The Role of Statutory Interpretation in Administrative Law

Justice Kristen Walker*

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Introduction

1 Sometimes I wonder if administrative law is just statutory interpretation. Of course it is not — the fact that we have a robust system of merits review, and that there can be judicial review of non-statutory decision-making provides immediate proof that statutory interpretation cannot provide all the answers to all questions in administrative law. Nonetheless, it is clear that, in the modern doctrine of judicial review of executive action, as developed by the High Court over the last 20 years or so, statutory interpretation has become the dominant mode of reasoning.

2 In this paper, I will explore the nature and significance of that development, discuss some aspects of statutory interpretation that have particular relevance for administrative law, and consider how we are to approach judicial review of non-statutory decision-making, where there is no statute to interpret. I will conclude with some remarks about the role that the intertwining of statutory interpretation and judicial review of administrative action plays in the maintenance of trust and confidence in government decision-making.

3 It is necessary at the outset to observe that executive decision-making is generally regarded as incorporating two distinct modes of executive power:

(a) power conferred on the executive by statute, and thus necessarily governed by the terms of the enabling statute; and

(b) executive power that is sourced from outside statute (from s 61 of the Constitution, s 64 of the Constitution, and/or the common law), and where there is generally no statute that governs the exercise of the power.

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* Judge of Appeal, Supreme Court of Victoria. LLB(Hons), BSc, LLM (Melb), LLM (Columbia).

4 I also note that s 61 of the Constitution, which vests the executive power of the Commonwealth in the Queen, does not distinguish between the different sources of executive power. The sources have been described as follows:

(a) Commonwealth legislation;

(b) express or implied powers in the Constitution itself; and

(c) what is loosely described as the 'common law'.[1]

These sources may overlap and are not a neat, mutually exclusive taxonomy.

The development of the role of statutory interpretation and judicial review

5 The first question I want to address is why it is that Australian administrative law has taken the path that it has, towards near-convergence with statutory interpretation.

6 Prior to the present era, judicial review of administrative decision-making was regarded as the application of common law principles. So, for example, in 1985, in *Kioa v West*, which can be regarded as the start of the modern jurisprudence on procedural fairness, Mason J explained the doctrine of procedural fairness as follows:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[2]

7 In contrast, Brennan J explained the doctrine of procedural fairness as follows:

> At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon *the legislature's intention* that observance of the principles of natural

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1 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, [124] (Edelman J) ('*Davis*').

2 (1985) 159 CLR 550, 584.

> justice is a condition of the valid exercise of the power…..When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention.[3]

8 What emerges from Brennan J's judgment in *Kioa v West* (and from some of his later judgments[4]) is a concern to ensure that Courts not stray into merits review — and the reason for that concern is to preserve the legitimacy of judicial review of executive action.

9 For the next couple of decades after *Kioa v West* a debate took place within the High Court as to whether the source of the presumptive limitations on the exercise of statutory power was to be found in the common law or in statute. On one view, Brennan J's conception ultimately triumphed: the understanding of the source of the courts' powers to judicially review an exercise of statutory power as derived from the court's function of doing no more than enforcing the statutory limits on power is now the dominant conception of judicial review in Australia.

10 However, Justice Gageler, writing extra-curially in 2016, described the outcome of the competition between the common law and statutory conceptions as a draw.[5] In his view, the relevant limitation on executive power is to be found in both. That is because, in order to discern in the enabling legislation the relevant limits on executive power — express or implied — the courts must interpret the legislation. And the techniques they use for that task are common law techniques of statutory construction, of course along with statutory commands found in modern Acts Interpretation Acts. In other words, the common law continues to play an important role in judicial review of executive action.

11 Although many statutes set out limits on the powers they confer on the executive, there is probably no statute that expressly sets out all of the limits on the powers it confers.

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[3] *Kioa v West* (1985) 159 CLR 550, 609 (emphasis added).

[4] See, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37–8; *Walton v Gardiner* (1993) 177 CLR 378, 408 ('*Walton*'); *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

[5] Justice Stephen Gageler, 'The intersection of the common law, statute law and notions of fairness' [2016] (March) International Family Law 15–20.

Rather, many limits on executive power are implied; and the process of implication results, of course, from common law techniques of statutory interpretation. Indeed, two of our most significant grounds of judicial review — procedural fairness and review for unreasonableness or irrationality — are the product of common law presumptions about what Parliaments do and do not intend. I will say more about these later.

12 An important aspect of this continued role for the common law is that the common law is dynamic — it is capable of being, and is from time to time, developed and changed by judges. That is apparent in recent times in relation to judicial review for unreasonableness and the doctrine of materiality, about which I will say more shortly.

Rules of statutory interpretation

13 What then are the relevant rules of statutory interpretation? I am not going to attempt to be comprehensive, given the time. Rather, I want to remind you of the basics, and then focus on a few aspects of statutory interpretation that have particular significance in the approach to the scope of executive power and judicial review.

14 As we know, because the High Court has told us many times, the starting point in any exercise of statutory construction is the text of the provision. We must also finish with the text. However, the text is to be considered in light of its context and purpose.[6] Consideration of purpose, while developed as an aspect of common law techniques of statutory interpretation, is further reinforced by statutory commands, which require courts to prefer a construction that would promote the purpose underlying the Act over a construction that would not promote that purpose or object.[7]

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6 *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 149 [20] (Kiefel CJ, Bell and Nettle JJ), see also 157 [41] (Gageler J), 162–3 [64] (Edelman J). See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) and the cases there cited at n 105.

7 See, eg, *Acts Interpretation Act 1901* (Cth), s 15AA; *Interpretation of Legislation Act 1984* (Vic), s 35(a).

15 In 2014, in *Thiess v Collector of Customs,* the High Court unanimously said that '[o]bjective discernment of statutory purpose is integral to contextual construction' and that

> it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[8]

16 However, the Court's approach to purpose has varied over time, and a 'sympathetic and imaginative' approach to discovering purpose is not always adopted.

17 Furthermore, as Gleeson CJ pointed out in *Carr v Western Australia*,[9] legislation rarely pursues a single purpose at all costs. And a purpose that is expressed in very general terms may simply not provide any useful guidance in respect of the point of construction under consideration. Thus purpose may not always provide a clear or definitive guide to the proper construction of the statute.

18 As for 'context', that term can do a lot of work in the area of statutory interpretation. It most obviously includes the legislative context — that is the section, division, part and Act in which the provision under consideration is found. But 'context' may also include the legal and factual circumstances in which the provision was enacted.

(a) By legal circumstances, I mean the pre-existing common law and body of statute law.

(b) And the factual circumstances direct attention to the mischief to which the legislation was directed: what particular factual problem was occurring that warranted legislative intervention?

19 Context can also include the materials to which reference may be made in order to undertake the process of statutory construction. These can include extrinsic materials, such as law reform debates, Parliamentary debates and other historical materials. But

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8 (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) quoting *Cabell v Markham* (1945) 148 F (2d) 737, 739.

9 (2007) 232 CLR 138, 143 [7].

of course, legislative history and extrinsic materials cannot displace the meaning of the statutory text.[10]

20 Having touched on the basics, I now want to address four more specific topics or rules of statutory interpretation:

(a) the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (‘*Anthony Hordern*’);[11]

(b) the implication of a standard of reasonableness or rationality;

(c) the implication of the duty to accord procedural fairness; and

(d) the implication of materiality.

A. *Anthony Hordern*

21 The principle in *Anthony Hordern* is one of my favourite principles, perhaps because Debbie Mortimer (now Chief Justice Mortimer), Richard Niall (now Justice Niall) and I used it to great effect in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (‘*Plaintiff M70*’).[12] The principle can be stated relatively simply, as follows:

> When a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power.[13]

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10 *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

11 *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1.

12 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144. In addition to counsel mentioned above, Craig Lenehan (now SC), Elizabeth Bennett (now SC) and Matthew Albert were also in the counsel team for that matter.

13 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672, 678–9 (Mason J, Barwick CJ agreeing at 674, Aickin J agreeing at 680); see also *Anthony Hordern* (1932) 47 CLR 1, 7 (Gavan Duffy CJ and Dixon JJ).

It has been quoted many times in the High Court and elsewhere.

22 The principle was further explained by the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* ('*Nystrom*'):

> It must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power.[14]

23 This principle was significant in *Plaintiff M70* because there were two possible powers the executive had to remove our clients from Australia:

(a) One was a power to remove a person to a regional processing country under s 198A of the *Migration Act*.

(b) The other was a general power — in fact a duty — to remove an unlawful non-citizen, unconstrained by the place to which they were to be removed, found in s 198 of the *Migration Act*.

Thus we not only had to succeed in defeating s 198A as a source of power, we also had to succeed in defeating s 198 as an alternative source.

24 As is now well-known, we succeeded. The High Court, applying *Anthony Hordern* and *Nystrom*, held that a person seeking asylum, whose claim had not been determined in Australia, could *only* be removed from Australia pursuant to s 198A — they could not be removed under s 198.

25 And, importantly, the Court held that s 198A did not authorise our clients' removal because the Minister's declaration of Malaysia as a country for removal under that section was invalid, again by reason of the application of common law principles of statutory interpretation.

26 *Plaintiff M70* is a high profile example of the application of *Anthony Hordern*. But I wanted to draw this principle to your attention because it is relatively common for a

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14 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 589 [59] (Gummow and Hayne JJ).

statute to contain one or more general powers, cast in broad terms, as well as more specific powers, to which conditions or limitations are attached. The principle assists in resolving how to approach the construction of such provisions. Once stated, it might seem obvious. But it can be overlooked.

27 However, it is important not to apply this principle mechanically, in every case in which there is a more general power and a more specific power. Because there are occasions where the High Court has adopted a more nuanced approach, and declined to apply the principle.[15]

28 Ultimately, whether the *Anthony Hordern* principle applies will require consideration of the text, context and purpose of the statute to ascertain whether the legislature intended that the specific power precludes recourse to the general power.

B. The implication of a standard of reasonableness / rationality

29 The second topic I wanted to mention is the presumption that the legislature does not intend a statutory power to be exercised unreasonably.

30 No Australian Parliament has, to my knowledge, sought to say expressly that a power it confers on the executive can be exercised unreasonably. But it is relevant to note that in Israel a bill to prevent the courts — and in particular the Supreme Court of Israel — from invalidating government decisions on the basis of unreasonableness was, at the time I was writing this paper, before the Knesset. It has provoked extensive protests, but I understand it passed earlier this week.[16]

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15 See, eg, *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270, concerning the statutory power in s 439A of the *Corporations Act 2001* (Cth) for a court to extend the convening period for a creditors' meeting, and a more general power in s 447A for a court to make 'such order as it thinks fit' about the operation of pt 5.3A of the Act (in which both provisions were found). The High Court permitted the invocation of the s 447A power, even where the statutory limitations upon the exercise of the s 439A power were not met.

16 'Israel's parliament ratifies contested law limiting Supreme Court powers, sparking protests', *Australian Broadcasting Corporation* (online, 24 July 2023) <https://www.abc.net.au/news/2023-07-24/apn-israel-ratifies-court-powers-law/102642466>

31 In Australia, at least theoretically it would appear to be possible for this presumption to be displaced by clear words — that is, Parliament could state that a particular power can be exercised unreasonably. Ultimately, it seems that to date in Australia political constraints have been sufficient to prevent that from occurring. But events in Israel are a reminder that that might not always be so.

32 The other point to make about this implication is that the concept of when a decision is unreasonable is subject to development and change by the courts.

33 Historically, there was a very high threshold before a court will quash a decision for unreasonableness, namely the standard of *Wednesbury* unreasonableness: a decision so unreasonable that no reasonable person could have reached it;[17] a decision that is 'arbitrary' or 'manifestly absurd'. More recently, however, the High Court's decision in *Minister for Immigration and Citizenship v Li*[18] has suggested a relaxation of the strictness of *Wednesbury* unreasonableness. That decision also suggested that proportionality has a role to play in assessing reasonableness.

34 In terms of the role of proportionality in determining unreasonableness, the different judgments took somewhat different approaches. Gageler J did not deal with proportionality at all. French CJ adverted to it in passing, but did not engage in any analysis. However, the joint judgment engaged in a greater discussion of proportionality,[19] suggesting that the matter could have been (but was not) approached on the following basis:

> In the present case, regard might be had to the scope and purpose of the power to adjourn in s 363(1)(b), as connected to the purpose of s 360(1). With that in mind, consideration could be given to whether the Tribunal gave excessive weight – more than was reasonably necessary — to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate

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17 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

18 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*').

19 *Li* (2013) 249 CLR 332, 365 [72], 366 [74].

> response is one path by which a conclusion of unreasonableness may be reached.[20]

Thus the joint judgment linked proportionality to the reasoning process, by reference to weight.

C. The implication of procedural fairness

35 The third issue, which I want to mention only briefly, is the implication of a duty of procedural fairness.

36 As I touched on earlier, it is presumed that when a Parliament confers on the executive a power to affect the rights, duties or interests (but no longer the legitimate expectations) of a person, it intends that the executive will observe the principles of natural justice, which take their content from common law conceptions of procedural fairness. That presumption again can be displaced — and has been on many occasions, although often the common law principles are replaced by a 'code' of statutory principles, rather than eschewed altogether. The *Migration Act* is a good example of codification.

Materiality

37 The fourth topic I want to consider is the issue of materiality, which has been the subject of several recent High Court decisions, particularly in the context of procedural fairness. The decisions in question are *Minister for Immigration and Border Protection v SZMTA* ('*SZMTA*'),[21] *MZAPC v Minister for Immigration and Border Protection* ('*MZAPC*')[22] and *Nathanson v Minister for Home Affairs* ('*Nathanson*').[23]

38 Materiality is the term used to refer to the question whether the error was one that could have made a difference to the decision that was in fact made. The question often posed

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20 *Li* (2013) 249 CLR 332, 366 [74].

21 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.

22 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506.

23 *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398.

is 'was there a *realistic possibility* that the decision in fact made *could* have been different, had the error not been made?'

39 The concept of materiality is used as a mechanism to protect from invalidity decisions infected by some errors that might *usually* be regarded as jurisdictional errors. That is, an error that might usually be a jurisdictional error, but which in the particular case could not have made a difference to the decision that was in fact made, will not be a jurisdictional error. The concept can usefully be explained by reference to examples.

First example

40 Take in the first instance a hypothetical case where a decision-maker had a statutory power to grant a licence only if *two* conditions are satisfied — that the applicant was a fit and proper person, *and* that the applicant had an appropriate qualification. Assume that the decision-maker concluded that neither condition was satisfied. Assume that the conclusion that the applicant was not a fit and proper person was infected by a denial of procedural fairness. That would *usually* be a jurisdictional error.

41 But if the other aspect of the decision — that the applicant lacked the necessary qualification — was not infected by any error, then the denial of procedural fairness could not have affected the ultimate decision. The decision-maker would have been required by the statute to refuse to grant the licence.

42 Thus the error, although *capable* of being a jurisdictional error, would not have been *material* — it could have made no difference to the outcome. The decision-maker would not have acted without jurisdiction if she made the only decision available to her.

43 This version of materiality is, I think, uncontroversial.

Second example

44 Take next a second example, where a decision-maker had a statutory power to grant a licence if *one* condition was satisfied — that the applicant was a fit and proper person — and that in reaching a conclusion on that question the decision-maker had before her information that was adverse to the applicant, and had not told the applicant that she had such information. Assume that was a breach of procedural fairness. However,

assume also that the decision-maker had not taken that adverse information into account in reaching her decision. Rather, the decision was reached by relying on different factual material.

45 Recent decisions of the High Court tell us that such an error is not material. That is because logically, disclosure of such information could not have resulted in a different decision. Thus any correction or supplementation of that information, or any submissions about its relevance or its weight, would have had no impact on the decision. That is, there was no realistic possibility that the decision in fact made could have been different.

46 This form of materiality has been more controversial, and has split the members of the High Court.[24]

Third example

47 Take next an example, where a decision-maker had a statutory power to grant a licence if one condition was satisfied — that the applicant was a fit and proper person — and that in reaching a conclusion on that question the decision-maker had before her information that was adverse to the applicant, and had not told the applicant that she had such information. Assume that was a breach of procedural fairness. Assume also that the decision-maker *had* taken that adverse information into account in reaching her decision.

48 In that context, the error would be material, because there was a realistic possibility that the decision in fact made could have been different. The applicant might have had additional information he could have placed before the decision-maker, or could have made submissions as to the weight to be given to the adverse information, that could have altered the outcome.

49 Importantly, in that final example, materiality does not require that the error *did in fact* make a difference to the outcome. It does not require the reviewing court to consider all of the evidence, and receive fresh evidence and submissions on the adverse material, and then decide whether, in its opinion, the decision would have been the same. That

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[24] See, for example, *SZMTA* (2019) 264 CLR 421.

would require the reviewing court to enter the territory of the decision-maker, and stray beyond the bounds of judicial review.

50 In each example, it is apparent that the exercise is backward looking: it involves considering the particular decision made by the decision-maker and asking whether, had the decision-maker not made the error they made, they could have come to a different decision. That involves a 'counterfactual analysis'.

51 As the plurality explained in *MZAPC,* the conceptual foundation for the requirement that an error be material in order to be jurisdictional in nature is the proposition that Parliament is not likely to have intended that a breach of a statutory condition that occasions no 'practical injustice' will deprive a decision of statutory force. Rather, a statute conferring power on an administrative decision-maker will <u>ordinarily</u> be interpreted as incorporating a threshold of materiality in the event of non-compliance, at least in the absence of a legislative intention to the contrary.[25]

52 The focus on the statute is important. There are some conditions on power routinely implied into statutes conferring power on the executive that, by their very nature, incorporate an element of materiality. That is, there are some errors that are such that they will *always* be material; in such a case, there is no need to ask any separate question as to materiality. The plurality in *MZPAC* gave two examples:

(a) the 'standard condition' that a decision-maker be free from actual or apprehended bias; and

(b) the 'standard condition' that the ultimate decision that is made lie within the bounds of reasonableness.

In neither context, the plurality said, would any separate analysis of materiality be required.[26]

53 Having developed the doctrine of materiality in *SZMTA* and *MZPAC*, the High Court to some extent retreated from the full implications of it in *Nathanson*. In that case the Court emphasised that when determining whether the outcome *could have been*

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25 *MZAPC* (2021) 273 CLR 506, 521–2 [30]–[33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

26 *MZAPC* (2021) 273 CLR 506, 522 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

different had the relevant condition been complied with, the court was engaged in 'reasonable conjecture within the parameters set by the historical facts'.[27]

54 Furthermore, the burden of proof in relation to the 'historical facts' falls on the person challenging the decision. However, that burden will be relatively easy to discharge. The plurality said as follows:

> There will generally be a realistic possibility that a decision-making process could have resulted in a different outcome if a party was denied an opportunity to present evidence or make submissions on an issue that required consideration. *The standard of 'reasonable conjecture' is undemanding.*[28]

55 Edelman J went further and described the onus of proving materiality as 'almost nothing'.[29]

56 Materiality thus provides yet another example of the importance statutory interpretation in judicial review, and of the dynamic common law principles relevant to that interpretation.

Review of non-statutory action

57 The focus on statutory interpretation in judicial review of executive decision-making then leads to a different, and more difficult question: how are the Courts to approach judicial review of non-statutory executive power?

58 Or, to put it differently, what are the limits on such powers that the Courts can legitimately enforce? And where do those limits come from? And does the answer differ depending on the nature of the power in question?

59 The starting point for the analysis of judicial review of non-statutory exercises of executive power is, in my opinion, the proposition that the constitutional separation of

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27 *Nathanson* (2022) 403 ALR 398, 410 [32] (Kiefel CJ, Keane and Gleeson JJ); See also 415–6 [55] (Gageler J), 422–3[83] (Gordon J).

28 *Nathanson* (2022) 403 ALR 398, 410 [33] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).

29 *Nathanson* (2022) 403 ALR 398, 425 [93].

powers requires that the courts be capable of determining the legality of any exercise of executive power.

60 Thus, as Mason J said in *R v Toohey; Ex parte Northern Land Council*:

> there is much to be said for the view ... that the exercise of a discretionary prerogative power "can be examined by the courts just as any other discretionary power which is vested in the executive". The question would then remain whether the exercise of a particular prerogative power is susceptible of review and on what grounds.[30]

61 That broad proposition might need to be subject to some qualification in relation to justiciability. But, assuming justiciability, the question then is how are the courts to discover the legal limits on power, in the absence of a statute to provide those limits?

62 This could be the subject of a long paper of its own, and I will not attempt today to be comprehensive, but we have of course recently had some consideration of some of these questions by both the Full Federal Court and the High Court in *Davis*,[31] to which I will come shortly.

63 Identification of the legal limits on a non-statutory power might depend on the source of that power. And that in turn will require us to ask whether we are speaking of the Commonwealth or the States. At the Commonwealth level, one might say all executive power is sourced in either s 61 or s 64 of the Constitution, as I indicated at the start of my paper. And one might then interpret s 61 as containing an implication that the executive powers thus vested in the Queen are to be exercised reasonably. But that seems unsatisfying, because s 61 is in such brief and general terms. In short:

(a) section 61 does not define the concept of executive power,

(b) it does not explain the sources from which the content of that power can be identified,

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30 (1981) 151 CLR 170, 220–1.

31 [2023] HCA 10.

(c) it does not identify any limits on executive power, or any basis for the implication of limits, and

(d) it provides and no framework by which the content of any limits — such as a standard of unreasonableness, for example — could be determined.[32]

And all of these things might vary, depending on the particular power or capacity under consideration.

64 Similarly, s 64 contains no detail about these matters.

65 It might, then, be relevant to assess the question of legal limits on the basis of the nature of the particular power in question. Is it a power traditionally referred to as a 'prerogative power' — that is, a power traditionally recognised by the common law as a special power inhering in the executive, and vested in the Queen by s 61?

66 If that is so, then it would be logical and coherent for the common law to determine the limits of that power. And in that context, the common law might require that if the power is one that affects a persons' rights or interests, it includes a duty of procedural fairness. Or the common law might require that a particular non-statutory power be exercised reasonably (or, at least, not unreasonably).

67 On the other hand, if the power is a 'capacity'**,** akin to the capacity a natural person has, it is less clear why it would be subject to common law limits. One might say that all exercises of executive power must have a source in law, as the High Court recognised in *Pape v Federal Commission of Taxation*[33] and the *Williams v Commonwealth (No 2)* cases.[34] Thus to call a power a 'capacity' does not foreclose the proposition that the common law will imply into such a power the same kinds of limitations as just discussed.

68 But the idea that the courts would undertake judicial review of government contracting decisions, for example, on reasonableness grounds may sound somewhat startling. Could the Courts, for example, review the exercise of the Victorian government's

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32 See discussion in *Davis* [2023] HCA 10, [119] (Edelman J).

33 (2009) 238 CLR 1.

34 (2014) 252 CLR 416.

recent decision to cancel the Commonwealth games, on the basis of unreasonableness? (I am assuming that decision was an exercise of the power to contract, and not the exercise of a statutory power, although I do not know the precise legal basis). And in that regard, it is important bearing in mind that, at least in Victoria, there is no equivalent to s 61; thus, in my view, the common law pathway is probably clearer and more orthodox at the State level.

69 The other significant point to always bear in mind in relation to a non-statutory power is that it will necessarily be subject to modification, abrogation or limitation by statute. *Davis* provides a recent example of a non-statutory power butting up against the limits of statute.

70 *Davis* concerned s 351 of the *Migration Act,* which gave the Minister for Immigration the power to substitute a decision of the Administrative Appeals Tribunal with a decision that is more favourable to an applicant on the basis of the public interest. The power could only be exercised by the Minister personally, and the Minister had no duty to consider whether to exercise the power in respect of any decision.

71 Earlier cases, including *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (‘*Plaintiff S10*’)[35] and *Minister for Immigration and Border Protection v SZSSJ* (‘*SZSSJ*’),[36] had explained that s 351 embodied two distinct ‘decisions’:

(a) a procedural decision as to whether to consider the exercise of the power, and

(b) a substantive decision as to whether to make the more favourable decision.

72 In 2016 the Minister issued guidelines (called ‘instructions’) to assist with the resolution of such cases. The purpose of the 2016 Guidelines was to:

(a) explain the circumstances in which the Minster may wish to consider intervening in a case;

(b) explain when the Department should refer a case to the Minster; and

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35 (2012) 246 CLR 636.

36 (2016) 259 CLR 180.

(c) confirm that if a case does not meet these guidelines, the Minster does not wish to consider intervening in that case.

73 The 2016 Guidelines said that the Minister will usually only consider the exercise of the public interest powers in cases with 'unique or exceptional circumstances'. Unique or exceptional circumstances included:

(a) compassionate circumstances;

(b) exceptional economic, scientific, cultural or other benefit to Australia; or

(c) circumstances in which the application of the legislation leads to unfair or unreasonable results.

74 Importantly, the 2016 Guidelines directed the Department to 'finalise cases' without referral to the Minister if the Department assessed the case as not having these unique or exceptional circumstances.[37]

75 These guidelines were similar to, but not the same as, guidelines that had been issued in 2009. The 2009 Guidelines had been considered in *Plaintiff S10* and *SZSSJ.* In *Davis* the Court explained their relationship to the statutory power in s 351 as follows:

> Being under no obligation to exercise the statutory power to make a procedural decision at all, however, the Minister can choose to make no procedural decision one way or the other under s 351(1). The Minister can instead choose to exercise executive power, involving the Minister acting in "a capacity which is neither a statutory nor a prerogative capacity", to give a non-statutory instruction to officers of the Department administered by the Minister under s 64 … as to the occasions, if any, on which the Minister wishes to be put in a position to consider making a procedural decision. Thus, the Minister can exercise executive power to give a non-statutory instruction to departmental officers to the effect that "I wish to be put in a position to consider making a procedural decision in any case that has the following characteristics ... but I do not wish to be put in a position to consider

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37 *Davis* (2023) 97 ALJR 214, 222 [2] (Kiefel CJ, Gageler and Gleeson JJ).

making a procedural decision in any case that has the following characteristics.[38]

76 However, neither of those cases had addressed the question whether the permissible scope of such a non-statutory instruction was affected by the fact that the power could be exercised only by the Minister personally. That question squarely arose in *Davis*, where there had been a departmental decision to 'finalise' Davis's case without referring it to the Minister for consideration. The Court declared that decision to have exceeded the executive power of the Commonwealth.[39]

77 In that regard, something should be said about the nature of the power the departmental officers had been exercising. As Edelman J observed:

> Some of the suggested formulations of that "power" resemble the bureaucratese of Sir Humphrey Appleby: a "procedural decision" by the officials to consider whether the Minister considered that he wished to consider the exercise of the "substantive power".[40]

78 A majority of the Court held that the 2016 Guidelines transgressed the limits of the s 351 power. The power conferred by s 351(1) to make the procedural decision not to consider making a substantive decision in a class of case is not unbounded. Rather, it is bounded by the exclusivity that s 351(3) attaches to the power that s 351(1) confers on the Minister.[41] Gordon J observed that, if a statute regulates or controls how executive power is to be exercised, then the statute governs to the exclusion of any residual, non-statutory power.[42]

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38 *Davis* (2023) 97 ALJR 214, 225 [19] (Kiefel CJ, Gageler and Gleeson JJ).

39 *Davis* (2023) 97 ALJR 214, 227–8 [38] (Kiegel CJ, Gageler and Gleeson JJ), 238 [100] (Gordon J), 240 [114], 250 [171]–[172] (Edelman J), 274–5 [318]–[319] (Jagot J).

40 *Davis* (2023) 97 ALJR 214, 239 [107].

41 *Davis* [2023] HCA 10, [29] (Kiefel CJ, Gageler and Gleeson JJ), [97] (Gordon J), [147] (Edelman J), [293] (Jagot J).

42 *Davis* (2023) 97 ALJR 214, 237 [96] (Gordon J), referring to *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 600–1 [279].

79 A Minister is, undoubtedly, *entitled to obtain non-statutory advice* and assistance from his or her department. But there are limits on that entitlement. As Edelman J helpfully explained, there are two categories of conduct:[43]

(a) permissible advice and assistance to the Minister so that the Minister can personally exercise the Minister's own liberty as to whether or not to consider the request; and

(b) an impermissible exercise by the officials themselves of the Minister's personal liberty.

80 The Court by majority held that, the determination by departmental officers of cases assessed by them not to have unique or exceptional circumstances, without referral, fell into category 2: the Minister, in substance, had entrusted the evaluation of the public interest to departmental officers; but that was an evaluation *he* was required to undertake. The Minister thus exceeded the statutory limit on executive power imposed by s 351(3). Thus the terms of s 351 constrained the non-statutory power of a Minister to obtain advice and assistance from his or her Department.[44]

Conclusion: Enhancing trust

81 Can I now turn to the theme of the conference: enhancing trust in government decision-making.

82 Does the present role of statutory interpretation in judicial review of executive action enhance trust in government decision-making? That is a difficult question to answer, in some abstract sense. And I am not aware of any surveys or polls that would reveal the answer.

83 It is probably trite to observe that the involvement of the Courts in the supervision of the legality of government decision-making is, in and of itself, likely to enhance trust in government decision-making. (Or perhaps judges simply assume that.) And, taking

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[43] *Davis* (2023) 97 ALJR 214, 239 [109].

[44] *Davis* (2023) 97 ALJR 214, 227–8 [38] (Kiegel CJ, Gageler and Gleeson JJ, Gordon JJ agreeing at 231 [66]), 249–50 [170]–[172] (Edelman J), 264 [254] (Jagot J).

that one step further, it is arguable that, by emphasising the statutory source of the limits on executive power that are (usually) being enforced by the Courts, the courts emphasise the fundamentally democratic nature of their role in this area. A democratically elected Parliament has imposed limits on executive power, and the Courts then simply give effect to the will of that democratically elected Parliament.

84 That understanding was reflected in the judgment of Brennan J in *Walton v Gardiner*, where his Honour linked his judgments in *Kioa v West* and *Quin* to Professor Wade's view that it is 'legislative supremacy' that provides the justification for judicial review of executive action.[45] Brennan J quoted Professor Wade as follows:

> [I]n every case [the judge] must be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.[46]

85 But I confess that, at some level, that seems too superficial and unpersuasive. Perhaps that is because I am a former Mason associate, and find more persuasive Sir Anthony's insights into the basis for judicial supervision of executive action. But I note that I am not alone in thinking this. It has been said by other prominent judges and commentators, including Justice Gageler,[47] Justice Beazley,[48] and Will Bateman and Leighton McDonald,[49] to name a few.

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45 (1993) 177 CLR 378, 408.

46 *Walton* (1993) 177 CLR 378, 408.

47 Justice Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28(2) *Federal Law Review* 303, 311–12.

48 Justice MJ Beazley, 'Administrative Law and Statutory Interpretation: Room for the Rule of Law?' AIAL Forum (No 93), 7.

49 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 173–9.

86 This turn to statutory interpretation, it seems to me, fails to recognise the role of the judge in the development of the common law rules of statutory interpretation. Recent examples of that important role can be seen in developments concerning the standard of unreasonableness to incorporate proportionality and in the recent development of materiality.

87 It also fails to reflect the ongoing tensions between the Parliament and the courts about judicial review of executive action, which have led to greater and greater legislative efforts to exclude the courts or to limit and minimise their role. The plethora of privative clauses and the legislative reaction to cases like *Plaintiff M70*, often enacted with bipartisan support, suggest that it is not really tenable to describe the Courts as simply giving effect to the will of the democratically elected legislature.

88 Finally, the turn to statutory interpretation fails to recognise the role that values play in both statutory interpretation and judicial review. As Justice Beazley observed in a paper delivered to this conference in 2018:

> [S]ubsumed 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.[50]

89 It is, I want to suggest, the presence of common law and constitutional values, particularly the rule of law, that ultimately provides a basis for an argument that judicial review enhances trust in government decision-making.

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50 Justice MJ Beazley, 'Administrative Law and Statutory Interpretation: Room for the Rule of Law?' AIAL Forum (No 93), 10.