ADMINISTRATIVE LAW AND STATUTORY INTERPRETATION: ROOM FOR THE RULE OF LAW?

The Hon Justice MJ Beazley AO*

In 1803, in the landmark decision of *Marbury v Madison*,[1] Marshall CJ of the US Supreme Court observed that '[i]t is emphatically the province and duty of the judicial department to say what the law is'.[2] On its face, this statement appears to be declaratory of the separation of powers doctrine. In Australia (although not in the US),[3] Marshall CJ's 'memorable words'[4] have been understood in a broader sense, as being 'a seminal statement of judicial review, of the administrative law kind'.[5] Nonetheless, as this article seeks to demonstrate, judicial acceptance of *Marbury v Madison* as the origin of judicial review in Australia has never strayed far from the doctrine of separation of powers.

Marbury v Madison according to the High Court

In one of the High Court's notable citations of *Marbury v Madison*, Brennan J, in *Attorney-General (NSW) v Quin*[6] (*Quin*), referred to Marshall CJ's statement in support of the proposition that:

> the duty [of the court] extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law.[7]

But what does it mean to say that it is the duty of the judiciary 'to say what the law is'? One answer can be found in a significant coda to this statement. Brennan J observed:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.[8]

This observation indicates limits to, or constraints on, the court's judicial review function, but, to the extent that the observation grounds judicial review in conduct that has already occurred, it is pure orthodoxy.

Marbury v Madison: its latest emanation

The impending exit of the UK from the EU has, perhaps creatively, seen an echo of the principle in *Marbury v Madison* in an altogether different context. In December 2017, a petition for judicial review was lodged by members of the Scottish, UK and European parliaments, seeking a declaration as to whether, when and how the UK's notification to leave the EU may be revoked unilaterally, with the intended effect that the UK

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would remain in the EU. In this regard, *Wightman MSP v Secretary of State for Exiting the European Union*[9] (*Brexit Case*) was an unusual case, as the petition did not seek to review the actions of any governmental body.

The Court of Session (Lord President Carloway, Lord Menzies and Lord Drummond Young) ruled that the question should be referred to the Court of Justice of the EU.[10] In reaching this conclusion, their Lordships, reflecting Marshall CJ's statement in *Marbury v Madison*, emphasised that the Court's 'central'[11] and 'primary'[12] function was to declare what the law is, a function they said 'quite unsuited'[13] to the legislature and the executive.

A central issue in the case was whether the question posed by the petitioners was justiciable or merely hypothetical, as well as whether the petitioners had standing. The Court held that the question raised by the petition was not hypothetical or academic, having regard to the passing of the *European Union (Withdrawal) Act 2018* (UK), s 13 of which provides that parliamentary approval is required before an agreement to withdraw between the UK and the EU can be ratified.[14] Accordingly, as Lord Menzies observed:

> There will have to be a vote, and it appears to me to be legitimate for those who are involved in that vote to know, by means of a judicial ruling, the proper legal meaning of Article 50, and in particular whether a member state which has given notification of its intention to withdraw from the EU may revoke that notification of intention unilaterally before the expiry of two years after the notification.[15]

Lord Drummond Young added that:

> it is clearly not for the courts to tell Members of Parliament what considerations they should regard as relevant but it is for the courts, if they are requested to do so, to advise Members of Parliament as to what the law is. It is then up to individual Members of Parliament to make what they will of the courts' advice … the question of revocation … is a matter that may, in some circumstances, be relevant to the way in which some Members of Parliament cast their votes on a matter of fundamental importance to the future of the United Kingdom.[16]

The duty to 'say what the law is'

Having, in this admittedly simplified way, identified the polar ends of judicial review, it is timely to consider the nature of the duty of the courts 'to say what the law is', the rationale underlying that duty and, more particularly, how that task is best undertaken.

In the administrative law context, the court's duty to 'say what the law is' has increasingly become the domain of statutory interpretation. Whilst 'administrative law cannot work without statutory interpretation',[17] there is a question whether this is a trend that will constrain the development of administrative law and, in particular, judicial review, in an era of significant regulatory oversight and increased executive activity. There is also an anterior question of what is the underlying rationale of administrative law. This anterior question is critical, lest the development of the law stray beyond its legitimate boundaries or, alternatively, straitjacket its proper development. In this respect, the *Brexit Case* may be seen as teetering on the outer edge of that legitimate boundary.

What is the underlying rationale of judicial review?

Commentators have viewed Brennan J's observation that judicial review is not designed to cure administrative injustice or error as indicating that its 'rationale … is simply to enforce obedience to the law'.[18] The *Brexit Case* aside, there is support for this view in the English and Australian authorities, drawing principally on the doctrine of the rule of law.

Beginning with the Australian authorities, the High Court's jurisprudence has consistently acknowledged and reinforced the importance of the rule of law in the context of judicial review. Indeed, a sharp increase in the Court's reliance on the rule of law as a guiding principle can be observed in the cases that followed the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).

One such example is the observation of Brennan J in *Church of Scientology Inc v Woodward*[19] (*Woodward*) in 1982:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[20]

Two years later, in *A v Hayden*,[21] Brennan J reiterated that '[n]o agency of the executive government is beyond the rule of law'.[22] More recently, in *Plaintiff S157/2002 v Commonwealth*,[23] Gleeson CJ described s 75(v) of the *Constitution* as securing 'a basic element of the rule of law',[24] and in *Argos Pty Ltd v Corbell*[25] (*Argos*) French CJ and Keane J expressed the view that '[t]he availability of judicial review serves to promote the rule of law'.[26] Their Honours noted two other features served by judicial review: 'improv[ing] the quality of administrative decision-making [and] vindicating the interests of persons affected in a practical way by administrative decision-making'.[27] Neither of these observations was novel. However, their Honours' language cannot be ignored: the reference was to 'interests', not 'rights' — an issue to which I will return.

The relationship between the rule of law and judicial review has also been central to the approach taken by the courts in the UK. In 1957, Denning LJ stated that '[i]f tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end'.[28]

Wade and Forsyth have identified the rule of law as requiring, in the administrative law context, that:

> every government authority which does some act which would otherwise be a wrong … or which infringes a man's liberty … to justify its action as authorised by law — and in nearly every case this will mean authorised directly or indirectly by Act of Parliament. Every act of governmental power … must be shown to have a strictly legal pedigree.[29]

However, as I indicated earlier, the relevance of the rule of law to judicial review has increasingly been articulated in terms of the doctrine of separation of powers.

In *R (Cart) v Upper Tribunal*[30] (*Cart*), Laws LJ in the Divisional Court, in what was described as a 'typically subtle and erudite judgment'[31] by Baroness Hale on appeal to the Supreme Court, observed that:

> The nature of the judicial review jurisdiction owned by the High Court has an elusive quality, because its limits are (generally) set by itself. In consequence, the distinction between a legal place where the jurisdiction cannot go, and a legal place where as a matter of discretion the High Court will not send it, is permeable: even unprincipled. Ultimately the court is simply concerned to give the jurisdiction the reach, or edge, which the rule of law requires.[32]

The question in issue in *Cart* was whether the High Court's supervisory jurisdiction, exercisable by way of judicial review, extended to decisions of certain tribunals that, under statute, were not amenable to any form of appeal. In describing judicial review as 'a principal engine of the rule of law',[33] Laws LJ recognised that to say so was anodyne without giving meaning to the term.[34] Noting that the rule of law is 'a Protean conception',[35]

his Lordship saw its connection in the administrative law sense with the doctrine of the separation of powers. As he explained:

> The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered.[36]

This interplay between the rule of law and the doctrine of separation of powers is reflected in later UK decisions. In *AXA General Insurance Ltd v Lord Advocate*[37] (*AXA*), Lord Hope referred to judicial review as going to 'the root of the relationship between the democratically elected legislatures and the judiciary'.[38] In his Lordship's view, the rule of law plays an important part in 'setting the boundaries of this relationship'.[39]

This same conception of the rule of law, articulated in terms of a relationship with the doctrine of separation of powers, is reflected in the extrajudicial writings of Gageler J.[40] His Honour has observed that the acceptance in Australia of *Marbury v Madison* has led to the identification of the rule of law as the source of judicial review but that it 'is more precisely identified as the constitutional separation of judicial power from legislative and executive power'.[41]

As these various judicial and extrajudicial observations illustrate, judicial review is a natural home for the rule of law and, for that reason, the courts must be cautious not to 'abdicate judicial responsibility',[42] borrowing the language of Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission*[43] (*Enfield*) in relation to the determination of jurisdictional facts. In *Enfield*, the High Court considered the issue of what weight (if any) a judge reviewing a decision of an administrative body was required to give to the conclusions reached by the decision-maker. The plurality[44] rejected the application in Australia of the *Chevron USA Inc v Natural Resources Defense Council Inc*[45] (*Chevron*) doctrine of 'deference'.[46]

However, Gaudron J's placement of the rule of law at the heart of judicial review is of particular note. Her Honour observed that the introduction of schemes such as the ADJR Act owed much to the recognition of two factors: first, the potential for executive and administrative decisions to adversely affect the rights, interests and legitimate expectations of individuals; and, secondly, the inadequacy of the prerogative writ remedies.[47] Observing that the administrative law reforms were also informed by a need for executive and administrative accountability,[48] her Honour observed that:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[49]

Her Honour concluded that:

> Once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of 'judicial deference' with respect to findings by an administrative body of jurisdictional facts.[50]

The separation of powers conception of the rule of law aligns with Gaudron J's focus on constraining governmental power in the passage cited above. However, her Honour also

referred to the protection of individual rights and interests. This raises the question whether administrative law serves to restrain governmental power only or whether its purpose is also to protect legal rights and interests — a question which, it has been suggested, remains unresolved in the evolution of judicial review.[51]

The various explanations of judicial review's underlying rationale referred to above appear to answer this question in favour of the former.[52] So much was made clear by Lord Reed in *AXA*, where his Lordship stated that:

> The essential function of the courts is … the preservation of the rule of law, which extends beyond the protection of individuals' legal rights … There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual …[53]

Similarly, in *Quin*, Brennan J characterised the scope of judicial review 'not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise'.[54] However, individual rights and interests are not irrelevant in administrative law. Questions of standing depend upon interests, but, more relevantly, Brennan J in *Woodward* and French CJ and Keane J in *Argos*, in the passages set out above, expressly referred to the protection and vindication of an individual's interests as a consequence of judicial review.

Further, the principle of legality, as a principle of statutory interpretation, assumes that Parliament does not intend to 'overthrow fundamental principles, infringe rights or depart from the general system of law'[55] unless the statute clearly expresses a contrary intention.

Accordingly, it appears that the answer to the 'rights and interests question' as a concern of administrative law is not that the protection of individual rights and interests is an underlying rationale of judicial review but that judicial review is the means whereby individuals can be assured that their rights and interests will only be affected by administrators acting in accordance with law. This may be viewed as a corollary to the restraint on governmental power.

What is clear, however, is that administrative law does not exist to 'right a wrong' by way of an enforceable remedy of the kind known to the common law and equity or to cure an injustice. If individual interests are protected or vindicated, that is consequential to the underlying rationale of judicial review.

That this is so has long been recognised. Arvind and Stirton have observed that, by the 1950s in the UK, the prevailing view was that the common law could not adequately provide redress for aggrieved individuals in light of pervasive growth and impacts of the administrative state.[56] Examining the discourse of the time, they saw that the academic consensus, far from reflecting today's orthodoxy as to the function of judicial review, was that radical change was needed.

The reformers of the time conceived of administrative law as being aimed at mediated conflicts between public and private interests.[57] Substantive review of decision-making was not only permissible but fundamental, the intent being that courts and other bodies could provide effective redress to individuals, promote better agency behaviour and develop a common law of good administrative decision-making while leaving questions of policy to the executive or Parliament.[58]

Arvind and Stirton suggest that one reason why this course was ultimately stymied was the intervention of Lord Diplock, then recently appointed to the House of Lords.[59] In 1969, Lord

Diplock had helped organise an Anglo-American judicial exchange on administrative law and sent a report on the exchange to the Lord Chancellor. He argued against a wide review of the administrative law system, contending that the focus should only be on simplifying the procedure associated with administrative redress.[60]

There had already been considerable progress in the 1960s in dismantling the doctrines which stood in the way of judicial review of administrative decision-making by virtue of four decisions of the House of Lords,[61] which, to varying degrees, influenced the development of administrative law in Australia. Lord Diplock considered it to be more appropriate for judges to continue to develop the direction of the law, with the caveat that the courts should not go in the direction of substituting their views on policy for those of the decision-maker.[62] The Lord Chancellor subsequently directed the Law Commission to examine only the narrow issue of procedure.

Although the availability of judicial review expanded dramatically in the ensuing years, it was without any of the features for which the reformers had argued. In today's legal and socio-political climate, any suggestion of like reforms would be untenable. The approach which ultimately endured was one which focused on the scope and limits of decision-making power, which construed the limits of such powers in a way that was primarily textual, rather than purposive, and which constrained the material available on review to that necessary to assess the legality of a decision.[63] In other words, the route to review of an administrative decision was by way of statutory interpretation.

A similar path was taken in Australia, with Brennan J at the helm.

An exercise in statutory interpretation: where does the underlying rationale of judicial review fit in?

The celebrated New Administrative Law reforms of the 1970s, in the form of the *Administrative Appeals Tribunal Act 1975* (Cth) and the ADJR Act, referred to by Gaudron J in *Enfield*, as mentioned earlier, were seen as radical developments in the evolution of Australian administrative law.[64] A significant feature of the reforms was the centrality and codification of the grounds of judicial review. However, in an almost contrarian response, there have been multiple attempts by the legislature to limit judicial oversight of administrative action, including the increased codification of decision-making procedures; the increased use of privative clauses; and the increased conferral of broad powers on administrative decision-makers,[65] all of which gave rise to questions of statutory interpretation.

The ascendancy of statutory interpretation in judicial review is therefore unsurprising. The genesis of this trend is usually attributed[66] to Brennan J's decision in *FAI Insurances Ltd v Winneke*[67] and was developed by him in *Kioa v West*,[68] *Quin* and *Project Blue Sky Inc v Australian Broadcasting Authority*.[69] The result was a shift in approach from one where the grounds of judicial review were central to one that expressed the legal norms of administrative law as products of parliamentary intention, to be revealed by applying principles of statutory interpretation.[70]

In current judicial review jurisprudence, the principles of statutory interpretation have been identified as one of four sources of law by reference to which the legality of administrative action may be determined, the others being the *Constitution*, the statute that the executive is charged with administering and the grounds of judicial review.[71] That three of these four sources are statutorily referenced raises the question of the continuing significance of the grounds of judicial review in administrative law — or at least the question of the extent of their significance.

Basten JA spoke earlier this morning of some of the limitations of the grounds of review and the need, particularly in less straightforward cases, to have regard to principles such as the separation of powers and to engage with the task of statutory interpretation.[72] Some have gone so far as to suggest that judicial review is 'a specialized branch of statutory interpretation'.[73] In this regard, it is the principles of statutory interpretation that define what is required for a valid exercise of power and operate to control discretionary decision-making by the executive.[74]

Certainly, recent High Court jurisprudence demonstrates the centrality of statutory interpretation to judicial review. This year, all but two of the judicial review matters that came before the High Court arose in the migration context and turned upon the construction of the *Migration Act 1958* (Cth). For example, in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*,[75] the central question was whether any failure to comply with a provision of the Migration Act regarding the giving of certain information to an applicant meant that there was no 'fast track reviewable decision' capable of referral to the Immigration Assessment Authority or, alternatively, that an essential precondition for the Authority's power to review such a decision was lacking, such that the Authority lacked jurisdiction to conduct a review. At its core, this was a question of statutory interpretation.[76] The two cases that did not arise in the migration context turned upon the proper construction of provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Security of Payment Act).[77]

Intuitively, the thought of reducing judicial review to an exercise in statutory interpretation seems undesirably simplistic, particularly when one considers that the underlying rationale of judicial review resides in the rule of law, recognised as an underpinning pillar of democracy. In 2000, Gageler J, writing extrajudicially, warned of this very trend.[78] He observed that equating judicial review with the principles of statutory interpretation fails to provide 'a complete explanation of the province and function of judicial review of administrative action',[79] identifying several areas where the common law based notion of judicial review remains 'undoubtedly superior'[80] — in particular, judicial review of the executive's exercise of prerogative power; the artificiality of attributing all administrative law rules to legislative implication; and circumstances where rules of procedural fairness quite apart from a statutory scheme must be observed.[81]

Bateman and McDonald also contend that a statutory interpretation approach to judicial review does little for 'the legitimation of administrative government'.[82] They argue that an approach guided by the grounds of judicial review is better able to serve the rule of law for two reasons: first, the grounds of review work to confine and structure exercises of administrative decision-making; and, secondly, they can lead to the development of generally applicable administrative law norms.[83]

A similar point has been made by Arvind and Stirton, who argue that, by focusing on the statute, judicial review operates in a manner that 'effectively robs the law of any unifying or overarching constitutional principles'.[84] Their concern was that judicial review based on principles of statutory interpretation neither provides guidance to decision-makers nor enables the development of principles of good governance. They suggest that, arguably, the statutory interpretation approach has had no impact on administrative decision-making outside the specific decision challenged or, at best, the narrow class of decisions to which a specific statutory provision applies.[85] However, an approach based on statutory interpretation is not without its merits. Bateman and McDonald themselves recognise that tethering judicial review to the statutory text and legislative purpose lends it 'democratic legitimacy'[86] by grounding it in the people's will as expressed by Parliament.[87] Further, it should not be overlooked that principles of statutory interpretation are common law

principles rooted in values which include the rule of law. The High Court recognised this in the recent decision of *Hossain v Minister for Immigration and Border Protection*[88] (*Hossain*).

In that case, the Federal Circuit Court had made an order in the nature of certiorari, setting aside a decision of the Administrative Appeals Tribunal that had affirmed a decision of a delegate of the Minister to refuse to grant a visa. The Federal Circuit Court also made an order in the nature of mandamus remitting the matter to the Tribunal for redetermination. The High Court held that, although the Federal Circuit Court was correct to find an error of law in the Tribunal's reasoning, it erred in characterising that error as a jurisdictional error.

In reaching this conclusion, the plurality emphasised the importance of statutory interpretation, stating that:

> Just as identification of the preconditions to and conditions of an exercise of decision-making power conferred by statute turns on the construction of the statute, so too does discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute.[89]

Critically, their Honours recognised that:

> [The common law principles that guide the interpretation of statutes conferring decision-making authority] reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecison-making is a function of the real world'.[90]

Similar observations were made by Gageler J in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[91] (*Probuild*) — a decision to which I will return. For present purposes, it is relevant to note his Honour's observation that:

> The common law principles of interpretation applicable to determining whether legislation manifests an intention that a decision or category of decisions not be quashed or otherwise reviewed are not static. As with other common law principles or so-called 'canons' of statutory construction, they have contemporary interpretative utility to the extent that they are reflective and protective of stable and enduring structural principles or systemic values which can be taken to be respected by all arms of government. And as with other common law principles of statutory construction, they are not immune from curial reassessment and revision.[92]

A principle of statutory interpretation that is often considered in the context of the rule of law, as well as the right of persons to access the courts,[93] is the principle of legality. Although often seen as a new feature of statutory interpretation, it is aptly described as an old principle, found in early High Court jurisprudence in *Potter v Minahan*[94] but with a new name. In *Lee v New South Wales Crime Commission*,[95] Gageler and Keane JJ considered that:

> [The principle of legality] extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.[96]

Similarly, in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*,[97] Gageler J stated that:

> [The principle of legality] insists on a manifestation of unmistakable legislative intention for a statute to be interpreted as abrogating or curtailing a right or immunity protected by the common law or a principle recognised by the common law to be important within our system of representative and responsible government under the rule of law.[98]

I referred earlier to two decisions of the High Court handed down this year which concerned the interpretation of the Security of Payment Act — namely, *Probuild* and *Maxcon Constructions Pty Ltd v Vadasz*[99] (*Maxcon*). These cases concerned the question whether the Supreme Court of NSW (or, in the case of *Maxcon*, the Supreme Court of South Australia) has jurisdiction to make an order in the nature of certiorari quashing a determination made by an adjudicator appointed under the Security of Payment Act (and its South Australian equivalent) for a non-jurisdictional error of law on the face of the record.

Probuild Constructions (Aust) Pty Ltd commenced judicial review proceedings in the Supreme Court in respect of a decision made by an adjudicator regarding its obligation to make certain payments to Shade Systems Pty Ltd. It sought an order in the nature of certiorari quashing the adjudicator's determination.

The plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) found that the Security of Payment Act evinced 'a clear legislative intention'[100] to exclude the Supreme Court's jurisdiction for non-jurisdictional errors of law. The issue was one of statutory interpretation. As the plurality stated:

> the question is a matter of statutory construction; and in the resolution of such a question, context is, as always, important. The Security of Payment Act contains no privative clause providing in terms that an adjudicator's determination is not to be quashed by way of certiorari on the basis of error of law on the face of the record. But that is not the end of the inquiry. There remains for consideration the question whether, absent an express statement but read as a whole, the Security of Payment Act has that effect. Whether it does depends on examination of the text, context and purpose of the Security of Payment Act. In undertaking that process, '[w]hether and when the decision of an inferior court or other decision-maker should be treated as 'final' (in the sense of immune from review for error of law) cannot be determined without regard to a wider statutory and constitutional context'.[101]

Gageler J, writing separately, likewise approached the matter as a question of statutory interpretation:

> The approach most consonant with our contemporary understanding of the nature and scope of judicial review … is that the question whether recourse to the Supreme Court to obtain an order in the nature of certiorari on the basis of error of law on the face of the record of a decision or category of decisions has been taken away by statute should now be answered through the application of ordinary statutory and common law principles of interpretation unencumbered by any presumption that it has not.[102]

Edelman J, also writing separately, likewise focused on the proper construction of the statute but by reference to the principle of legality. His Honour considered that a narrow approach to the construction of privative clauses, which 'has supported the access of people to the courts to correct legal error for nearly four centuries … is today one of the working hypotheses upon which legislation is drafted'.[103]

> It is sometimes described as part of the principle of legality in the construction of legislation. The concept of 'legality', in the principle of legality, must embrace the determination of whether decisions made with authority are legal — that is, whether they are made by a process that accords with the law: '[t]he rule of law and the ability to have access to a court or tribunal to rule upon legal claims constitute principles of this fundamental character'. Therefore, absent irresistible clarity, a construction will not be

> adopted which departs from the 'general system of law' permitting review of authorised decisions for legal errors.[104]

However, his Honour considered that the principle of legality applies with variable impact:[105] [t]he less need there is for the rationale for the narrow approach to construction, the weaker will be [its] operation'.[106] In respect of legislation in the nature of the Security of Payment Act, which only required adjudicators to determine parties' rights, in effect, on an interim (as opposed to a final) basis, his Honour held that the principle applied 'with very little force'.[107]

Common to both Gageler and Edelman JJ's judgements is a recognition that subsumed within common law principles of statutory interpretation are values central to our system of government, including our system of law. Accordingly, where courts are faced with issues of judicial review that turn upon statutory interpretation, even in the absence of any express consideration of the underlying rationale of judicial review, the very application of the common law principles gives effect to notions of the rule of law. As Lord Steyn in *R v Secretary of State for the Home Department*[108] observed:

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law and the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.[109]

This infiltration, so to speak, of the 'values' underlying judicial review was expressly recognised by Edelman J (with whom Nettle J substantially agreed) in *Hossain*. His Honour observed that, in the context of administrative law, judicial exercises in statutory interpretation are not solely dependent on the literal text;[110] rather, 'the statute is construed in light of the background principles and history of judicial review, as well as common law principles'.[111]

Conclusion

My initial purpose in accepting, with trepidation before such a learned audience, the invitation to give this lecture was to satisfy a curiosity as to the impact of *Marbury v Madison* on Australian administrative law. What I discovered, and what I hope I have described, is that, despite a minimalist approach to its citation, it explains the underlying rationale for judicial review in Australian administrative law — namely, that it is grounded in that part of the rule of law that underpins the doctrine of the separation of powers.

Writing in 1956, Jaffe and Henderson suggested that, without the rule of law, 'the law of judicial review is emptied of its organising principle, is bereft of its generative point of view, and can be stated only as a congeries of diverse cases'.[112] As I have sought to explain, the adjudication of administrative action by way of judicial review has, in large part, if not completely, become anchored in statutory interpretation.

There are critics of this approach and there is sometimes nostalgia for a grounds-based approach. It is true that the different approaches have different impacts on administrative action. In particular, an approach based on statutory interpretation removes, to a significant degree, the expectation that judicial review enables a court to provide guidance for good administration, as has been suggested occurred or can occur under a grounds-based approach.

Rather, the court seeks to ascertain, by the application of the usual principles of statutory interpretation, Parliament's intention in respect of a particular statute, and it is only within that context that the court determines whether the administrative action exceeded that which the decision-maker was charged with doing. Although it is unlikely that an approach

to judicial review based on statutory interpretation will provide guidelines for good administration, its impact is likely to be more profound in that it sends the singular message that all administrative action must fall within the statutory parameters which authorised it.

Accordingly, it can readily be seen that an approach to judicial review based on statutory interpretation not only gives effect to the underlying rationale of judicial review but also in no way constrains it. In particular, the currency now given to the principles to which O'Connor J referred in *Potter v Minahan* under the label of the principle of legality continues to enshrine values central to our system of government, including our system of law, in the application of administrative decision-making that so fundamentally affects the relationship between the government and its citizens.

Endnotes

1 (1803) 1 Cranch 137.
2 (1803) 1 Cranch 137, 177 (Marshall CJ).
3 Justice Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 310.
4 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J).
5 James Stellios, 'Marbury v Madison: Constitutional Limitations and Statutory Discretions' (2016) 42 *Australian Bar Review* 324, 324. Stellios' characterisation draws a distinction between constitutional judicial review and judicial review of administrative action, the line between which he suggests is not clean.
6 (1990) 170 CLR 1
7 (1990) 170 CLR 1, 35 (Brennan J), referring to *Victoria v Commonwealth* (1975) 134 CLR 338, 380 (Gibbs J).
8 (1990) 170 CLR 1, 35–36 (Brennan J).
9 [2018] CSIH 62.
10 [2018] CSIH 62.
11 [2018] CSIH 62, [28] (Lord President Carloway).
12 [2018] CSIH 62, [48] (Lord Drummond Young).
13 [2018] CSIH 62, [49] (Lord Drummond Young).
14 [2018] CSIH 62, [27] (Lord President Carloway), [37] (Lord Menzies), [58] (Lord Drummond Young).
15 [2018] CSIH 62, [37] (Lord Menzies).
16 [2018] CSIH 62, [58] (Lord Drummond Young).
17 Jeffrey Barnes, 'How Statutory Interpretation Sustains Administrative Law' (2015) 22 *Australian Journal of Administrative Law* 163, 176.
18 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 28.
19 (1982) 154 CLR 25.
20 (1982) 154 CLR 25, 70 (Brennan J).
21 (1984) 156 CLR 532.
22 (1984) 156 CLR 532, 588 (Brennan J).
23 (2003) 211 CLR 476.
24 (2003) 211 CLR 476, 482 [5] (Gleeson CJ). This was cited with approval by the High Court in *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350, 360 [44] (Kiefel CJ, Bell, Gageler Keane, Nettle and Gordon JJ).
25 (2014) 254 CLR 394.
26 (2014) 254 CLR 394, 411 [48] (French CJ and Keane J).
27 (2014) 254 CLR 394, 411.
28 *R v Medical Appeal Tribunal* [1957] 1 QB 574, 586 (Denning LJ).
29 Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 17.
30 [2011] QB 120.
31 *R (Cart) v Upper Tribunal* [2012] 1 AC 663, 680 [30] (Baroness Hale).
32 [2011] QB 120, 156 [98] (Laws LJ).
33 [2011] QB 120, 137 [34] (Laws LJ).
34 [2011] QB 120, 137 [35] (Laws LJ).
35 [2011] QB 120, 137 [35]. See also Wade and Forsyth, above n 30, 17. There are many formulations of the rule of law: see, for example, *Prohibitions del Roy* (1607) 12 Co Rep 63, 65; AV Dicey, *Introduction to the Study and the Law of the Constitution* (Palgrave McMillian, 10th ed, 1959) 188–202; Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Academy of Social Sciences* 8, 8; World Justice Project, *WJP Rule of Law Index 2016* <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016>.
36 [2011] QB 120, 137 [36] (Laws LJ).
37 [2012] 1 AC 868.

[38] [2012] 1 AC 868, 910 [42] (Lord Hope). See also the observations of Lord Reed, who stated, at [142], that 'Judicial review under the common law is based upon an understanding of the respective constitutional responsibilities of public authorities and the courts. The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law. The courts therefore have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed their limits'.

[39] [2012] 1 AC 868, 910 [42] (Lord Hope).

[40] See also Susan Kneebone, 'What is the Basis of Judicial Review?' (2001) 12 *Public Law Review* 95, 99–100.

[41] Gageler, above n 4, 309.

[42] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 158 [60] (Gaudron J).

[43] (2000) 199 CLR 135.

[44] (2000) 199 CLR 135, 151–152 [39]–[42] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

[45] (1984) 467 US 837.

[46] *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837. The *Chevron* doctrine provides that where a statute administered by a federal agency or regulatory authority is susceptible of several constructions, the court will defer to the agency's interpretation of the statute, provided that it is a permissible construction: see Justice Ronald Sackville, 'The Limits of Judicial Review of Executive Action — Some Comparisons Between Australia and the United States' (2000) 28 *Federal Law Review* 315, 323ff.

[47] (2000) 199 CLR 135, 156–157 [54] (Gaudron J).

[48] (2000) 199 CLR 135, 157 [55] (Gaudron J).

[49] (2000) 199 CLR 135, 157 [56] (Gaudron J).

[50] (2000) 199 CLR 135, 158 [59] (Gaudron J).

[51] Joe McIntyre, *What is Administrative Law About? Power, Rights, and Judicial Culture in Australia* (23 April 2018) AUSPUBLAW <https://auspublaw.org/2018/04/what-is-administrative-law-about/>.

[52] See also Kneebone, above n 41, 98.

[53] [2012] 1 AC 868, 950 [169] (Lord Reed). See also *Brexit Case* [2018] CSIH 62 [67] (Lord Drummond Young): 'The fundamental purpose of the supervisory jurisdiction is … to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law…'.

[54] (1990) 170 CLR 1, 35 (Brennan J).

[55] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

[56] TT Arvind and Lindsay Stirton, 'The Curious Origins of Judicial Review' (2017) 133 *Law Quarterly Review* 92, 93.

[57] Ibid 99.

[58] Ibid 96, 100–1.

[59] Ibid 107.

[60] Ibid 107–8.

[61] These were *Ridge v Baldwin* [1964] AC 40; *Conway v Rimmer* [1968] AC 910; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[62] Arvind and Stirton, above n 57, 108.

[63] Ibid 109.

[64] Matthew Groves, 'Should We Follow the Gospel of the Administrative Decisions (Judicial Review) Act 1977 (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 736–7.

[65] See, for example, Justice John Basten, 'Administrative Law and Statutory Interpretation' [2012] *New South Wales Judicial Scholarship* 12.

[66] Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 155–6, 163–72.

[67] (1982) 151 CLR 342.

[68] (1985) 159 CLR 550.

[69] (1998) 194 CLR 355.

[70] See Bateman and McDonald, above n 66.

[71] Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 5.

[72] Justice John Basten, 'Judicial Review — Can We Abandon Grounds?' (Speech delivered at Australian Institute of Administrative Law National Conference, University of New South Wales, 27 September 2018).

[73] Stanley de Smith, Harry Street and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 4th ed, 1981) 558, quoted in *Union des Employes de Service, Local 298 v Bibeault* [1988] 2 SCR 1048, 1087 (Beetz J).

[74] Chief Justice French, 'Statutory Interpretation and Rationality in Administrative Law: National Lecture on Administrative Law 2015' (2015) 82 *AIAL Forum* 1, 2, 10. See also Wade and Forsyth, above n 30, 17.

[75] (2018) 353 ALR 600.

[76] (2018) 353 ALR 600, 602 [1] (Gageler, Keane and Nettle JJ), 621 [92] (Edelman J).

[77] See *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225; *Maxcon Constructions Pty Ltd v Vadasz* (2018) 351 ALR 369.

78 Gageler, above n 4, 312.
79 Ibid.
80 Ibid.
81 Ibid.
82 Bateman and McDonald, above n 66, 178.
83 Ibid 177.
84 Arvind and Stirton, above n 57, 112.
85 Ibid 116.
86 Bateman and McDonald, above n 66, 175.
87 Ibid 175–6.
88 [2018] HCA 34. See also *Shrestha v Minister for Immigration and Border Protection* [2018] HCA 35.
89 [2018] HCA 34 [27] (Kiefel CJ, Gageler and Keane JJ).
90 [2018] HCA 34, [28] (Kiefel CJ, Gageler and Keane JJ).
91 (2018) 351 ALR 225.
92 (2018) 351 ALR 225, 239 [58] (Gageler J).
93 *Hockey v Yelland* (1984) 157 CLR 124, 130 (Gibbs CJ).
94 [1908] HCA 63.
95 (2013) 251 CLR 196.
96 (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ).
97 (2015) 255 CLR 352.
98 (2015) 255 CLR 352, 381–382 [67] (Gageler J).
99 (2018) 351 ALR 369.
100 (2018) 351 ALR 225, 234 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
101 (2018) 351 ALR 225, 233 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
102 (2018) 351 ALR 225, 240 [60] (Gageler J).
103 (2018) 351 ALR 225, 249 [88] (Edelman J).
104 (2018) 351 ALR 225, 249 [87] (Edelman J).
105 (2018) 351 ALR 225, 254 [102] (Edelman J).
106 (2018) 351 ALR 225, 254 [103] (Edelman J).
107 (2018) 351 ALR 225, 249 [90] (Edelman J).
108 [1998] AC 539.
109 [1998] AC 539, 587 (Lord Steyn).
110 [2018] HCA 34, [64] (Edelman J).
111 [2018] HCA 34, [64] (Edelman J).
112 Louis L Jaffe and Edith G Henderson, 'Judicial Review and the Rule of Law' (1956) 72 *Law Quarterly Review* 345, 347.