for the Commission to "have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good",[76] the reference to some aspects of the Secretary of State's

---

72 *Begum* [2021] AC 765 at 787 [40].

73 *Begum* [2021] AC 765 at 789-793 [46]-[62].

74 *Begum* [2021] AC 765 at 795 [68].

75 *Begum* [2021] AC 765 at 795 [68] referring, in connection with the last of these matters, to *Edwards v Bairstow* [1956] AC 14. The Court also referred to the need to consider the obligations of the decision-maker under the *Human Rights Act 1998* (UK), but that issue may be left aside here.

76 *Begum* [2021] AC 765 at 795-796 [70].

assessment not being justiciable;[77] and the stated need to accord the Secretary of State's assessment "appropriate respect, for reasons both of institutional capacity … and democratic accountability".[78]

47. Any tension that might be thought to arise from the conclusion that an "appeal" to the Commission is confined to grounds that would found judicial review depends on assigning a particular meaning (or at least connotation) to the notion of "appeal". Appeal is a statutory remedy, not a process of the common law.[79] Many of us are used to rules of court or other provisions which provide that an appeal from one court to another shall be by way of rehearing.[80] Provisions of that kind can be traced back to the Rules of Procedure contained in the schedule to the *Supreme Court of Judicature Act 1875*.[81]

48. Not only did the statute providing for an appeal against the deprivation decision contain no equivalent provision, it said nothing about the nature of the "appeal". This being so, it would be wrong to begin by drawing analogies between this "appeal" and appeals from a trial court to a court of appeal having jurisdiction to re-hear the case on the record of proceedings and materials submitted in evidence at trial.

49. Even so, it is to be observed that both counsel for the Secretary of State and counsel for Ms Begum had accepted, in their submissions to the

---

77 *Begum* [2021] AC 765 at 791-792 [56], 796 [70] referring to *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at 191-192 [49]-[50] and *A v Secretary of State for the Home Department* [2005] 2 AC 68 at 102 [29].

78 *Begum* [2021] AC 765 at 796 [70], again referring to *Rehman* [2003] 1 AC 153 and *A* [2005] 2 AC 68.

79 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108.

80 See, eg, *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [13].

81 See *Dignan* (1931) 46 CLR 73 at 106-110 where Dixon J identifies the differences between an appeal by way of rehearing and "an appeal strictly so called". Appeal by hearing *de novo* is a still further kind of appeal. Appeals to the High Court of Australia are not appeals by way of rehearing but are appeals strictly so called: *Coal and Allied Operations* (2000) 203 CLR 194 at 203 [12].

Court, that the appeal provided by the Act was "a full merits appeal"[82] by which at least counsel for Ms Begum meant an appeal "in which [the Commission] stands in the shoes of the Secretary of State and considers all the evidence *even if it was not before the Secretary of State*".[83] The Court adopted a narrower construction.

50. Whatever the limits on any appeal process, there is one central difficulty that confronts anyone deprived of their citizenship on the ground that they present a risk to national security. How can they cast doubt upon, let alone contradict the advice given to the decision-maker by the security services?

51. The Supreme Court set out the substance of the advice the Security Service gave to the Secretary of State in Ms Begum's case.[84] All of it is important but some features show why challenging it is so difficult.

52. First, it focused on "threat". Second, it expressly proceeded from the premise that "*any* individual assessed to have travelled to Syria and to have aligned with ISIL posed a threat to national security".[85] The Security Service's assessment explained the conclusion by making two points – "*anyone* who had travelled voluntarily to ISIL-controlled territory to *align with ISIL* since the declaration of the caliphate was aware of the ideology and aims of ISIL and the attacks and atrocities it had carried out … were assessed to have made a deliberate decision to align themselves with [ISIL] and its ideology in support of its terrorism-related activity", even if they travelled to fill non-combatant roles.[86] That is, *anyone* who travelled to ISIL-controlled territory was "actively supporting a terrorist organisation".[87] The Security Service went on to say that the threat from individuals who returned to the UK from ISIL-controlled territory could manifest itself in several ways: involvement in ISIL-directed attack planning; involvement in ISIL-enabled attacks; radicalising and recruiting

---

82 *Begum* [2021] AC 765 at 774, 776.

83 *Begum* [2021] AC 765 at 776 (emphasis added). The report of argument reveals no challenge to this proposition.

84 *Begum* [2021] AC 765 at 781-782 [16]-[20].

85 *Begum* [2021] AC 765 at 781 [16] (emphasis added).

86 *Begum* [2021] AC 765 at 781 [17] (emphasis added).

87 *Begum* [2021] AC 765, 781 [17].

UK-based associates; providing support to ISIL operatives; and "posing a latent threat to the United Kingdom".[88]

53. Once the relevant question is framed (as it must be) in terms of "threat" or "risk", it is very difficult for the person affected, or a reviewing court or tribunal, to show that the answer given was not open or was one that no reasonable decision-maker would have reached. Observing that the argument begins from an unqualified universal premise about a class of persons to which the person affected belongs, how and on what evidentiary basis would that person show that their membership of the class does *not* entail the conclusion that they pose the identified threat or risk? Bare denial will not be enough. Assertions of reformation, even if coupled with observation of intervening events, will not demonstrate the falsity of the Security Service's adoption of a premise of universal application. Instead, the person affected (or the court or tribunal) is faced with one insuperable difficulty. Security agencies necessarily make evaluative judgments on issues of threat or risk. The judgments made will almost always be based in part on intelligence material – material that is and must remain secret, material that will almost always be diffuse, fragmentary and sometimes contradictory. How can that kind of judgment be contradicted?

54. In *A v Secretary of State for the Home Department*,[89] the House of Lords dealt with a challenge to the conclusion that there was a public emergency threatening the life of the nation by looking at only some of the material on which the executive had based its conclusions (in that case, the Commission had been given other material described as "closed material").[90] Even so, it may be doubted that, taken together, the open and closed material exhausted the information on which a security service would (or should) act in reaching a conclusion about such a large question then in issue – namely, whether there was a public emergency threatening the life of the nation. This being so, is there any practical choice for a court or tribunal except to act on the view that is proffered by the executive? And where the security services have said that an individual presents a threat to security, is there any practical

---

88 *Begum* [2021] AC 765 at 781-782 [18].

89 [2005] 2 AC 68.

90 *A* [2005] 2 AC 68 at 137 [117].

choice for a court or tribunal except to accept that assessment? How can the individual show that it is not well-based?

55. If this is right, two questions follow. First, what is gained by providing for appeal or review? Does making a "national security" decision subject to review or appeal "entangle" the courts in work of a kind that may undermine "public confidence in the disinterestedness of the Judicial Branch"?[91] Does it run the risk of the executive (and thus the political branches of government) borrowing the Judicial Branch's reputation for impartiality and non-partisanship (on which its legitimacy depends) "to cloak [the executive's] work in the neutral colors of judicial action"?[92] Does the provision for review or appeal shield the political branches of government from direct political accountability for decisions of this kind? If they have that effect, is that desirable?

56. No matter how those questions are answered, there is a further question. Does the difficulty of showing reviewable or appealable error in cases of the kind now being considered show that we should hesitate before deciding that existing public law doctrines and remedies are deficient in some way and should be remoulded to provide some "more effective" check on the exercise of "national security" powers? Do we need to direct attention to means of oversight outside the courts? Are those non-judicial means of oversight effective? Should judicial review, in areas of this kind, be understood as directed primarily to the prevention of abuse or misuse of power? If that is part of the purpose of judicial review, are the existing review grounds of fraud[93] or error of law *and* the existing procedures for judicial review sufficient to catch and expose cases of that kind?

57. In Australia, issues about deprivation of citizenship have been examined against long-established doctrines of separation of power. As those doctrines have been developed in Australia, there are two relevant and related principles. First, the judicial power of the Commonwealth can only be exercised by the courts referred to in s 71 of

---

91 *Mistretta v United States* 488 US 361 (1989) at 407. See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 277 [144]-[145].

92 *Mistretta* 488 US 361 (1989) at 407.

93 In this context used in a broad sense which encompasses "bad faith". See *Anisminic* [1969] 2 AC 147 at 171; *Craig v South Australia* (1995) 184 CLR 163 at 176, 178.

the *Constitution* (the High Court, federal courts established by the Commonwealth and other courts invested with federal jurisdiction).[94] Second, federal courts can only exercise judicial power and incidental non-judicial functions.[95]

58. It is also long-established that judicial power cannot be defined exhaustively.[96] Even so, there are particular functions that are exclusively judicial. The clearest example is the function of adjudging and punishing criminal guilt.[97] Two key constitutional values underpin that conclusion: the historical judicial protection of liberty against incursions by the legislature or the executive and the protection of the independence and impartiality of the judiciary so that it can operate effectively as a check on legislative and executive power.[98]

59. Those principles were recently examined by the Court in connection with deprivation of citizenship in the case of *Benbrika*.[99] The law in issue in that case permitted the Minister to determine in writing that a person ceases to be an Australian citizen if:

- the person had been convicted of an offence or offences in the federal Criminal Code (including Terrorism offences);
- the person had been sentenced to imprisonment for at least three years;
- the Minister is satisfied that "the conduct of the person … demonstrates that the person had repudiated their allegiance to Australia"; and
- the Minister is satisfied that "it would be contrary to the public interest for the person to remain an Australia citizen".

---

94 Stellios, *Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 234.

95 Stellios, *Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 234.

96 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373.

97 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

98 *Benbrika* (2023) 97 ALJR 899 at 912 [51]; 415 ALR 1.

99 *Benbrika* (2023) 97 ALJR 899; 415 ALR 1.

60. This last criterion was amplified by a later provision identifying certain matters that the Minister must have regard to in considering the public interest but the detail of those matters need not be noticed. What should be noted is that the Minister was not obliged to give reasons for decision,[100] and the law provided that the rules of natural justice did not apply in relation to making a decision under the provision.[101] The contrast between these provisions and the way in which the courts operate is stark.[102]

61. While there is a long history of banishment and exile over thousands of years in various societies, there is no long history in Australia of denationalisation and citizenship deprivation by the executive in retribution, or as a sanction, for past criminal conduct.[103] Provisions for "citizenship cessation" for terrorism-related conduct and offences were first introduced in 2015 and were a new development in our legal and constitutional history.[104]

62. In *Benbrika*, the High Court held that those provisions were invalid on the ground that they provided for (an extra) punishment for crime when the adjudging and punishing of criminal guilt is an exclusively judicial function.[105]

63. Now again, I do not mention *Benbrika* to debate its correctness as a matter of Australian constitutional law. Rather, I point to it as identifying the basic issues of general constitutional principle which statutes may pose if they authorise the executive to inflict detrimental consequences on individuals when the executive is satisfied that "it is in the public interest to do so". Laws of that kind may, and in this case did, demand consideration of principles of separation of powers.

---

100 *Benbrika* (2023) 97 ALJR 899 at 916 [67]; 415 ALR 1.

101 *Benbrika* (2023) 97 ALJR 899 at 905 [13]; 415 ALR 1.

102 *Benbrika* (2023) 97 ALJR 899 at 916 [67]; 415 ALR 1.

103 *Benbrika* (2023) 97 ALJR 899 at 916-917 [71]; 415 ALR 1 at 20.

104 *Benbrika* (2023) 97 ALJR 899 at 916-917 [71]; 415 ALR 1 at 20.

105 *Benbrika* (2023) 97 ALJR 899 at 912 [49]-[50], 914 [60], 924 [105], 925 [115]; 415 ALR 1 at 13-14, 17, 29, 31.

Conferral of a benefit in the public interest

64. Some "public interest powers" can be exercised to give a person a benefit which would not otherwise be available. The Australian *Migration Act 1958* (Cth) has several provisions which permit the Minister to grant a visa to an unlawful non-citizen not otherwise entitled to that visa under the Act if the Minister thinks it to be in the public interest to do that. Powers of this kind may not present issues about separation of powers, but they present other kinds of issues.

65. The *Migration Act* powers I have mentioned all give the power to the Minister personally and provide that the Minister is under no duty to consider exercising the power.[106] The Minister is bound to table a statement in the Parliament recording the decision made.[107] There is no requirement,[108] in that statement or otherwise, to explain why the Minister thought it in the public interest to exercise the power. Because the powers are exercised to provide visas to persons who would not otherwise be entitled to a visa, the powers operate as dispensing provisions exempting the person concerned from compliance with the generally applicable provisions of the Act governing the grant of visas.[109] Such powers have been disfavoured since the Bill of Rights abolished the prerogative dispensing power "as it hath been assumed and exercised of late", and, as J A Cannon wrote in the *Oxford Companion to British History*,[110] that power "caused little further trouble" after the Bill of Rights.

66. The central difficulty with a power of this kind is that the sole criterion for exercising the power is expressed as "[i]f the Minister thinks that it is in the public interest to do so".[111] It follows that there is little if any scope for judicial review of what has been done or not done in connection with the exercise of the power. The Minister exercising the

---

106 See, eg, *Migration Act 1958* (Cth), s 417(3) and (7).

107 See, eg, *Migration Act 1958* (Cth), s 417(4)-(6).

108 Other than *Migration Act 1958* (Cth), s 417(4).

109 See *Plaintiff M79 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at 366-367 [85]-[87].

110 Cannon, *The Oxford Companion to British History*, 2nd ed (2015).

111 See *Migration Act 1958* (Cth), ss 46A(2), 48B(1), 195A(2), 351(1) and 417(1).

power need not (and does not) give reasons. The connection between the grant of a visa to an individual and the *public* interest is unexplained. The person who obtains the visa will not challenge what was done; no-one else seems likely to have standing.[112] And it may be thought unlikely that Parliament will examine particular exercises of the power while the Minister is a member of a government having the confidence of the lower House. So there seems to be little check on the exercise of the power.

Privative clauses

67. The political branches of government do not always welcome judicial review of executive decisions, especially Ministerial decisions. Appeal may be made in political debate to what is seen as a "democratic deficit" if judges review decisions of elected officials. Ideas of this kind can be seen behind debates about the construction and application of legislation containing "ouster" or "privative" clauses intended to limit or exclude judicial review. But like so many appeals to catchy slogans, reference to "democratic deficit" in this context would have the observer ignore the importance of other relevant considerations. The chief consideration ignored in this case is that most basic of all – the rule of law. The rule of law is a defining characteristic of democratic systems of government. Unfettered (and thus arbitrary) executive power is not consistent with the two notions that are central to the rule of law, being the *absence* of arbitrary power and universal subjection to "laws publicly made, taking effect (generally) in the future and publicly administered in the courts".[113] These ideas are ignored when it is said that what Ministers decide should not be judicially reviewable because judges are not elected but Ministers are.

---

112 See, generally, *Unions NSW v State of New South Wales* (2023) 97 ALJR 150 at 157 [16]-[18]; 407 ALR 277 at 282-283.

113 Bingham, *The Rule of Law* (2010) at 8.

68. Privative clauses have a long history[114] and have been included not infrequently in Australian state and federal legislation. They have, therefore, been considered more than once by the High Court.[115]

69. I referred earlier in this paper to the constitutional grant to the High Court of Australia of jurisdiction to grant mandamus, prohibition or an injunction against an officer of the Commonwealth.[116] This provision, coupled with the undoubted power of the Court to declare laws made by the Parliament to be unconstitutional, lies beneath the way in which the High Court has dealt with "ouster" or "privative" clauses.[117] Doctrines of parliamentary sovereignty so important to British constitutional thinking cannot be applied to the Australian *Constitution*. It is important to identify why that is so.

70. The Australian *Constitution* creates a federal form of government. What follows has been expressed in this way:[118]

> "A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them. The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature."

71. Those considerations must then be understood against the recognition that the Australian *Constitution* is "an instrument framed in accordance with many traditional conceptions, to some of which it gives

---

114 See, eg, *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.

115 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S134/2002* (2003) 211 CLR 441; *Plaintiff S157* (2003) 211 CLR 476; *Kirk* (2010) 239 CLR 531.

116 *Constitution*, s 75(v).

117 See, eg, *Plaintiff S157* (2003) 211 CLR 476 at 482-483 [5]-[6].

118 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268.

effect ... others of which are simply assumed".[119] The rule of law is one such assumption.[120] Dixon J said that it is "a conception without which the theory of a rigid Constitution could never have grown".[121]

72. The central conundrum presented by a privative clause was identified by Dixon J nearly 80 years ago. His Honour said that:[122]

> "It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition."

73. The question presented by a privative clause is a question of interpretation of the whole instrument.

74. Some of the debate that has occurred following the Supreme Court's decision in *R (Privacy International) v Investigatory Powers Tribunal*[123] has suggested that, because the relevant ouster clause considered in that case was "clear",[124] the construction adopted by a majority of the Supreme Court was unavailable.[125] If that is the argument advanced it appears to begin from a premise that is assumed rather than established – that read in the context of the Act as a whole

---

119 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

120 *Australian Communist Party* (1951) 83 CLR 1 at 193.

121 Dixon, "Two Constitutions Compared" in Crennan and Gummow, *Jesting Pilate and Other Papers and Addresses*, 3rd ed (2019) at 220.

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

123 [2020] AC 491.

124 The ouster clause provided that Tribunal decisions "shall not be subject to appeal or be liable to be questioned in any court".

125 *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 at 538 [99], 540-542 [104]-[112], 550-551 [145], [147], 558 [167]-[168].

(including both the ouster clause *and* the express or implied limits on authority to make the decision in issue) the ouster clause operates according to the most ample understanding of its words. But that is the very issue for decision. The premise assumes the conclusion and the reasoning is circular. If the issue is resolved by giving the ouster provision its fullest possible operation, are there *no* legal limits to the exercise of the relevant power? Are provisions in the Act which apparently limit the authority to make the decision of any effect?

75. This last point may be illustrated by the argument advanced in the High Court of Australia by the Commonwealth as to the construction of a privative clause in the *Migration Act*. It was said that "Parliament may confer on a Minister absolute power to decide whether an alien visa is granted. Hence there is no reason it cannot indicate that there are some *non-binding guidelines* (being the provisions of the [Act] other than the [privative clause]) that should be applied".[126] To embrace the notion of treating elaborated statutory provisions governing the grant of visas as no more than "non-binding guidelines" would do great violence to the *Migration Act*. But what the notion points to is the basic (and necessarily fatal) error of logic that follows from taking as a premise a conclusion about the construction and application of the ouster clause, without regard to the construction and application of the whole Act. It matters not whether that premise is said to be rooted in principles of parliamentary sovereignty.

VI. Conclusion

76. I referred at the start of this paper to the frequency and importance of governments contracting with third parties for provision of services to the public or sections of the public. As I suggested, there is much more to explore about how public law principles and doctrines apply in this field. I also identified five other areas where the practice of government seems to have changed over recent decades:

- the proliferation of (largely) independent offices or bodies exercising public power;
- the changes in the role of the permanent public service; increasingly frequent use of external consultants and the increasing prominence of the Minister's private office with its political advisers;

---

126 *Applicant S134/2002* (2003) 211 CLR 441 at 443 (emphasis added).

- automated decision-making;
- executive decisions which work a detriment to an individual; and
- attempts to insulate executive decisions from judicial review.

77. I asked whether these changes should cause us to consider whether public law principles and doctrine have developed in ways that respond sufficiently to these changes in the practice of government. Here I have looked only at the last two areas.

78. Those who read this paper will form their own views about whether those two areas identify deficiencies in principle or doctrine. For my own part, I am yet to be persuaded that they do. In large part that answer depends on the continued application of two fundamental principles:

- "It is … the province and duty of the judicial department to say what the law is";[127] and
- A central purpose of judicial review (an Australian lawyer would likely say *the* central purpose) is the declaration and enforcement of the legal limits on the exercise of public power.

79. And that answer is necessarily provisional. So long as the legal limits on the exercise of executive power (wherever the source of that power may lie) can be and are declared and enforced by the courts, the applicable public law doctrines and principles are working properly.

80. It will, however, always be important to keep asking the question lest principle and doctrine prove unable to meet the demands of the rule of law in its intersection with the practice of government.

---

127 *Marbury v Madison* 5 US 87 (1803) at 111; *Quin* (1990) 170 CLR 1 at 35-36.