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Lecture

SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2019 – "JUDICIAL REVIEW IN AUSTRALIA: THE PROTECTION AND POWER OF COURTS UNDER THE AUSTRALIAN CONSTITUTION"

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1 Sir Owen Dixon is generally considered to have been one of Australia's leading jurists. In 1943, he was speaking to the American Bar Association on the topic of sources of legal authority.[2] He referred to a variance between the American Constitution[3] and the Australian Constitution[4] which he described as being "of deep significance". It is significant, he said, because it means that our countries "are not at one in our conception of the unity of the legal system" of our nations.[5]

2 He explained the position in the US by reference to a passage in a dissenting judgment by Justice Holmes.[6] "Law", said Justice Holmes:[7]

> … is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

3 Sir Owen Dixon then explained the position taken in Australia: "In Australia we subscribe to a very different doctrine. We conceive a State

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1 I express my appreciation for the research undertaken by my then Senior Associate, Michael Maynard, for the purpose of this paper.

2 Owen Dixon, "Sources of Legal Authority" in *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Susan Crennan AC QC & William Gummow AC eds) (The Federation Press, 3rd Ed, 2019).

3 Constitution of the United States.

4 Constitution of the Commonwealth of Australia.

5 Owen Dixon, "Sources of Legal Authority" in *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Susan Crennan AC QC & William Gummow AC eds) (The Federation Press, 3rd Ed, 2019) at p 246.

6 Owen Dixon, "Sources of Legal Authority" in *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Susan Crennan AC QC & William Gummow AC eds) (The Federation Press, 3rd Ed, 2019) at pp 246–247.

7 *Black and White Taxicab and Transfer Co v Brown and Yellow Taxicab and Transfer Co* 276 US 518 at 533–534 (1928).

as deriving from the law; not the law as deriving from a State. A State is an authority established by and under the law …"[8] The common law, he said, is antecedent to the constitutional instruments which ultimately united Australia into a federal Commonwealth. "The anterior operation of the common law in Australia is not just a dogma of our legal system … It is a fact of legal history", he said.[9]

4 Neither Justice Holmes nor Sir Owen Dixon was speaking of the common law as something having a transcendental quality. The common law of which Sir Owen Dixon spoke was not some immutable common law of England pre-Federation which might involve for Australia notions such as parliamentary supremacy. Indeed the common law of Australia, whilst informing the Constitution, is itself influenced by the Constitution.[10]

5 The context for the statements by Justice Holmes and Sir Owen Dixon was federalism. Justice Holmes denied that the common law was a body of law, whereas Sir Owen Dixon considered that its anterior operation, combined with features of the Constitution, meant that it could operate as a unit.[11] This need not be elaborated upon for the purposes of my discussion. The point made by Sir Owen Dixon by reference to it is fundamental to Australian constitutional law. It explains the Australian conception of the rule of law to which all are subject, and points to the importance of the place of the courts in our constitutional system: "Within the limits of its jurisdiction … the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and … remedies".[12]

6 The federal judiciary under the Commonwealth Constitution is separate, independent and the exclusive repository of federal judicial power, subject to other courts being invested with federal jurisdiction. It determines the limits of legislative and executive power, largely through the process of judicial review. Judicial review is understood to be an

8 Owen Dixon, "Sources of Legal Authority" in *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Susan Crennan AC QC & William Gummow AC eds) (The Federation Press, 3rd Ed, 2019) at p 247.

9 Owen Dixon, "Sources of Legal Authority" in *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Susan Crennan AC QC & William Gummow AC eds) (The Federation Press, 3rd Ed, 2019) at p 247.

10 William Gummow, "The Constitution: Ultimate Foundation of Australian Law?" (2005) 79 ALJ 167.

11 See *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 563.

12 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24, [39], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

application of the rule of law. And because the courts are concerned to determine the limits of governmental power by the process of review, it has accepted jurisdictional error as the test.

7 The Commonwealth Constitution itself recognises the importance of the High Court having a power of review. It provides for constitutionally entrenched remedies which may be granted following a process of review. This power to review has been regarded as reinforcing the assumption of the rule of law upon which the Constitution was founded.

8 This is not to suggest that there have not from time to time been challenges to the court's power to review governmental action. From time to time, the High Court has had to consider the extent of the operation of privative provisions and whether they are effective to oust review for jurisdictional error. Another question for the High Court has been privative provisions affecting State Supreme Courts' jurisdiction for review. If such provisions could be effective in protecting jurisdictional errors, not only would those courts not be able to function in a way that the Commonwealth Constitution assumes that they would; the High Court would not be able to fulfil its role as the final appeal court for Australia.[13]

I. The separation of powers and the Judiciary

9 If the starting point is the law, as Sir Owen Dixon explained, the next step must be the creation of the three branches of government which are subject to it and, in particular, the Judiciary which deals with justiciable controversies arising under the Commonwealth Constitution and the law. "While the anterior operation of the common law in Australia informs the Constitution … the development of the common law of Australia since 1901 must conform with it".[14]

10 The constitutions of Australia and the Republic of Singapore[15] have in common the separation of the powers of the three branches of government. Under the Australian Constitution, they are dealt with in

13 See *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581, [98]–[100], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

14 Susan Crennan AC QC, "Sir Owen Dixon: The Communist Party Case, Then and Now" in *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Susan Crennan AC QC & William Gummow AC eds) (The Federation Press, 3rd Ed, 2019) at p 18, citing *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 564–566.

15 Constitution of the Republic of Singapore (1999 Reprint).

three different chapters. Chapter I is titled "The Parliament" and vests the legislative power of the Commonwealth in the "Federal Parliament".[16] Chapter II, "The Executive Government", contains provisions which vest the executive power of the Commonwealth in the Queen, exercisable by the Governor-General acting with the advice of the Federal Executive Council.[17] Chapter III is simply titled "The Judicature". Its lead provision vests "[t]he judicial power of the Commonwealth … in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction".[18]

11 Under the Constitution of Singapore, executive authority is vested in the President and exercisable by the President or the Cabinet by the provisions of Part V.[19] Legislative power is vested in the Legislature, consisting of the President and the Parliament, by Part VI.[20] Judicial power is vested in the Supreme Court and in such subordinate courts as may be provided by any written law by the provisions of Part VIII.[21]

12 There are some other provisions of Chapter III of the Commonwealth Constitution which I need to mention for the purpose of the discussion which follows.

13 Section 75 deals with the original jurisdiction of the High Court. Section 75(v) is the provision I alluded to earlier which entrenches the court's power of review. It gives the High Court original jurisdiction in all matters "in which a Writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

14 Section 73 deals with the appellate jurisdiction of the High Court. It includes jurisdiction to hear and determine appeals from "the Supreme Court of any State" as well as "any other federal court". Section 77(iii) permits a state court to be invested with federal jurisdiction. This structural aspect of the Constitution effectively establishes a system of courts for Australia and a system of law.

16 Constitution of the Commonwealth of Australia, s 1.
17 Constitution of the Commonwealth of Australia, ss 61–63.
18 Constitution of the Commonwealth of Australia, s 71.
19 Constitution of the Republic of Singapore (1999 Reprint) Art 23.
20 Constitution of the Republic of Singapore (1999 Reprint) Art 38.
21 Constitution of the Republic of Singapore (1999 Reprint) Art 93.

II. Judicial independence and exclusivity

15 Australia and Singapore also appear to share in common firm views about the independence of the Judiciary. In Australia, it has been held that courts exercising the judicial power of the Commonwealth must be independent of both the federal and state governments.[22] Judicial independence has been described by a former Chief Justice, speaking extra-judicially, as "the priceless possession of any country under the rule of law";[23] and in decisions of the court, as "fundamental to the Australian judicial system",[24] and as assisting the public perception of the courts as independent, which is essential "to the system of government as a whole".[25] In the jurisprudence of the Supreme Court of Singapore, it has been said that "judicial independence is a fundamental tenet" of the law and "one of the foundational pillars of Singapore's constitutional framework".[26] To this end, it has been said, there should be no interference by government with the performance of the judicial function.[27]

16 The role of the federal judiciary under the Commonwealth Constitution is exclusive. Only courts may exercise the judicial power of the Commonwealth. The landmark case, *Australian Communist Party v The Commonwealth*,[28] explains the nature of federal judicial power and its exclusivity.

17 The legislation in question in that case dissolved the Communist Party and provided for its property to be forfeited.[29] It empowered the Governor-General, on the advice of a committee appointed for the purpose, to declare unlawful, by instrument, any body of persons with communist affiliations.[30] The Governor-General could make a declaration

22 *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 277–278 and 289, *per* Dixon CJ, McTiernan, Fullagar and Kitto JJ. See further, *eg*, *Wainohu v State of New South Wales* (2011) 243 CLR 181 at 193, [8], 206, [39], 211–212, [50], and 216, [62], *per* French CJ and Kiefel J.

23 The Honourable Sir Gerard Brennan, AC KBE, Chief Justice of Australia, "Judicial Independence" Australian Judicial Conference, Canberra (2 November 1996).

24 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343, [3], *per* Gleeson CJ, McHugh, Gummow and Hayne JJ. See also, *eg*, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 164, [35], *per* McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

25 *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11, *per* Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

26 *AHQ v Attorney-General* [2015] 4 SLR 760 at 778, [35].

27 *AHQ v Attorney-General* [2015] 4 SLR 760 at 778, [35]. See also, regarding separation of powers, *eg*, *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at 957, [11]; *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at 1158, [68]–[69].

28 (1951) 83 CLR 1.

29 Communist Party Dissolution Act 1950 (Cth) ss 4 and 8.

30 Communist Party Dissolution Act 1950 (Cth) s 5.

respecting an individual, which could affect the ability of that person to work for the Government.[31]

18 In the recitals to the legislation, it was asserted that communism is a threat to "the security and defence of Australia". This was an attempt to bring the legislation within a constitutional head of power, the defence power, in order to be valid.[32]

19 The High Court rejected this attempt on the part of Parliament to "'recite itself' into power".[33] It said that only the courts could determine whether the legislation serves a defence purpose, or otherwise falls within a recognised head of power, and is therefore constitutionally valid. It held to be invalid provisions of the legislation because they did not prescribe any rule of conduct or prohibit particular acts or omissions, but proscribed persons and bodies – with Parliament itself determining, or empowering the Executive to determine, the facts upon which the existence of legislative power depended. That determination – of the existence of constitutional facts – is a function reserved for the Judiciary.[34]

20 Sir Owen Dixon observed in that case that:[35]

> … [h]istory, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.

21 The *Communist Party* case is perhaps best known for what Sir Owen Dixon said about the relationship between the Commonwealth Constitution and the rule of law. Consistently with his extra-judicial writings, he described the Constitution as "an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government".[36] Others, he said, are assumed. And he gave as an example the rule of law.[37] Since then it has been accepted that "[t]he rule of law is one of the assumptions upon which the *Constitution*

31 Communist Party Dissolution Act 1950 (Cth) ss 9–11.
32 Constitution of the Commonwealth of Australia, s 51(vi). See also ss 51(xxxix) and 61.
33 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 206, *per* McTiernan J. See also 264, *per* Fullagar J.
34 See, *eg*, George Winterton, "The Significance of the *Communist Party* Case" (1992) 18 Melb U L Rev 630 at 650.
35 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187.
36 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.
37 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

is based" and upon which it "depends for its efficacy. Chapter III of the *Constitution* … gives practical effect to that assumption".[38]

III. Judicial review and the rule of law

22 Judicial review, whether of legislative or executive action, is understood to be a guarantee of the rule of law by preventing those branches of government from exceeding the powers or functions provided by the Commonwealth Constitution and by the law. It is the role of the Judiciary, to which Chapter III refers, to determine what the law is in the event of a controversy. And in doing so it will determine whether a legislative or executive act is within or without power.

23 In this respect, the Constitution significantly departed from the position which pertained in Britain in the late 19th century, when our Constitution was being drafted. The constitutional norms which apply in Australia "are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements".[39]

24 In the *Communist Party* case, Justice Fullagar said that "in our system the principle of *Marbury v Madison* is accepted as axiomatic".[40] It is, he said, "modified in varying degrees in various cases … by the respect which the judicial organ must accord to opinions of the legislative and executive organs", but it is "never excluded".[41]

25 The principle expressed by Chief Justice Marshall in *Marbury v Madison*,[42] to which Justice Fullagar referred, is that "[i]t is emphatically the province and duty of the judicial department to say what the law is".[43] Acceptance of this principle places "a fundamental limitation upon any general acceptance … of the maxim that the Sovereign could do no wrong".[44] It is the duty of the judicial branch of government to declare

38 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351, [30], *per* Gleeson CJ and Heydon J. See also, *eg*, *Thomas v Mowbray* (2007) 233 CLR 307 at 342, [61], *per* Gummow and Crennan JJ.

39 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570, [66], *per* Gleeson CJ, Gummow, Hayne and Heydon JJ.

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

41 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262–263.

42 5 US 137 (1803).

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

44 *Commonwealth v Mewett* (1997) 191 CLR 471 at 547, *per* Gummow and Kirby JJ. See also 497, *per* Dawson J.

and enforce the law that limits the powers of all three branches. It does so by processes such as judicial review and the remedies associated with it.[45] That constitutional precept is associated with what Justice Dixon said in the *Communist Party* case about the Constitution being founded upon an assumption of the rule of law.[46]

IV. Section 75(v)

26 Whilst the framers of the Constitution were aware of, and in agreement with, what Chief Justice Marshall said in *Marbury v Madison*, they were concerned to avoid the actual result reached in that case.[47] It is well known that the Supreme Court held that it had the power to strike down legislation.[48] It is sometimes overlooked that the plaintiff was denied the remedy of mandamus because, whilst the Supreme Court had appellate jurisdiction, it did not have original jurisdiction to issue it.[49] Congress lacked legislative power to authorise the Supreme Court to grant mandamus to compel the officer, the new Secretary of State (James Madison), to perform a statutory duty, namely to deliver to William Marbury the commission appointing him a Justice of the Peace, which had been signed and sealed by the outgoing administration.[50]

27 Andrew Inglis Clark, one of the early draftsmen of the Commonwealth Constitution when he was Attorney-General for the colony of Tasmania, included a forerunner to s 75(v) – and urged its reinsertion when it was taken out – in order to avoid the problem in *Marbury v Madison*.[51] It is a provision which is unique to the Australian Constitution. Justice Gaudron once remarked that it is uniquely Australian, like Australian Rules Football and lamingtons.[52] More importantly, it is regarded as securing "a basic element of the rule of

45 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24, [39], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

46 See *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24, [40], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

47 See, *eg*, *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25, [41], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

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

49 *Marbury v Madison* 5 US 137 at 174–175 (1803).

50 *Marbury v Madison* 5 US 137 at 138 (1803).

51 Letter from Barton to Inglis Clark (14 February 1898) in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) at p 846, para 31.4.

52 Mary Gaudron QC, "Remembering the Universal Declaration and Australia's Human Rights Record", address at the Jessie Street Trust, Sydney (3 March 2006), quoted in Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) at p 387.

law"[53] and reinforces what Sir Owen Dixon said about the rule of law assumption.[54] It recognises what he said to the American Bar Association so long ago, about the State deriving from, and therefore being subject to, the law.

28 It may be recalled that s 75(v) of the Constitution provides that the High Court shall have original jurisdiction "[i]n all matters … in which a writ of Mandamus, prohibition or injunction is sought against an officer of the Commonwealth". An "officer of the Commonwealth" has not been exhaustively defined, but may include ministers, Commonwealth public servants, statutory office holders and federal police.[55] The remedies provided for have come to be called "constitutional writs" because they derive their operation from their constitutional context.[56]

29 The grounds for the remedies are not specified. They are informed by the common law.[57] Under Australian common law, mandamus and prohibition are available only for jurisdictional error, and this is the position respecting s 75(v).[58] The position with respect to injunctions has not been fully explored, although it has been observed that it may be available on wider grounds and certainly for "fraud, bribery, dishonesty or other improper purpose".[59] The question of why certiorari is not amongst the listed remedies has long been debated.[60] It has been suggested that it may be explained by the understanding of the framers of the Constitution of certiorari as applied in the US at that time.[61]

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53 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482, [5], *per* Gleeson CJ, quoted in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25, [44], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

54 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513, [103], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

55 See, *eg*, *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 65, *per* Murphy J.

56 *Re Refugee Review Tribunal, ex parte Aala* (2000) 204 CLR 82 at 92–93, [21], 97, [34] (*per* Gaudron and Gummow JJ), 118, [86], (*per* McHugh J), 135–136, [144] (*per* Kirby J), and 141, [162] (*per* Hayne J).

57 See, *eg*, *Re Refugee Review Tribunal, ex parte Aala* (2000) 204 CLR 82 at 97, [34], 101, [40]–[41] (*per* Gaudron and Gummow JJ), 134–135, [141]–[143] (*per* Kirby J), 139–140, [158]–[160], 141–142, [164]–[166], and 143, [169] (*per* Hayne J).

58 See, *eg*, *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at 162, [47], and 165, [56], *per* Gummow, Hayne, Heydon and Crennan JJ.

59 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 508, [82], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ. See also, *eg*, *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at 165, [57], *per* Gummow, Hayne, Heydon and Crennan JJ.

60 See, *eg*, L J W Aitken, "The High Court's Power to Grant Certiorari – The Unresolved Question" (1986) 16(4) *Federal Law Review* 370; William Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but No Certiorari?" (2014) 42(2) *Federal Law Review* 241.

61 William Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but No Certiorari" (2014) 42 *Federal Law Review* 241 at 243–245 and 250.

30 The purpose of s 75(v) that has generally dominated discourse is accountability: to subject the Executive to the rule of law.[62] Justice Dixon said that s 75(v) was included in the Constitution "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power".[63] The jurisdiction of the High Court under s 75(v) cannot be altered or removed by statute.[64]

V. The centrality of jurisdictional error

31 The requirement that there be jurisdictional error is central to the ability of the courts to review and grant remedies with respect to administrative decisions. The High Court has recognised that there are sometimes difficulties in distinguishing between jurisdictional and non-jurisdictional error, but it has maintained the distinction.[65]

32 In Australian jurisprudence, "[t]here is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do".[66] A denial of procedural fairness is an example.[67] "By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction".[68] It is sometimes referred to as "the authority to go wrong".[69] The former kind of error involves a departure from the limits on the exercise of power; the latter

62 See, *eg*, James Stellios, "Exploring the Purposes of Section 75(v) of the Constitution" (2011) 34(1) UNSW Law Journal 70.

63 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 363.

64 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482–483, [5]–[6], *per* Gleeson CJ, 512, [98], and 513, [103], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

65 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 571, [66], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, referring to *Craig v South Australia* (1995) 184 CLR 163 at 177–180.

66 *Re Refugee Review Tribunal, ex parte Aala* (2000) 204 CLR 82 at 141, [163], *per* Hayne J.

67 See Matthew Groves, "Exclusion of the Rules of Natural Justice" (2013) 39 *Monash University Law Review* 285.

68 *Re Refugee Review Tribunal, ex parte Aala* (2000) 204 CLR 82 at 141, [163], *per* Hayne J.

69 *Re Refugee Review Tribunal, ex parte Aala* (2000) 204 CLR 82 at 141, [163], *per* Hayne J.

does not.[70] A jurisdictional error is "regarded, in law, as no decision at all".[71]

33 The scope of judicial review in Australia is therefore to be understood in terms of the extent of the power in question and the legality of what has been done or not done. This has no doubt led to a focus upon an analysis of limitations and obligations, express or implied, associated with the power given by the statute, in the process of construing the statute. But it has not developed as an attempt by the Judiciary to scrutinise the merits of a particular case.[72]

34 The duty and jurisdiction of courts reviewing administrative action does not go beyond the declaration and enforcement of the law which determines the limits of the power in question.[73] It is well settled in Australia that "the court has no jurisdiction simply to cure administrative injustice or error"[74] more generally. The merits of administrative decision-making, which include the correctness of policy choices, are regarded as distinct from legality. The merits are "for the repository of the relevant power".[75] A similar approach appears to be taken here in Singapore. It has been said of judicial review in Singapore that it "finds its place as an avenue for parties to bring claims of *legality* to the courts, and not for the purposes of challenging the very *merits* of a policy decision" [emphasis in original].[76]

VI. The challenge of privative provisions

35 Privative, ouster or finality provisions, which seek to limit or exclude the ability of courts to conduct judicial review, have been part of the Australian legal landscape for many years. Their terms, understood literally, would seem to diminish or deny the ability of the courts to determine the law and whether it has been obeyed.

70 *Re Refugee Review Tribunal, ex parte Aala* (2000) 204 CLR 82 at 141, [163], *per* Hayne J.

71 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614–615, [51], and 616, [53], *per* Gaudron and Gummow JJ. See also 646–647, [152], *per* Callinan J.

72 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36–38, *per* Brennan J.

73 See, *eg*, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36, *per* Brennan J; *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 152–153, *per* Gleeson CJ, Gummow, Kirby and Hayne JJ.

74 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36, *per* Brennan J; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 288, [20].

75 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36, *per* Brennan J.

76 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [56].

36 The operation of a privative provision is therefore capable of giving rise to an obvious contradiction, when regard is had to the courts' supervisory role. The contradiction is most obvious where jurisdictional error is involved. That is because a jurisdictional error, by definition, is an error committed by the decision-maker for which the statute granting power expressly or impliedly attributes the consequence that the decision is a nullity. A privative provision may purport to prevent the court from declaring or enforcing that consequence.[77]

37 The resolution to the contradiction which, generally speaking, has been reached is that a privative provision does not protect an administrative decision which exceeds the decision-maker's jurisdiction or power.[78] It might be effective for mere defects or irregularities or other non-jurisdictional errors. In an early leading case it was said that:[79]

> It is … 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.

Later in *Plaintiff S157/2002 v Commonwealth*[80] ("*Plaintiff S157/2002*"), Chief Justice Gleeson made the point that "[i]f tribunals were to be at liberty to exercise their jurisdiction without any check by the courts, the rule of law would be at an end".[81]

38 *Plaintiff S157/2002* concerned a privative clause. Section 474(1) of the Migration Act 1958 (Cth) provided that a "privative clause decision" was "final and conclusive", that it "must not be challenged, appealed against, reviewed, quashed or called into question in any court" and was "not subject to prohibition, mandamus, injunction, declaration or certiorari in any court of any account". A "privative clause decision" was defined to mean one "made, proposed to be made, or required to be made … under" the Act or "under a regulation or other instrument made under" the Act.[82] Section 486A(1) provided that an application to the

77 See, *eg*, *R v Hickman, ex parte Fox* (1945) 70 CLR 598 at 616, *per* Dixon J; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 486, [17], *per* Gleeson CJ.

78 See, *eg*, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 500, [57], 510, [92], 511, [96], and 512, [98], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ; and *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at 161–162, [45], and 164–165, [55]–[56], *per* Gummow, Hayne, Heydon and Crennan JJ.

79 *R v Hickman, ex parte Fox* (1945) 70 CLR 598 at 616, *per* Dixon J.

80 (2003) 211 CLR 476.

81 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 483, [8], quoting *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 at 586, *per* Denning LJ.

82 Migration Act 1958 (Cth) s 474(2).

High Court for a remedy "in respect of a privative clause decision must be made … within 35 days of the actual … notification of the decision".

39 The plaintiff claimed to be a refugee. The Refugee Review Tribunal affirmed the decision of the delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to refuse the plaintiff a protection visa. The plaintiff challenged the tribunal's decision in the Federal Court and the matter was remitted by consent to the tribunal, differently constituted, to redetermine it. The tribunal again affirmed the delegate's decision. The proceedings which the plaintiff wished to commence in the High Court, on the basis that the new decision was made in breach of the rules of procedural fairness, by then were outside the time limit set by s 486A. Therefore, the plaintiff commenced proceedings in the High Court for declarations that both ss 474 and 486A were invalid.[83]

40 The joint judgment in *Plaintiff S157/2002* first addressed s 474(1), which demarcated a "privative clause decision".[84] It was not suggested that the court should approach such a provision with an eye to invalidity. No such assumption was to be made.[85] Rather, it was said to be necessary at the outset to ascertain the protection that a privative provision purports to afford the decision in question. This is determined by a process of construction.[86] The process of construction is aided by two basic rules. The first is that a construction which complies with the Constitution is to be preferred.[87] The second is the presumption that Parliament does not intend to cut down the jurisdiction of the court unless expressly stated or necessarily implied.[88]

41 Other constitutional requirements or limitations were also identified as relevant to the process of construction. They included that respecting the exercise of judicial power: "a privative clause cannot operate so as to allow a non-judicial tribunal or other non-judicial decision-making authority to exercise the judicial power of the Commonwealth".[89]

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83 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 477.

84 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 498, [52].

85 Acts Interpretation Act 1901 (Cth) s 15A: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth …"

86 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 491, [26], *per* Gleeson CJ, 501, [60], and 504, [70], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

87 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 504, [71], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

88 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 505, [72], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

89 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 505, [73], citing *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 and *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

Parliament "cannot confer on a non-judicial body the power to determine conclusively" the question of, and limits upon, its own jurisdiction.[90]

42 The joint judgment went on to reason that, strictly construed, decisions tainted by jurisdictional error were not "privative clause decision[s]". They could not be, because they were not made "under" the Act as the definition required. As a matter of general principle, a jurisdictional error is regarded in law as no decision at all. A privative clause decision, being one made under the Act, must be read to refer to decisions which do not involve a failure to exercise jurisdiction or an excess of jurisdiction.[91]

43 So understood, s 474(1) did not seek to oust the jurisdiction of the court in respect of jurisdictional errors and was therefore "valid in its application to the proceedings which the plaintiff" wished to initiate.[92] Section 486A, by its terms, had no application to the proceedings because they did not concern a privative clause decision.[93] The result was that, on their proper construction, neither provision was seen to bar or limit the exercise by the court of its jurisdiction in that case.[94]

44 Section 75(v) was described in the concluding passages of the joint judgment as "a means of assuring to all people that officers of the Commonwealth obey the law".[95] Their Honours said that it reinforces what Justice Dixon had said about the rule of law assumption in the *Communist Party* case. It places significant barriers in the way of impairing judicial review, not the least because it is a constitutionally "entrenched minimum provision of judicial review".[96]

45 In a recent decision of the Court of Appeal of the Supreme Court of Singapore in *Nagaenthran a/l K Dharmalingam v Public Prosecutor*,[97] a provision alleged to be privative was held, on its proper construction,

90 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 505, [73], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
91 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 505–506, [74]–[76], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
92 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 508, [83], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
93 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 509, [87], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
94 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 510, [92], *per* Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
95 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513–514, [104].
96 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513, [103].
97 [2019] 2 SLR 216.

not to oust judicial review.[98] The court therefore did not need to discuss the constitutional efficacy of privative provisions, but Chief Justice Sundaresh Menon, delivering the judgment of the court, observed that to the extent that legislation purported to oust the judicial review jurisdiction of the court it "would be constitutionally suspect".[99] His Honour said that "[i]t follows from the nature of the judicial function, as well as the fact that the State's judicial power is vested in the Supreme Court under Article 93 … that 'there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded'".[100] In particular, his Honour said, the rule of law gives rise "to the principle that '[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power'".[101]

46 Much of what his Honour said reflects what has earlier been said about the assumptions on which the Commonwealth Constitution is based. This was reiterated by the High Court in a decision in 2017, *Graham v Minister for Immigration and Border Protection*[102] ("*Graham*"). It was there said that "all power of government is limited by law",[103] which is of course the point made by Sir Owen Dixon in the speech to which I referred at the outset of this discussion. It was reiterated that "[t]he presence of s 75(v) … 'secures a basic element of the rule of law'",[104] so that Parliament cannot legislate to deny the court "the ability to enforce the legislated limits of an officer's power".[105]

47 In *Graham*, a provision of the Migration Act 1958 (Cth) purported, among other things, to prevent the Minister for Immigration and Border Protection from being required to divulge or communicate information which had been provided by criminal intelligence or investigative bodies on condition that it be treated as confidential information, including to

98 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [51] and [68].

99 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [74].

100 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [73], quoting *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [31].

101 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [73], quoting *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

102 (2017) 263 CLR 1.

103 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24, [39], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

104 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25, [44], quoting *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482, [5].

105 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27, [48], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

a court or tribunal.[106] Drawing upon the principles in *Marbury v Madison*, the *Communist Party* case and *Plaintiff S157/2002*, the court held by majority that the provision was invalid to the extent that it denied the court evidence (on the facts of the case, all of the evidence) upon which the Minister's decision was based when it was exercising jurisdiction under s 75(v) to review that decision.[107] The provision was seen to impose a blanket restriction on the receipt of "evidence relevant to the curial discernment of whether or not legislatively imposed conditions … on the lawful exercise of powers … have been observed".[108]

VII. Further protection of review powers

48 Much of the focus of my discussion to this point has been upon the role of the High Court in its original jurisdiction. But the court is also the final appellate court for Australia. It is the ultimate check on judicial review conducted not only by other federal courts but also State Supreme Courts. State Supreme Courts have an important supervisory role in judicial review. If those courts are denied the ability to review administrative decisions for jurisdictional error, then the High Court is unable to exercise its appellate, supervisory jurisdiction. And if that occurs, the exercise of some powers at state level would be completely immune from supervision.[109]

49 The supervisory jurisdiction of state courts, at the time the Commonwealth Constitution came into force, was and continues to be the means by which the limits of state executive power are determined. And because s 73 of the Commonwealth Constitution gives the High Court appellate jurisdiction with respect to State Supreme Courts, the exercise of the state supervisory jurisdiction is ultimately subject to the superintendence of the High Court as the Federal Supreme Court under the Constitution.[110]

50 Under the Commonwealth Constitution, State Supreme Courts may also be invested with federal jurisdiction.[111] In the provision it makes for that investment and for appeals to the High Court, the Constitution

106 Migration Act 1958 (Cth) s 503A.

107 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 32–33, [64]–[66], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

108 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27, [50], *per* Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

109 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580–581, [96]–[100], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

110 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580–581, [98], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

111 Constitution of the Commonwealth of Australia, ss 71 and 77(iii).

establishes an integrated system of courts in which the common law of Australia is applied. The existence of this integrated system of courts and law necessarily requires "that there be in each State a body answering the constitutional description of the Supreme Court of that State".[112] This in turn requires that that body function as a court. It has long been accepted that there was a constitutional significance in the choice of the word "court". It has been observed that "[t]he nature of a court … [was] well known in England long before the Australian colonies began".[113] The meaning of the word "court" has come to us through a long history and it is in light of that history that the provisions of the Constitution respecting courts are to be understood.

51 It has always been accepted in Australia that although the Constitution prescribes a separation of powers at the federal level (save for the overlap between the executive government and the Legislature),[114] there is no entrenched separation of powers at the state level.[115] For some time it was thought to follow that state parliaments could legislate to alter the nature of their courts – even if the consequence was that the Commonwealth Parliament could no longer invest them with federal jurisdiction.[116]

52 In a line of cases from 1996 onward, the High Court considered the effect upon state courts, as institutions, of statutes which purported to give a special role to those courts; one that is arguably different from those undertaken by courts. In that process, it came to consider the essential attributes of courts.

53 In the first of those cases, *Kable v Director of Public Prosecutions (NSW)*,[117] the statute in question was directed explicitly to a particular prisoner serving a sentence for the manslaughter of his wife. It essentially required the State Supreme Court to order his continued detention after the date when he was due to be released if, among other things, it was reasonably satisfied that he was likely to commit a serious act of

112 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 139, *per* Gummow J.
113 *Kotsis v Kotsis* (1970) 122 CLR 69 at 91, *per* Windeyer J.
114 See, *eg*, *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 273–276, *per* Dixon CJ, McTiernan, Fullagar and Kitto JJ.
115 See, *eg*, *Gilbertson v South Australia* [1978] AC 772 at 783, *per* Diplock LJ.
116 See, *eg*, *Kotsis v Kotsis* (1970) 122 CLR 69 at 77, *per* Barwick CJ.
117 (1996) 189 CLR 51.

violence.[118] That is to say, the court was to order his detention when no offence had been committed.[119] The statute was held invalid.

54 As is to be expected when a new constitutional principle is being developed – here in relation to Chapter III – the reasons of members of the majority were expressed somewhat differently. Nevertheless, a principle emerged to the effect that a State could not confer on a court which is a repository of federal jurisdiction a function which is incompatible with or repugnant to the exercise of that jurisdiction.[120] Also to be seen is the emergence of the notion of the institutional impartiality and integrity of the courts, necessary for the maintenance of public confidence in the courts and which is likely to be undermined if the courts are perceived as an arm of the Executive.[121]

55 In the cases which followed, the effect of the legislation in question upon the "institutional integrity" of the courts was applied as a test for invalidity. Later cases spoke of the "defining characteristics" of a court which they must continue to bear if they are to satisfy the constitutional description of a court.[122] Those characteristics were held to include "independence, impartiality, fairness and adherence to the open-court principle",[123] as well as the giving of reasons,[124] generally speaking. It was not suggested that this is an exhaustive list.

56 The case of *South Australia v Totani*[125] focused on the decisional independence of courts from external influence, notably the Executive. The legislation in that case empowered the Attorney-General to make a declaration in relation to an organisation if the Attorney-General was satisfied that members of the organisation associated for purposes related to serious criminal activity and the organisation represented a risk to public safety and order.[126] A further provision required the State

118 Community Protection Act 1994 (NSW) ss 3 and 5.
119 See, *eg*, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 108 and 122–123, *per* McHugh J.
120 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98–99, *per* Toohey J, 102–104, 107–108, *per* Gaudron J, 109, 124, *per* McHugh J, 133–134 and 143–144, *per* Gummow J.
121 See, *eg*, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, *per* Toohey J, 104, 107, *per* Gaudron J, 116, 118, 121, 124, *per* McHugh J, 127–128 and 133–134, *per* Gummow J.
122 See, *eg*, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 73, [55], 76, [63]–[64], 83, [85], and 86, [93], *per* Gummow, Hayne and Crennan JJ.
123 *South Australian v Totani* (2010) 242 CLR 1 at 43, [62], *per* French CJ.
124 See, *eg*, *Wainohu v State of New South Wales* (2011) 243 CLR 181 at 208–209, [44], *per* French CJ and Kiefel J.
125 (2010) 242 CLR 1.
126 Serious and Organised Crime (Control) Act 2008 (SA) s 10(1).

Magistrates Court, on the application of the Commissioner of Police, to make a control order against a person if satisfied that that person was a member of an organisation so declared.[127] A control order could limit the freedom of movement and association of a person.[128]

57 The law was held invalid on the ground that it authorised "the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with that Court's institutional integrity".[129] The reasons of members of the High Court pointed to independence and impartiality as a defining characteristic of a court which set it apart from other decision-making bodies.[130] Not for the first time, words from *Mistretta v United States*[131] were employed, namely that the reputation of the judicial branch of government could not be used by the legislative and executive branches to "cloak their work in the neutral colors of judicial action".[132]

58 In a case in 2010, *Kirk v Industrial Court of New South Wales*[133] ("*Kirk*"), the High Court was to further extend the notion of a court's defining characteristics and to turn its attention once again to a privative clause.

59 It has been observed by one commentator that the defining characteristics identified in earlier cases tended to be functional in nature.[134] Independence and impartiality may be understood to fall within this description. But in *Kirk*, a State Supreme Court's defining characteristics were extended to include the powers and functions that such courts historically undertook by way of review.[135]

60 In that case, the appellant and his company had been convicted of contravening provisions of the New South Wales Occupational Health and Safety Act 1983, one of which required employers to ensure the health,

127 Serious and Organised Crime (Control) Act 2008 (SA) s 14(1).
128 Serious and Organised Crime (Control) Act 2008 (SA) s 14(5).
129 *South Australian v Totani* (2010) 242 CLR 1 at 52, [82], *per* French CJ. See also 67, [149] (*per* Gummow J), 92–93, [236] (*per* Hayne J), 160, [436] (*per* Crennan and Bell JJ), and 173, [481] (*per* Kiefel J).
130 See, *eg*, *South Australian v Totani* (2010) 242 CLR 1 at 52–53, [83], *per* French CJ, and 157, [428], *per* Crennan and Bell JJ.
131 (1989) 488 US 361.
132 *South Australian v Totani* (2010) 242 CLR 1 at 172, [479], *per* Kiefel J, quoting *Mistretta v United States* (1989) 488 US 361 at 407.
133 (2010) 239 CLR 531 at 580, [96].
134 James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 294.
135 James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 6th Ed, 2015) at p 294.

safety and welfare of their employees at work.[136] The High Court held that the Industrial Court misconstrued the statute and misapprehended the limits of its functions and powers. It had convicted the appellant and his company when "it had no power to do so".[137] It had no power because no particular act or omission was identified as constituting the offence. The decision was vitiated by jurisdictional error.[138]

61 The New South Wales Industrial Relations Act 1996, however, contained a privative provision in terms that a decision of the Industrial Court was "final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal".[139] It extended "to proceedings … for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise".[140]

62 The High Court held that the privative clause must be construed by reference to constitutional considerations and, in particular, the principle that it is beyond the power of a State to alter the character of a Supreme Court so that it ceases to meet its constitutional description.[141] To deny a State Supreme Court the jurisdiction it has historically exercised would be to alter one of its defining characteristics.[142]

63 The majority said that "[t]he supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court".[143] That supervisory jurisdiction is ultimately subject to the superintendence of the High Court.[144] To deprive a State Supreme

136 Occupational Health and Safety Act 1983 (NSW) s 15(1).
137 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 575, [74] and [75], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
138 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 574–575, [74]–[77], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
139 Industrial Relations Act 1996 (NSW) s 179(1).
140 Industrial Relations Act 1996 (NSW) s 179(5).
141 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 579, [93] and 580, [96], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
142 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581, [99], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
143 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580, [98], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
144 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581, [98], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

Court of its supervisory jurisdiction "would be to create islands of power immune from supervision and restraint".[145]

64 Considerations of judicial power as derived from the nature and jurisdiction of a court have not gone unremarked in Singapore. Article 93 of the Singapore Constitution provides that "[t]he judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force". In *Chee Siok Chin v Minister for Home Affairs*,[146] the High Court said that the court's inherent jurisdiction derives "from the very nature of the court as a superior court of law … [with] authority to uphold, protect and fulfil the judicial function of administering justice according to law".[147] And as a commentator has observed, the inherent jurisdiction necessarily includes the power to conduct judicial review of legislation and of executive decisions.[148] More recently, the Court of Appeal of Singapore expressly observed that "the court's power of judicial review … is a core aspect of the judicial power and function".[149]

VIII. Conclusion

65 The provisions of our respective constitutions concerning our highest courts have much in common. Our courts also share in common an understanding of what follows from constitutions which provide for the separation of powers and create a distinct and exclusive role for those courts. That role is to determine and enforce the law to which all are subject. The determination of the law where there is a controversy about the use of legislative or executive power necessarily involves the determination of the limits of those powers and this is essential to the maintenance of the rule of law.

66 It is to be expected that from time to time the other branches of government will consider the court's power to determine whether a decision is made within the limits of executive power to be inconvenient or undesirable. But the point made by Sir Owen Dixon in the *Communist Party* case must surely be right. If there be a danger to our systems of democratic and responsible government for which our constitutions provide, it is likely to come from within the very institutions which need

145 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581, [99], *per* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
146 [2006] 1 SLR(R) 582.
147 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [30].
148 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at p 466, para 10.039.
149 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [71].

to be protected. The importance of the power of judicial review therefore cannot be overstated. Australian courts, acting within the limits of their power, must be protective of this jurisdiction, which the framers of our Constitution intended the courts to exercise. It will not surprise you to learn that many of the most influential of the framers were lawyers. And some came to be the first justices of the High Court.
