JUDICIAL REVIEW: A VIEW FROM CONSTITUTIONAL AND OTHER PERSPECTIVES

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THE FOUNDATIONS OF ADMINISTRATIVE LAW

Administrative law forms an important part of public law. Public law also includes and is subject to the prescriptions of constitutional law. In shaping the principles of public law within the limits that necessarily apply to the judicial process, the courts, notably the High Court, have a large responsibility. There is the responsibility to ensure that the principles so shaped protect and enhance the form of democratic government for which the Constitution provides, as well as the rights and freedoms recognised by the common law, the common law being the foundation of the Australian Constitution. Professor Allars has succeeded in painting a broad picture of what that has entailed in the area of administrative law, so far as I was concerned.

Justice Gummow is unquestionably right in reminding us that judicial review has roots in the Constitution itself. Whether he is also right in saying that there has been a failure to realise this by some who teach administrative law not comparatively, but through English spectacles, I am unable to judge. Since Justice Gummow presented his paper, the High Court has confirmed[1] yet again, that in conformity with the seminal statement of Marshall CJ in *Marbury v Madison*,[2] as elaborated by Brennan J in *Attorney-General (NSW) v Quin*,[3] an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers. The statement is in one sense an expression of what is meant by the rule of law. More accurately, as Mr Gageler points out in his paper, it stems from the constitutional separation of the judicial power which provides the framework within which s 75(v) of the Constitution is to be found.

The positive characteristic attributed to the judicature by Marshall CJ has its negative counterpart, at least while the authority of the *Boilermakers Case* still stands.[4] The courts are concerned with legality alone; the courts are not concerned with the

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1 *City of Enfield v Development Assessment Committee* [2000] HCA 5 at [43].

2 1 Cranch 137 at 177 (1803): 5 US 87 at 111.

3 (1990) 170 CLR 1 at 35-36 per Brennan J. See also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

4 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affd *sub nom Attorney-General for Australia v The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529; *R v Joske; ex parte Shop Distributive and Allied Employees' Association* (1976) 133 CLR 194 at 216.

merits of administrative action to the extent that they can be distinguished from legality.[5]

The significance of this negative proposition depends upon the content of the principles governing legality. The potential scope of the concept of legality is affected by the constitutional provisions relating to judicial power to which I shall refer later. Otherwise, the relevant principles governing legality are to be found in statute and common law.

Here we encounter the great debate, summarised by Mr Gageler, between those who, like Sir Gerard Brennan, assert that the source of authority for the application of the principles of administrative law must be found in statute and those who, like myself, assert that the source is to be found in the duty of the courts to declare and enforce the law which, of course, includes the common law principles of judicial review as well as statute law. As Mr Gageler notes, there are shortcomings in the statute source theory.

For the most part, little turns on the contest between these theories. The adherents of both theories concede that neither statute nor common law can be viewed in isolation. In the ultimate analysis, however, it is relevant to know whether one should look first to statute in order to ask whether it authorises the exercise of judicial review which is sought; or first to the common law principles of review and then ask whether they have been displaced by a contrary statutory intention. The difference may well be significant because in one case it is necessary to find a source of authority in statute and in the other there is authority unless it is displaced by a contrary statutory intention. Professor Allars elaborates this point and, in doing so, treats the common law as an ultimate constitutional foundation, to use Sir Owen Dixon's expression.[6]

Sir Gerard Brennan, in *Quin*, drew from the courts' exclusive concern with legality, a further proposition, namely 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.

He went on to say that the law had developed implied limitations on the extent or exercise of statutory power but that those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.[7] That part of his Honour's statement which I have quoted does not in any way deny that judicial review of administrative action, though centred upon scrutiny of the legality of the exercise of power, operates to protect the rights and interests of the individual and is to be seen as such a protection. The common law duty of procedural fairness is directed precisely to that end, insisting as it does on procedural due process so as to ensure fairness to those who may be affected adversely by the decision to be made. So it is legitimate in shaping the principles of judicial review to take account of the need to protect the interests of individuals from illegality and excess of power.

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5 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J, cited with approval in *City of Enfield v Development Assessment Committee* [2000] HCA at [44].

6 O Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240.

7 (1990) 170 CLR 1 at 36.

THE CLEAVAGE BETWEEN JUDICIAL REVIEW AND MERITS REVIEW—A COMMENT ON PROFESSOR CANE'S PAPER

This brings me to Professor Cane and his criticism of the distinction between judicial review and merits review, a distinction drawn by the Kerr Committee and subsequently repeatedly drawn by the High Court. I acknowledge that, subject to some qualifications, a single system of review (including merits review) vested in a court would be a desirable way to go forward, provided that it is constitutionally and legally achievable. The problem is that the proviso cannot be satisfied. We would find ourselves in a constitutional and legal marshland which I shall outline. Moreover, the goal of a single system is not politically achievable. There is formidable opposition from both politicians and administrators to an enlargement of review of administrative action by the judiciary. That opposition may not be as powerful as it was when the Kerr Committee made its report but it is still so powerful as to be an unsurmountable obstacle at this time.

Merits review by a court would provide the advantage of ensuring that an exercise of an administrative discretion was within constitutional power. Curial merits review would largely solve the problem, identified by Professor Zines, which arises from deficiencies in relief by way of judicial review. Curial merits review would go a long way towards overcoming "the inadequacy of the judicial process to uphold the law".[8] That inadequacy was reduced, though not eliminated, by the introduction of the obligation of the decision-maker to give reasons on request.[9] In this respect, the decision of the European Court of Justice in *Johnston v Chief Constable of The Royal Ulster Constabulary*,[10] discussed by Professor Zines, is of interest. It is consistent with the proposition that existing remedies, if necessary, should be adjusted so as to ensure that an exercise of discretionary power does not exceed constitutional requirements, a proposition based on the European principle of effective judicial control, not yet recognised in Australia. We should not readily contemplate the inadequacy of judicial process to uphold the Constitution.

Before turning to the constitutional limitations, it is desirable to compare judicial and merits review. I agree with Professor Cane that the difference is not as great as it is often represented to be but the difference is still significant. The comparison is hampered by the blancmange-like quality of the expression "merits review". For the most part, it is used in the sense of review that includes, but goes beyond, what is comprehended in review for legality. The distinction between judicial review and merits review assumes that the content of review for legality is not co-extensive with the scope of potential review; in other words, the grounds of judicial review for legality do not include review on the basis that the decision-maker, though making no error of law, arrived at a decision which, though not unreasonable, falls short of the correct or preferable outcome.

According to the long established jurisprudence of the High Court, the grounds of judicial review are limited and are not co-extensive with the grounds which, generally speaking, would be available to an appellant in an appeal from an administrative decision. The difference between judicial review and appeal is well recognised. In an

8 *Dawson v Commonwealth* (1946) 73 CLR 157 at 182.
9 Administrative Decisions (Judicial Review) Act (Cth) 1977, s 13.
10 [1990] ECR 1-2433; [1990] 3 CMLR 1.

appeal, the tribunal can substitute its opinion of what is a correct (or preferable) outcome on the material before it for that of the decision-maker;[11] in judicial review, the court cannot do that.[12] The difference is a central element of recent High Court judgments,[13] and of English judgments of high authority as well.[14]

Emphasis on this difference conveys the impression that the gulf between the two is greater than it actually appears to be when the available grounds of challenge in appeal and review are compared. Professor Cane, by concentrating on specific grounds, is able to show that the gulf shrinks. The existence of *Wednesbury* unreasonableness as a ground of review highlights the point. And, as recent experience demonstrates, judges do from time to time trespass into merits review, wittingly or unwittingly.[15]

Yet we know that many applicants for judicial review fail to achieve their real object, namely obtaining a review of the substance of the administrative decision. Perhaps the best evidence of the difference are the limitations on the availability of relief on the ground of *Wednesbury* unreasonableness,[16] and the reluctance to grant relief on the basis of lack of proportionality. Here it should be noted that, in England, though not in Australia, there is a trend towards adopting a higher standard of scrutiny for *Wednesbury* unreasonableness.[17]

Despite the distaste for the concept of proportionality as a criterion for judicial review, because it is said to be a severer test than *Wednesbury* unreasonableness,[18] as Professor Zines points out, it has been applied vigorously by English courts under European Community law. Indeed, when combined with the margin of appreciation, it

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11 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Johnson v Federal Commissioner of Taxation* (1986) 72 ALR 625 at 628.

12 *Hamblyn v Duffy* (1981) 35 ALR 388; *Johnson v Federal Commissioner of Taxation* (1986) 72 ALR 625 at 628.

13 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577; *City of Enfield v Development Assessment Committee* [2000] HCA 5 at [44].

14 See, for example, *R v Secretary of State for Trade and Industry; Ex parte Lonrho* [1989] 1 WLR 525 at 535.

15 See J McMillan, "Federal Court v Minister for Immigration" (1999) 22 *AIAL* 1 where the author advocates that administrative review should be undertaken principally by tribunals rather than courts.

16 Historically the common law set its face against review for error of fact. This attitude has influenced the interpretation of the unreasonableness ground. The consequence is that a demonstrably unsound finding of fact does not amount to an error of law: *R v District Court; Ex parte White* (1966) 116 CLR 644 at 654; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

17 See *R v Chief Constable of Sussex; Ex parte International Trader's Ferry Ltd* [1998] 3 WLR 1260 at 1288-1289 per Lord Cooke of Thorndon; P Craig, "Unreasonableness and Proportionality in UK Law" in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) at 94-96.

18 *Brind v Secretary of State for House Department* [1991] 1 All ER 720.

has been assimilated to *Wednesbury* unreasonableness.[19] It can be a useful concept, a matter I shall mention later.

In the final analysis, under the law as it presently stands, it is reasonably clear that there is a significant difference between review for legality and review on the merits, even though the difference may not be very large.

One question then is whether it is constitutionally possible by means of legislation under s 76(ii) of the Constitution to vest in a federal court general jurisdiction by way of appeal "on the merits" from administrative decisions on the footing that the court is able to substitute its decision (the correct or preferable decision) for that of the decision-maker. It is permissible under s 76(ii) to vest in a federal court a jurisdiction that is in form an appeal from the decision of an administrative decision-maker or tribunal. The old "appeal" to the High Court in taxation, patent and trade mark matters from Boards of Review and Appeal Tribunals were accepted examples. In substance, these "appeals" were exercises of original jurisdiction by the High Court in which it was for the Court to determine the outcome rather than to consider whether the administrative decision itself could or could not be supported.[20]

The proposition stated in the preceding paragraph is, of course, subject to the qualification that the jurisdiction to be conferred upon a court is

> not only a jurisdiction with respect to a matter lying within [the matters] referred to in ss 75 and 76 [of the Constitution] but is so conferred as to involve the exercise of judicial power.[21]

Spelling out what the qualification requires, in *Farbenfabriken Bayer*, Dixon CJ was able to say of s 44 of the Trade Marks Act 1905 (Cth):

> [it is] a provision which is apt to confer judicial power and relates to a fit subject matter for judicial power; the subject involves a matter within s. 76(ii)...[I]n the character of the provision itself, in the manner in which the power is to be exercised or in the subject no reason can be found for denying that it forms a proper exercise of the constitutional power conferred [by ss 76(i) and 77 (iii)].

Determining a taxpayer's liability to tax or an applicant's right to registration of a patent or a trade mark are straightforward examples of the exercise of judicial power. At the other end of the administrative (or industrial spectrum), there are functions which have been held to be non-judicial and cannot be undertaken by a court.

Between these extremes, there is the marshland created by our inability to come up with an instructive brightline definition of "judicial power". So the problem of classifying a particular decision-making function as "judicial" or "non-judicial" still remains with us.

What Dixon CJ said in *The Queen v Spicer: Ex parte Australian Builders' Labourers' Federation*,[22] illustrates the problem. It was a case in which the Court by majority held

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19 *R v Chief Constable of Sussex; Ex part International Trader's Ferry Ltd* [1998] 3 WLR 1060 at 1227 per Lord Slynn of Hadley and at 1288-1289 per Lord Cooke of Thorndon.

20 See *Federal Commission of Taxation v Lewis Berger & Sons (Australia) Ltd* (1927) 39 CLR 468; *Jafferjee v Scarlett* (1937) 57 CLR 115 at 126; *Commissioner of Taxation v Finn* (1960) 103 CLR 165; *Farbenfabriken Bayer AG v Bayer Pharma Pty Ltd* (1959) 101 CLR 652; *Kaiser Aluminium and Chemical Corporation v Reynolds Metal Co* (1969) 120 CLR 136.

21 *Farbenfabriken Bayer AG v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 657 per Dixon CJ.

22 (1957) 100 CLR 277.

that a power given by statute to the Commonwealth Industrial Court to disallow any rule of a trade union on prescribed grounds did not involve an exercise of judicial power. The distinction drawn by the Chief Justice was between "an arbitrary discretion" and a

> judicial discretion proceeding upon grounds that are defined or definable, ascertained or ascertainable.[23]

The relevant provision was characterised as affording guidance in the exercise of an industrial discretion rather than as providing a legal standard governing a judicial discretion.[24] The discretion given by the statute was said to have been based "wholly on industrial or administrative considerations"[25] and involved "considerations of industrial policy".[26] Neither characterisation is particularly illuminating. The same comment can be made about the similar characterisation of the statutory provisions in *The Queen v Spicer; Ex parte Waterside Workers' Federation of Australia.*[27] At the same time, it was acknowledged in the first of the two cases that there was no reason why a court could not be given a power under s 76(i) to quash union rules which do not conform with judicially manageable tests or standards of justice, fairness or propriety.[28]

There is, in the judgments in these cases, as well as in *Farbenfabriken Bayer*, several strands of thought that contribute to the result. One is the absence of a definable or ascertainable standard; another is the notion that policy, specifically industrial policy or administrative policy, was involved; a third is the idea that the subject matter to which the function relates was not fit for judicial power. The clear implication is that a function that involves evaluating and deciding broad questions of policy is alien to the judicial function.

What was there implied was subsequently stated expressly in *Precision Data Holdings Pty Ltd v Wills*:

> [I]f the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power.[29]

There are many administrative decision-making functions in which policy is a relevant factor. The potential consequence is that the function cannot be characterised as a judicial function. In this respect, it is not to the point that the AAT adopts a deferential attitude towards government policy. Granted that point, we are still confronted with the proposition that evaluation and determination of policy factors are said to be alien to the exercise of judicial power, according to a wealth of authority in the High Court.

This may be a rather narrow view of the judicial function, as Professor Cane suggests. Courts and judges now undertake functions that were thought at an earlier

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23 Ibid at 291.
24 Ibid at 290.
25 Ibid at 289 per Dixon CJ.
26 Ibid at 310 per Taylor J.
27 (1957) 100 CLR 312.
28 *The Queen v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 291. See also *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368; *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 94.
29 (1991) 173 CLR 167 at 189.

time to stand outside the exercise of judicial power. For example, appeals in industrial and town planning matters have been undertaken by courts, at least in some jurisdictions which do not observe a strict separation of judicial power. Courts constantly apply very general standards, like reasonableness, despite earlier reservations about doing so.

This prompts me to say that we need to explore in more depth what lies at the bottom of the policy/judicial power antinomy. As I have said before, policy comes in different shapes and sizes. What is more, there are examples of courts dealing with and evaluating policy factors. Duty of care cases, notably involving public authorities, turn on such factors. The speech of Lord Hoffmann in *Stovin v Wise*[30] is a strong example. *Stovin v Wise* is just one of many cases in which the courts have regard to underlying policy considerations in formulating the legal principle to govern the issue to be determined. So the policy considerations which are truly alien to the exercise of judicial power need to be identified.

On the authorities, the true test may well be: is the particular function appropriate for a court in the sense that the issues can be resolved by the application of legal principles and judicially manageable criteria and standards? If so, some functions involving policy may be inappropriate, others not so. If policy is to be dealt with according to judicial method, informing the formulation of principle to be applied to the case in hand, that is one thing; but if the court is required to deal with policy at large, then the function is non-judicial.[31] It is possible that, over time, the courts might move to a position where the judicial function extends to a wide array of policy considerations, excluding only limited subjects such as defence and foreign affairs. Clearly we are presently well short of that destination.

There are some indications that an unexpressed reason why policy factors are considered to be alien to the judicial function is that determination of policy factors is contentious and controversial and may expose judges to criticism in an area where judges have no special claim to expertise.[32] In other words, judgments on issues of policy are unlikely to command the respect which judgments on questions of law will attract. In recent cases dealing with the judicial power, the Court has expressly referred to the importance of maintaining public confidence in the administration of justice, itself a policy factor which became influential, if not decisive, in both *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[33] and *Kable v Director of Public Prosecutions (NSW)*.[34]

Once it is acknowledged that public confidence in the administration of justice is a relevant policy factor in formulating legal principle, especially in the constitutional context of judicial power, it is difficult to predict where this policy factor will take us, or how the judges will identify community perceptions of the courts. The risk is that they will attribute to the community perceptions arising from their own specialised knowledge. To do so would be quite unrealistic. Be that as it may, the use of this policy factor suggests the possibility that it could be deployed to spell out the ideas of policy and inappropriateness of function which are said to be objections to the exercise of

30 [1996] AC 923.
31 *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 567 per Stephen J.
32 See L Zines, *The High Court and the Constitution* (4th ed 1997) at 198.
33 (1997) 189 CLR 1.
34 (1996) 189 CLR 51.

judicial power. If this were to occur, it might compel some refinement in thinking which would result in a closer identification of the characteristics of the policy factors that are truly alien to the judicial function, and likewise of activities which are inappropriate for the exercise of judicial power.

That a statutory discretion is expressed in wide terms and is not accompanied by a prescription of criteria or standards does not necessarily mean that its exercise is non-judicial. In many such cases, the courts can and will develop criteria and standards to be applied in exercising the discretion.[35] But in other cases the courts will not do so because the nature of the policy considerations precludes such development or because the statute, on its true construction, exhibits an intention that the administrative decision-maker is to exercise a relatively unfettered discretion.

Although it is not possible in this class of case to entrust a court with the function of reviewing the exercise of the discretion on the merits, it would be possible to give that function to an administrative review tribunal, to the extent that the statute conferring the discretionary power does not make any element in the exercise of the discretion unreviewable.

There are, of course, many cases in which some, but not all, elements of the exercise of a discretionary power are judicially reviewable, leaving a core of the exercise of the discretion that is unreviewable by a court. The discretionary power to consent to transfer of an irrigation-farm lease, dealt with in *Water Conservation and Irrigation Commission (NSW) v Browning*,[36] is an illustration. In these cases an appeal to a court must necessarily be confined to elements of the exercise of the discretion which are judicially reviewable.

I shall leave aside review of questions of fact. In the 1960s and 1970s, a proposal for judicial review of findings of fact would have been decisively rejected. There seems to be no enthusiasm for it now in political and administrative circles.

There are also strong arguments, which there is no present occasion to develop, against subjecting the administration and, for that matter, the courts, to the burden of judicial fact-finding scrutiny across the board. And there are arguments, perhaps equally as strong, against entrusting judges with policy evaluation and assessment, especially in areas where others have much greater expertise.

It was not in the 1970s and, as things presently stand, it is still not constitutionally permissible to erect a general system of judicial merits review of administrative decisions. It might have been possible to sift through the myriad of administrative discretions with a view to classifying them in a constitutional context. One could not have been confident in the precise correctness of such a classification. In any event, a recommendation for judicial merits review where it was possible, but for tribunal merits review in other cases, would simply have provided greater scope for opposition to the overall proposal. That comment applies today as it did then. The Government acceptance of the "New Administrative Law" was an extremely narrow call. It was due to the efforts of Mr RJ Ellicott QC, the then Attorney-General. He would not have succeeded if the scheme featured judicial review on the merits or even an expanded form of judicial review.

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35 *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 133 CLR 194 at 216 per Mason and Murphy JJ.

36 (1947) 74 CLR 492 at 505; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757 and 758.

Another possibility was, by a generally expressed statutory provision, to vest jurisdiction in judicial merits review in a court but only in so far as such review, in any particular case, involved the exercise of judicial power. This course was unsatisfactory simply because it would require a determination in particular cases that the proposed review involved or did not involve the exercise of judicial power. Such a provision would raise the prospect of jurisdictional disputes.

My penultimate comment on this topic is that, if a recommendation for major reform in Australia, notably one which provided for review of administrative decisions across the board, was to have a reasonable prospect of success, it had to avoid constitutional objections and uncertainties. There was no point in proposing a régime which would have been unacceptable, more particularly when opponents could point to constitutional objections.

My last word on the topic is to say that, though a contributor to it, I am not an unqualified supporter of the High Court's Ch III jurisprudence. Perhaps it has relied too heavily on conceptualism to the detriment of a functional approach. I have entertained doubts about the basis on which the negative implication was drawn in the *Boilermakers Case*.[37] Although, on its face, the implication is based on an analysis of the text and structure of the Constitution, it ultimately turns not so much on textual considerations as on a policy consideration, namely that vesting in a body both executive and judicial power is to threaten judicial independence. It has seemed to me that the incompatibility test favoured by Williams J has much to commend it. The Privy Council's rejection of it was quite unconvincing. But the overthrow of *Boilermakers* and its replacement with the incompatibility test would not eliminate the need to distinguish judicial from non-judicial power. Section 71 of the Constitution requires that the exercise of judicial power be vested in Ch III courts and not otherwise.

THE CHEVRON DOCTRINE AND "THE HARD LOOK" DOCTRINE

The *Chevron*[38] doctrine has its attractions. They are elaborated by Justice Sackville. However, in the High Court's recent examination of the doctrine, mention is made of the deficiencies of the doctrine, not of its attractions.[39] Significantly, the critical examination of the *Chevron* doctrine was immediately followed by a re-affirmation of the *Marbury v Madison* and *Attorney-General (NSW) v Quin* framework for judicial review in Australia.[40]

Although the *Chevron* doctrine was not explicitly rejected, it is difficult to escape the conclusion that the Court regarded the doctrine as amounting to an abdication of the judicial responsibility to declare and enforce the law. The Court's view on this point conforms to that of Lord Diplock in *In re Racal Communications*.[41] Implicit in this is the assumption that a question of law can be distinguished from a question of fact and a matter of policy. This is one of the great assumptions of Anglo-Australian administrative law. Although the distinction is supported by legislation and by a

37 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
38 *Chevron USA, Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984).
39 *City of Enfield v Development Assessment Committee* [2000] HCA 5 at [41] and [42].
40 Ibid at [44].
41 [1981] AC 371 at 384.

wealth of judicial authority, it is an assumption which perhaps may be challenged one day, as it has been in the United States and Canada.

The High Court in *City of Enfield* made no reference to the comment of Dixon J in *R v Hickman; Ex parte Fox*[42] (a case concerning the application of regulations to the "coal mining industry") that:

> [f]rom a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not according to the legal rules of construction and the analytical reasoning upon which the decision of a court of law must depend.[43]

That comment, when read with his Honour's later comment about the powers of a Local Reference Board, is of some interest. That later comment was:

> These powers are concerned entirely with the settlement of disputes. They do not include any authority to decide either the limits of the local Board's own jurisdiction or the extent of the application or operation of the conception involved in the expression "coal mining industry".[44]

The passages quoted lend support to the view that, within the area of constitutional power and within the limits of judicial review, it is possible to vest in the decision-maker a power to decide the limits of its jurisdiction. If the decision-maker's opinion is made the statutory criterion and he addresses himself to the correct test and the relevant facts, his decision will stand unless, in an extreme case, *Wednesbury* unreasonableness can be established.[45] This approach would seem to be different from *Chevron* or at least the High Court's understanding of *Chevron* as demonstrated in *City of Enfield*. The High Court did not treat the *Chevron* doctrine as resting on a legislative provision which makes the decision-maker's opinion the criterion.

The *Hickman* principle, which applies when there is a privative clause, gives the decision-maker some leeway, but it does not operate on the basis of a grant of interpretative authority to the decision-maker, though this may be its practical effect. The principle attempts to reconcile the tension between a limited grant of power and the existence of a privative clause by providing an interpretive reconciliation of the conflict. Indeed, the principle rescues the privative clause from invalidity. It has been suggested that the grant of interpretive authority to the decision-maker could be harnessed to the *Hickman* principle so as to provide a rationality test to be applied by the court to the exercise of power by the decision-maker.[46] But in such a case, there may be no need for the principle, the purpose of which is to ensure some latitude to the decision-maker. The grant of interpretive authority, which must be subject to some limitations, would itself achieve that latitude.

The adoption of the "hard look" doctrine, though it would be a relatively simple step to take, would present more of a challenge to the established distinction between judicial review for illegality and merits review.

Having regard to the existence of authorities which support the proposition that the courts will not review the making of a perverse finding of fact for which there is some

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42 (1945) 70 CLR 598.
43 Ibid at 614-615.
44 Ibid at 617.
45 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 at 136 per Cooke J.
46 See P Bayne, "Administrative Law" (1992) 66 *ALJ* 523 at 524-526.

evidence,[47] something might be achieved by providing that a perverse, capricious or arbitrary decision is reviewable. As Sackville J points out, the "hard look" doctrine arises out of the use of these words in the Federal Administrative Procedures Act (1945). The problem, it seems to me, is that Australian courts, seized as they are with the distinction between judicial and merits review, will not interpret these grounds as going so far as to amount to authority to engage in merits review or even to adopt the "hard look" approach. A bolder and more directly expressed reform would be required.

THE CROWN

One virtue of an Australian Republic would have been the demise of "the Crown" and with it some of the obscurity and confusion that has surrounded that concept. Unfortunately some of the obscurity and confusion would remain as the new law sought to preserve old common law rights and principles applicable to the Crown; and to give them in a new operation as applied to a republican form of government. The prerogatives of the Crown fall into that category. As Dr Seddon notes, it is remarkable that there is still no authoritative Australian decision holding that an exercise of prerogative power is subject to judicial review. And, as he also says, there can be little doubt that, subject to some exceptions, the higher courts will move in the same direction as the English courts.

I agree with Dr Seddon that the concept of the Crown in Australia is now of limited significance. For the most part, we have succeeded, through legislative and other means, in bringing about this situation. However, there are still some areas where difficulty is unresolved or where, in seeking to resolve difficulty, we have generated other difficulties. One such area is Crown immunity, where the kinks in s 64 of the Judiciary Act 1903 (Cth) governing the liability of the Commonwealth in actions by a citizen, have not been completely ironed out. Another is in the application of statutes to the Crown, a subject which is more complicated in a federal than in a unitary system. As Dr Seddon suggests, other jurisdictions should follow the South Australian and Australian Capital Territory example, by providing that all legislation binds the Crown unless there is specific provision to the contrary.

CAN WE LEARN FROM THE EUROPEAN EXPERIENCE?

Professor Saunders' comparative examination of the relations between governments in federal-autonomous systems is revealing. Despite the statement by Deane J that co-operation between governments is a "positive objective" of the Australian Constitution,[48] the Constitution by its provisions does little to achieve or facilitate the attainment of the objective. In effect it provides for a dualist system, in which each system is more or less self-contained. The Constitution does not, as the German Basic Law does, contemplate a degree of integration between the central and the provincial system. The German federal model does not seem, on its face, to give rise to as many jurisdictional divides as the Australian system. The complexities of *Re Wakim; Ex parte McNally*,[49] would appear to be foreign to the German system.

47 See, for example, *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139.
48 *The Queen v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 589.
49 (1999) 163 ALR 270.

Particularly is this so in matters of administrative review, where review is in the hands of the courts beginning at the sub-national level and ending at the national level. Our Constitution makes no provision for the review of Commonwealth-State agencies to serve co-operative federalism purposes. There are difficulties therefore in reviewing the decisions of such a body, difficulties which may become critical as attempts are made to stitch together the cross-vesting pieces struck asunder by the decision in *Re Wakim; Ex parte McNally*.[50] Are the decisions of such a body made in the exercise of power conferred by a State legislature subject to Commonwealth merits or judicial review simply because the Commonwealth gave legislative consent to the conferral by the State?

Difficulties of this kind seem not to have been foreseen by the framers of the Constitution. The conceptual ingenuity of a future generation of High Court Justices lay beyond the horizon of their imagination. Perhaps they thought that the inclusion of the reference provision (s 51(xxxvii)) would overcome the difficulties. If so, they were sadly mistaken. There seems to be strong opposition within the States to a reference of power.

With the jurisdictional fall-out from *Re Wakim*, we are now paying a high price for failing to set up a single system of courts. Equally, the absence of a unified system of administrative review will present a range of difficulties. These difficulties may serve to discourage co-operative federalism which becomes even more desirable, if not necessary, in the globalised world.

The European models certainly provide food for thought. Whether we can take advantage of them is questionable. That is because the European model seems to me to stem from a different conception of government, arising in the case of Germany from the concept of an undivided state, as Professor Saunders points out. The European tradition of nation state government was more closely centred upon government by the executive with less emphasis on the democratic institution of Parliament and this may play a part in the greater integration that is displayed in European federation than we see in Australia. That same European tradition may explain why certain European legal concepts, such as proportionality, notwithstanding their obvious utility, have not been accepted enthusiastically in Anglo-Australian law. In the Anglo-Australian world, the sovereignty and authority of Parliament invest its choice of the decision-maker with a status and importance—even an aura—that has no precise counterpart in Europe.

European legal concepts are making a contribution to our law. Margin of appreciation has a special appeal to judges and lawyers who recognise that on some issues there must be some scope for legislative judgment. Legitimate expectation is well-known to us, though controversial in some quarters. The principle of legal certainty provides a sharper edge for ideas that have long been recognised in our law. Much the same can be said for the principle of effective judicial control.

Proportionality, perhaps more than any other European legal concept, has generated debate. Its use in relation to the exercise of legislative and executive power which affects fundamental or protected individual rights is accepted; but elsewhere the legitimacy of its use is less clear. The importance of the principle in Community law is attested by the fact that "it is invoked by litigants more often than any other general

50 Ibid.

principle of Community law".[51] Although the concept is applied according to different standards of scrutiny depending upon the nature of the issue and the interest that is at stake,[52] the standard to be applied to administrative decisions presents a high hurdle to the applicant seeking review. In England, the view has been expressed that:

> outside the field of human rights, proportionality should normally only be applied if the means are manifestly grossly out of balance in relation to the end sought.[53]

In other words, the decision must be plainly wrong. That, it has been said, is the European as well as the English position.[54] On that footing, proportionality would not undermine, let alone overthrow, the prohibition on judicial merits review. But, in the same case, on appeal, the House of Lords adopted a rather different approach, proportionality and the margin of appreciation being together assimilated, in most cases at least, to *Wednesbury* unreasonableness. In making that conjunction, Lord Cooke of Thorndon intensified the standard of scrutiny for *Wednesbury* unreasonableness.[55] Here, in Australia, we have not reached that position.

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51 T Tridimas, "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny" in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 65 at 66.

52 Ibid.

53 *R v Chief Constable of Sussex; Ex parte International Trader's Ferry Ltd* [1997] 2 All ER 65 at 80 per Kennedy LJ; affd [1998] 3 WLR 1260.

54 Ibid at 81 per Kennedy LJ but cf T Tridimas, above n 51 at 67 where the author suggests that the European standard of scrutiny is higher than that acknowledged by Kennedy LJ.

55 [1998] 3 WLR at 1288-1289.