CHAPTER 2

THE SCOPE OF JUDICIAL REVIEW

2.1 GENERAL INTRODUCTION TO JUDICIAL REVIEW

This and the next four chapters are concerned with judicial review. In thinking about judicial review in particular (and administrative law more generally), it is important always

to bear in mind that Australia is a federation, and not to identify Australian law exclusively with federal law. Although the Australian legal system has an integrated judicial system, it remains useful to distinguish between the judicial review jurisdiction exercised by federal courts—the High Court and the Federal Court in particular[1]—and that exercised by state courts. At the federal level, the High Court's 'original' judicial review jurisdiction derives from s 75 of the Constitution. By statute, the Federal Court shares this 'constitutional' jurisdiction to supervise administrative action,[2] but also has further sources of jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and (separately) under the *Judiciary Act 1903* (Cth). By contrast, the Supreme Courts of each state and territory have what is called 'inherent' or 'supervisory' judicial review jurisdiction. Until recently, the legal source of this jurisdiction was thought to be the common law. However, the High Court controversially held, in *Kirk's* case (2010), that aspects of this jurisdiction are, like the High Court's 'original' jurisdiction, derived from and protected by the federal Constitution.[3] Although the constitutional basis for the state Supreme Courts' entrenched judicial review jurisdiction is distinct from the High Court's jurisdiction under s 75(v) of the Constitution to review decisions made by 'officers of the Commonwealth', we will see that the purpose and nature of the two jurisdictions have been conceptualised consistently. To make matters more complex, in some states, courts also have statutory sources of judicial review jurisdiction. In three of the four states where such statutes exist, the approach has been to a greater or lesser extent to clone the basic approach to judicial review adopted by the *ADJR Act* (2.5.3).

Understanding of the system of judicial review in Australia is further confounded by the fact that associated with these various sources of judicial review jurisdiction may be different bodies of law dealing with matters such as the scope and grounds of, and access to, judicial review, as well as the available remedies. Most obviously, the *ADJR Act* (like its state clones) not only confers judicial review jurisdiction, but also contains rules about the grounds of, and access to, judicial review, and about remedies. While the effect of the *Kirk* decision has, broadly speaking, brought the law associated with the supervisory jurisdiction of state courts on these matters into alignment with the law applicable in the constitutional judicial review jurisdiction of the High Court (and the statutory *Judiciary Act* jurisdiction of the Federal Court),[4] the extent of any differences remains unclear. In addition to its 'original' judicial review jurisdiction, the High Court has appellate jurisdiction in relation to the judicial review jurisdiction of other federal courts, both constitutional and statutory, and also in relation to the various sources of judicial review jurisdiction exercised by state courts.

Although a degree of technical detail is necessary in explaining the law, we have tried to avoid getting overly bogged down in the intricacies of this extremely complex system in order

1 On the jurisdiction of the Federal Circuit Court see n 103 below.

2 *Judiciary Act 1903* (Cth), s 39B.

3 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531. The basis for this conclusion is examined in 2.4.3 and 6.1.

4 J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 91.

to provide a strategic overview. Important things to bear in mind when reading the judicial review chapters are:

› the distinction between federal law and state law;

› the distinction between judicial review and merits review (1.2.2; 2.2.2); and

› the differences between the various sources of judicial review jurisdiction—the Constitution, the *ADJR Act*, other federal statutes (notably the *Judiciary Act*), state statutes and the common law.

To succeed in a judicial review application, an applicant must satisfy a number of distinct requirements: the court must have jurisdiction to judicially review the impugned act or decision and it must accept that the application raises 'justiciable' issues; the applicant must be an appropriate person to bring the application (that is, the applicant must have 'standing'); there must be a breach of an administrative law norm (that is, a 'ground of review' must be available); and the court must also have power to grant an appropriate remedy. Additionally, it must be the case that the legislature has not validly excluded or diminished the court's review jurisdiction. In practice, these issues may be interrelated in various ways. But it is helpful to deal with the issues separately so that their interrelations can be properly understood.

This raises the question of the order in which these elements of a judicial review action are best discussed. There is no single, correct way of arranging an analysis of judicial review. We have chosen to order the topics as follows: scope of judicial review (that is, issues connected with the courts' judicial review jurisdiction) (Chapter 2); judicial review remedies (Chapter 3); the administrative law norms applied by the courts (also known as the grounds of judicial review) (Chapter 4); access to judicial review, principally a discussion of 'standing' to seek review (Chapter 5); and, finally, statutory restriction of judicial review (Chapter 6).

Although at first sight it may appear odd to deal with the remedies which may be awarded if all other elements of a judicial review application are present before discussing those elements, it will be seen that a discussion of remedies equips us with a conceptual apparatus and the requisite language necessary for a clear understanding of issues relevant to the legal norms (the grounds of judicial review), standing and the exclusion of review by statute.[5] For example, the need to establish that a ground of judicial review amounts to a 'jurisdictional error' depends upon the remedy sought and the source of the court's jurisdiction to engage in review; standing is *remedy*-specific; and the interpretation of statutes attempting to oust judicial review jurisdiction has been affected by concepts (including 'jurisdictional error') which developed in the context of the availability of particular remedies. Although these chapters may be read in any order, we think that reading them in the order they are presented will provide an illuminating picture of the conceptual structure of the law of judicial review.

In this chapter we begin our examination of judicial review by considering how far the law of judicial review extends. What decisions or acts are subject to judicial review? Before

5 Historically, this can be explained by the fact that the law of judicial review developed through the medium of the prerogative writs: 1.2.2. In other words, administrative law was remedially oriented. For this reason some of the concepts necessary to understand the nature of the courts' review jurisdiction (i.e. the scope of review) are related to concepts which have their origin in the availability of judicial review's remedies.

diving into the details of how this question is answered in Australian law, we undertake two tasks to frame that discussion. First, we offer an explanation of the general nature of the courts' judicial review jurisdiction (2.2). The question of the scope of judicial review (what or whose decisions are to be reviewable) is necessarily answered in the context of background ideas about its general nature and purposes. The second task we undertake is to explain why readers should not be surprised to discover that the boundaries of judicial review (the scope of its application) are both complex and changeable (2.3). Much of the law on the scope of judicial review is, in Australia, notoriously technical. Placing our discussion in a larger frame thus serves to emphasise that large questions lurk beneath the surface. What is the nature of governmental or public power? What are the competing legal mechanisms for keeping it to legal account? And, at the highest level of abstraction, what is the nature of the relationship between individuals and the various institutions of the administrative state?

2.2 THE NATURE OF THE COURTS' REVIEW JURISDICTION

The so-called 'supervisory' or 'inherent' jurisdiction to undertake judicial review of administrative decisions and conduct evolved as a creature of the common (that is, judge-made) law. For the historically minded, an obvious question is: how did the judges get away with this institutional power grab? Part of the answer lies in the fact that the bodies and officers being reviewed at that time were typically thought to have a 'judicial' nature, and thus were appropriately reviewed by the superior courts.[6] It was also the case that the 'administration' over which the courts were asserting their jurisdiction was local rather than central (which, for present purposes, can be taken to represent administration by 'the Crown').[7] Whatever the historical details, the continuing assertion of this review power has been and continues to be justified by reference to its *limited* nature. The courts have consistently (if not always persuasively) insisted that the purpose of 'supervisory' judicial review is not to *usurp* powers of administrators but merely to *supervise* their exercise. The meaning of this claim has been explored by reference to two fundamental distinctions: the contrasts between *appeal* and *review*, and *judicial* (or legality) review and *merits* review. The questions of whether these distinctions adequately reflect the role of judges undertaking review, and the extent to which they are capable of meaningfully guiding judges, are subject to ongoing debates. Nevertheless, it is through these distinctions that the basic rationale for review and its limits have been articulated.

6 In the relevant period the justices of the peace (i.e. lay judicial officers) became the 'administrators of England': L L Jaffe and E G Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345, 363.

7 *Mayor and Aldermen of the City of London v Richard Henry Cox* (1867) LR 2 HL 239, 254.

2.2.1 The appeal/review distinction

The distinction between appeal and review focuses on the idea that, although appeal courts can typically substitute their own decision for that of the original decision-maker, a review court cannot. Even if a court undertaking judicial review decides that there is only one legally available outcome, the court will, in most circumstances, remit the decision to the original decision-maker to be made in accordance with the law.[8] Whereas judicial review was originally a creation of the common law, appeals have always been creatures of statute.[9] As such, appeals come with whatever powers and procedures are deemed appropriate by the legislature.[10] A general appeal—where the appellate body can consider all aspects of a decision (law, fact, and policy)—typically carries with it a remedial power to *substitute* a new decision. This remedial power stands in sharp contrast to the legal consequences attaching to judicial review's remedies, which are connected with conclusions about the legality, and not the correctness, of decisions. The traditional judicial review remedies (the prerogative writs) allow courts to quash decisions illegally or unlawfully made (certiorari), prohibit the commencement or continuation of illegal action (prohibition), or compel the performance of certain legal duties (mandamus).[11]

Note, however, that appeals may also be limited to points or questions of law and, if this is the case, the function of the court hearing an appeal is in essence the same as that performed by a judicial review. The difficulty with this way of stating the distinction between review and appeal—by focusing on the more limited remedial powers of judicial review and emphasising that they typically do not enable the substitution of a new decision to replace that of the original decision-maker—is that it tells us very little about any substantive differences between appeal and review (that is, whether appeal and review cases are decided on the basis of different rules and principles). It merely restates the basic functions of judicial review remedies, each of which falls short of enabling the substitution of a new decision.

The court's limited remedial role in judicial review applications is reflective of the traditional 'rule of law' rationale for judicial review under which the role of the courts is to ensure those exercising powers conferred by parliament are kept within 'the limits of their jurisdiction'.[12] In this way, the justification for judicial review—to ensure administrators do not act beyond (ultra) their power (vires)—also suggests that the nature of the courts' function is limited.[13] Thus, although courts may ensure that decision-makers do not exceed their legal powers, judicial review is 'not intended to take away from [government] authorities the powers and discretions properly vested in them by law and to substitute the courts as

8 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 598.

9 See *Fox v Percy* (2003) 214 CLR 118, 124.

10 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 399–400 [27].

11 These remedies, along with declarations and injunctions, are explained in Chapter 3.

12 Jaffe and Henderson, n 6 above, 358.

13 On the distinction between jurisdictional and non-jurisdictional errors, and ultra vires and intra vires, see 3.4 and 3.4.1.

the bodies making the decisions'.[14] Courts can supervise the *boundaries* of an administrator's legal powers, but should not *exercise* those powers. In this way, 'neither branch usurps or intrudes upon the functions proper to the other'.[15] Nevertheless the distinction between review and appeal in and of itself gives little away about the substantive nature of the supervision undertaken by judicial review courts.

2.2.2 Legality review, merits review and the separation of powers

The distinction between legality review and merits review can be understood as an elaboration of the distinction between review and appeal, though the focus is less on the formal remedial powers available to the court and more on the notion that the grounds on which decisions may be reviewed must be restricted. That is, the distinction between judicial review and merits review emphasises that the legal norms of judicial review are distinct from, and more limited than, the full set of norms and considerations relevant to the correctness or wisdom of the original administrative decision. However, the notion that the legal boundaries patrolled by judicial review are not coextensive with the criteria relevant to the merits of a decision does not indicate how exactly those boundaries are to be ascertained.

Judicial review, it is sometimes said, involves 'a review of the manner in which the decision was made'.[16] But this way of drawing the distinction between review (as focusing on procedure) and the merits (as focusing on substance) is potentially misleading. Although some grounds of judicial review do focus on procedure, others clearly raise matters of substance. The unreasonableness ground of review is only the starkest example. Even on the traditional *Wednesbury* approach whereby a decision could only be held illegal where it is so unreasonable that no reasonable decision-maker could have so decided (4.5), unreasonableness review cannot be coherently characterised as raising only procedural questions. More controversially, some of the legal norms that constrain the reasoning processes of decision-makers may be difficult to apply without any consideration of the underlying substantive issues (see further 4.3).

In theory, where an administrator is exercising statutory powers, the idea that judicial review should patrol the boundaries of their powers appears straightforward. However, the reality is that the legal boundaries that circumscribe the decision-making powers of the executive government are, in any given situation, defined by a complex mix of statutory limitations and common law doctrine as applied to the particulars of an individual case (see 4.1.1). Consequently, few commentators deny the *extensive* creative role played by modern judges in stating the legal boundaries of executive power, even where those powers derive from statute.[17] At least to some extent, then, it is possible for judges to allow themselves to

14 *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, 145 ('*Evans*').

15 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 600.

16 *Evans* [1982] 3 All ER 141, 155 (Lord Brightman).

17 This is so even for those who believe that judicial review is an elaborate exercise in statutory interpretation, where judges are in theory doing the bidding of the legislature (4.1.3): see, e.g., M Elliot, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001).

be guided by principles which concern whether the decision was right or fair, by reference to general norms of 'good administration' or theories about the appropriate relationship between individuals and the state.[18] This is not to say that judges make everything up and are wholly unconstrained. But if they are limited by a clear distinction between legal issues and the merits, this remains to be satisfactorily articulated.

What is clear is that the legality/merits divide reflects a deeply ingrained concern that judicial review should not, in the name of the 'rule of law', enable judges to *unduly* colonise public administration by reference to their own perceptions of what 'good administration' requires. Although the distinction has traditionally been seen as a corollary of the ultra vires or rule of law rationale for judicial review, this conclusion begs the question of the character of the legal norms that define the powers (vires) of administrators. Perhaps for this reason, in Australian law the legality/merits distinction is increasingly thought to be an outworking of complex ideas about the separation of powers, according to which legal checks on the executive should not allow judges to arrogate to themselves functions which have been given to more appropriate (and, perhaps, more legitimate) decision-makers (2.6.2.1). For example, Brennan J argued that courts are not equipped (that is, they lack the expertise and resources) to make decisions which require individual and community interests to be balanced, and that adversarial processes are not well suited to decision-making that requires multiple interests to be considered and balanced.[19]

The High Court's insistence on the separation of *judicial* power from executive power (at the Commonwealth level) has in turn worked to 'constitutionalise' these functional reasons for restraint. Chapter III of the Constitution subjects federal executive power to the law and, moreover, the court has held that it is the job of the judicature to declare and enforce the legal limits of the powers conferred upon administrative decision-makers.[20] This is central to the court's understanding of how the rule of law is secured within Australia's constitutional arrangements.[21] Further, according to the strict approach to the separation of *judicial* power, whatever the 'merits' of administrative decision-making involves, it is off limits to federal judges as it would involve the courts in the exercise of non-judicial functions (7.1; 7.2.1). On this basis, the separation of powers principle looms large in Australian debates about the limits of judicial review.[22]

Again, however, the separation of judicial power (like the basic rule of law or ultra vires justification for judicial review) arguably fails to illuminate the *specific criteria* by which

18 Notwithstanding that judges often deny this: see 4.1.4.

19 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37. For discussion, see M Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399, 400.

20 *Corporation of City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153 ('*Enfield*').

21 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

22 The rule of law also has constitutional status, albeit the diminished status of a 'constitutional assumption': *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. However, this principle is understood more as a corollary of the separation of judicial power than as a principle with independent and direct normative impact: *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 23 (McHugh and Gummow JJ) ('*Lam*').

the boundaries of legal powers are to be drawn. The difficulty is that, like most abstract constitutional principles, the separation of powers has received different interpretations in different times and places, and it continues to be vigorously contested.[23] In Australia the constitutional entrenchment of judicial review reflects an important idea within the separation of powers, namely that 'power should be a check to power'.[24] But the idea that this review should be strictly limited to legal questions reflects, as we have noted, functional reasons for allocating particular powers to different parts of the governmental apparatus. Thus although, in Australia, we talk of a strict separation of judicial power, that separation is constructed on a compromise between important constitutional ideas which can pull in opposite directions.

The upshot is that while Brennan J's canonical statement that 'the merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone' is routinely repeated,[25] it remains difficult to give concrete content to the concept of 'the merits' of a decision in a non-circular way. As one judge concluded, the merits of a decision are to be found in 'that diminishing field left after permissible judicial review'.[26] That is, the legality/merits distinction is simply marked by whether or not a particular legal norm of judicial review has been breached in a given case; if it has not, then judges cannot interfere with the 'merits' of the decision. But the question we have been examining is whether the separation of powers principle can provide guidance on this very issue—that is, when courts can permissibly undertake judicial review.

It is, then, difficult to conclude that the separation of powers enables us to clarify the details of the boundary between merits and legality review. Nonetheless, it is important to acknowledge that the strict separation of judicial power in Australia plays a substantial role in heightening judicial sensibilities to the importance of leaving *some* latitude for administrators to get things 'wrong'.[27] In this way we can also understand the wariness of Australian judges about enforcing so-called 'substantive' versions of the 'rule of law', which explicitly invite judges to make value judgments on the fairness of outcomes.[28] There is, in short, a separation of powers *sensibility* that runs much deeper in the Australian judicial psyche (influenced by an entrenched constitutional separation of judicial power) than in the English. According to the High Court:

> In Australia, the existence of a … written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems … An aspect of the rule of law under the *Constitution* is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.[29]

23 Compare, e.g., E Barendt, 'Separation of Powers and Constitutional Government' [1995] *Public Law* 599; and A Tomkins, *Public Law* (Oxford University Press, 2003), Ch 2.

24 C L Montesquieu, *The Spirit of the Laws* (T Nugent trans, 1873) Bk XI, Ch IV, 172 [trans of: *De l'Esprit des Lois*]. This theme is a central feature of US constitutional design.

25 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

26 *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388, [46]. See M Aronson, M Groves, and G Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edn (Lawbook Co, 2017), 190.

27 For example, *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 175–8.

28 *Lam* (2003) 214 CLR 1, 2 (McHugh and Gummow JJ).

29 Ibid, 24–5.

The constitutional separation of powers thus influences, even if it does not determine, the development of specific doctrines associated with the grounds of judicial review. Admittedly, this is a vague conclusion. However, to the extent the constitutional context for judicial review contemplates both judicial values associated with legality and other values associated with administration, it may be, as one influential judge has suggested, that the search for 'conceptually definitive boundaries and precise tests' of the function of judicial review 'is doomed to fail'.[30]

2.3 THE SHIFTING AND COMPLEX BOUNDARIES OF 'GOVERNMENTAL' POWER AND JUDICIAL REVIEW

Consistent with the basic rule of law and separation of powers rationales for judicial review, the most straightforward way to delineate its scope is to say that it involves the review of *government* power (in particular, review of the 'administrative' or executive branch of government).[31] Though this is true as a broad-brush generalisation, the scope of judicial review in Australia is characterised by considerable complexity for a number of reasons.

First, even if the scope of judicial review were to be fixed by the criterion of whether a decision-maker was, formally speaking, part of the executive,[32] it must be conceded that the common law never subjected *all* decisions made by government decision-makers to judicial review. Historically, certain decision-makers (for example, governors and the Governor-General) and categories of power (for example, prerogative powers) were immune from review (2.6.2.2). Moreover, although the law is increasingly hostile to immunities based on formal classifications of powers or categories of decision-makers, it continues to be the case that the nature of a particular power exercised by a government decision-maker may take its exercise beyond review by the courts (because it is 'non-justiciable' (2.6.2) or an exercise of 'private' rather than 'public' power (2.6.1)), at least in relation to the application of some of the grounds of judicial review.

Second, attention must be paid to attempts by the legislature to oust or diminish the courts' powers of judicial review. Although there is an entrenched minimum provision of judicial review at the Commonwealth and state levels, legislatures can remove the availability of some of judicial review's remedies and, subject to unclear limits, it appears there are legislative techniques which may operate to diminish the practical efficacy of judicial review. These issues will be examined in Chapter 6. Although judicial review is certainly focused upon the control of government power, it has never applied uniformly to each and every exercise of power by the government.

30 J Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 294.

31 M Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 209.

32 We shall see that things are not so simple.

The third reason why the law has not contented itself with general references to the amenability of 'government' decisions to review is, perhaps, logically prior to questions about whether particular government decisions should be subject to judicial review. Before asking whether certain decisions made by the 'government' should not be reviewable, we first need to know what 'government' is and which decision-makers are included within it. As noted in 1.1, administrative law, including the law of judicial review, has as its focus the *legal* regulation of the executive branch of government. The difficulty, however, is that the concept of 'the executive branch of government' is more complex than it may at first appear. For one thing, the executive branch in an administrative state cannot be accurately understood in unitary terms. The executive is composed of a multiplicity of institutions and actors to an extent not captured by the 'branch' metaphor. Relatedly, many executive government bodies and decision-makers are not closely tethered to the *political* executive (at the Commonwealth level, the Prime Minister and Cabinet). The paradigmatic executive body in Australia (and England) is the government department headed by a politically accountable minister of state and staffed by public servants, who are appointed rather than elected. But in Australia there is a long history of the use of statutory corporations to perform functions which, in certain other countries, might be performed by departments of state (a contemporary example is the Commonwealth Superannuation Corporation). There are also many regulatory agencies (for example, the Australian Prudential Regulation Authority and the Australian Consumer and Competition Commission) which are, to varying degrees, removed from political control and interference, and yet which still clearly belong to the 'executive'.

As also noted earlier (1.4) there are, however, even deeper complexities involved in identifying governmental power with the 'executive branch'. It can be observed that over the course of the past 35 years or so, various functions that were previously performed by government departments or government-owned businesses have been transferred to non-governmental bodies through the use of techniques such as privatisation of public assets and contracting-out (or 'outsourcing') of functions—particularly the provision of 'public services'—to the private sector. For instance, Australia's largest telecommunications company, Telstra—once wholly owned by the federal government—is now entirely owned by private investors. Private law firms now provide many legal services to the federal government that would once have been delivered 'in-house' by legally trained public servants. So-called 'public–private partnerships' have become increasingly popular vehicles for the provision of new infrastructure such as roads and hospitals. There is, undoubtedly, a long history of 'private' actors being involved in functions which are, have been, or could be considered to be state functions or responsibilities. But these recent trends (which have been felt throughout the common law world) have thrown this role into stark relief.[33]

33 M Taggart, 'The Nature of Functions of the State' in P Cane and M Tushnet (eds), *The Oxford Handbook of legal Studies* (Oxford University Press, 2003). The 2008 Global Financial Crisis certainly generated cross-currents, though the extent to which the 'underlying belief in the superiority of market ordering over state control' has been disrupted is questionable: see M Aronson, 'The Great Depression, this Depression, and Administrative Law' (2009) 37 *Federal Law Review* 165, 203.