

**12<sup>th</sup> Annual Whitmore Lecture  
Council of Australasian Tribunals (NSW Chapter)**

**The Foundations of Administrative Law**

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It is a great honour and privilege to be asked to give this annual lecture in honour of a great scholar and teacher. I did not have the good fortune to be taught by Professor Whitmore; but during my one year part-time attendance in 1975 at the University of New South Wales Law School, I glimpsed him from time to time while in the library.

Much has occurred in this field in the last 30 years. There have been shifts of thinking and movements that can be described in the way Cardozo described the development of customary morality: “silently and unconsciously from one age to another”.<sup>1</sup> The shifts and movements in the law that are relevant to administrative law have developed “silently and unconsciously” in part because they are related to the customary morality of which Cardozo spoke.

The phrase “administrative law” may for some purposes be too narrow and too evocative of the abstraction of administration. Administrative law is better conceptualised as part of the law that controls<sup>2</sup> and shapes public power. It is not separate and distinct from fields of law, principle and conceptions that likewise deal with public power, such as the criminal law and the law of bankruptcy. One only needs to recall that one of the most influential judgments of

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\* Chief Justice of the Federal Court of Australia.

<sup>1</sup> Cardozo, B., *The Nature of the Judicial Process* (Yale University Press, 1921) at 104-105.

<sup>2</sup> I use the word “control” to describe the law’s control of Parliament, the Executive and the judiciary. To the extent the judiciary declares and enforces the law it can be seen as supervising repositories of power, and, unless a repository wishes to behave in the spirit of President Jackson’s (perhaps apocryphal) comment on the Supreme Court’s orders in *Worcester v Georgia* 31 US (6 Pet) 1 (1831) (see Hall (ed) “Andrew Jackson” *The Oxford Companion to the Supreme Court* at 442 ff), or in the spirit of Georgia’s ignoring of a stay of execution by the Supreme Court of the execution of a convicted Cherokee: see Newmyer, RK *Joseph Story: Statesman of the New Republic* (University of North Carolina Press, Durham, 1985), thus controlling them.

the High Court in examining the exercise of discretionary power (*House v The King*<sup>3</sup>) was a sentencing appeal to appreciate this proposition. The taxonomy of subject matter in the law is undoubtedly helpful in order to organise ideas and thinking, but taxonomy should not become part of the law itself, or even a force to shape it. The expression of the subject as the law concerned with public power also helps at the outset to illuminate the necessary lack of definitional clarity that will always prevail at its heart. This is so because the subject is power, which is relational, human, and societal, sourced in authority, compulsion, and consent. Recognition of this indefinability and uncertainty, in a definitional sense, at the heart of power and its control permits one to conceptualise and express principles and rules for its control in their political, societal and human contexts, and, most importantly, at the appropriate level of generality. That appropriate level of generality of expression and conceptualisation creates the stability of doctrine that a scheme of interlocking definitions and rules crafted in the search for the Holy Grail of ultimate formulaic certainty can never do. Nevertheless, the expression does help to keep properly illuminated the important aspect or perspective of public or governmental *administration*.

I propose to focus on the foundations of the general law, rather than the various judicial review statutes that have been passed by Commonwealth and State Parliaments.

The foundational features that underpin the law that controls public power are political, societal and temporal. Through these features one comes to a foundation of administrative law in numbers and symbols: 75(v).

The political foundational feature is that the law that controls public power must conform to the Constitutional framework of the polity: Parliamentary will as the expression of the democratic process and its authority; the responsibility of the Executive to Parliament; the

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<sup>3</sup> [1936] HCA 40; 55 CLR 499.

place of Parliament and the Executive in a society founded on, and imbued with, the Rule of Law, in a federation under a Constitution, founded on and encased by common law, reflecting the sovereignty of the Australian people; and the expectation of Parliament that the Judicature will faithfully control the exercise of power by lawful constraint, recognising the proper spheres of power and responsibility. Within that taxonomy or division of power, there are deep constitutional relationships informing the proper operation of the organs of state power.

The societal foundational feature is that there is the need for the law to operate and manifest itself as a **human** expression of values that sustain a pluralist, democratic society, not as a desiccated and soul-less structure of abstract and abstractedly expressed rules, rights and duties, but as the decent, human and fair control of necessary power, giving appropriate trust to those elected to govern. This social or human foundation is more apparent in some exercises of power than it may be in others. The more directly the subject matter in respect of which, or the context in which, the power is exercised, affects people, the more likely that these human and social values will be expressed in the control of that power.

The temporal foundational feature is the need for law concerned with public power to be shaped for and by the present (and so, necessarily, by the past), but in a way that makes a path to the future clear. This reflects the fluidity and wholeness of law in its human state; and it helps one appreciate the danger in the creation of static or fixed rules expressed in closed language, over which and past which time, values and society will wash and flow.

These three foundational features of the law of public power (political, social and temporal) enable one to see the deep influence of the Constitution, the human, and the historical in the development of administrative law. These three features highlight how the ultimate foundation of administrative law is the need for the control of power in society for that

society to be civil and ruled by law and not by the will of the powerful. That is, the ultimate foundation is the Rule of Law, framed constitutionally for public power by s 75(v) of the Constitution.

The circumstances and the context of the control of public power depend upon the conditions of, and forces operating on, society at the time. The underlying assumptions, and operative forces guiding or shaping that control also come, at least in part, from the conditions of, and forces operating on, society. In part, however, they come from basal human conceptions, in particular the recognition of the dignity and freedom of the individual. The respect for the dignity of the individual (not just as an atomised individual, but also the individual as a social being) and of the human by those who wield power and shape society cannot be ignored. This protection of the individual is essential to the protection of society; for the absence of respect for the dignity of some endangers all and endangers the civility of the fabric of the state. Failure to recognise dignity and its importance in how power is executed is a driving force of human alienation and disaffection. To recognise and accord dignity cannot be achieved only by following defined and abstracted rules. It is about how a person is treated in a human way, sometimes in indefinable ways.

The recognition that the subject of the law is power and its control enables the appreciation that the necessary concern of the law is (metaphorically) both horizontal and vertical. By horizontal, I mean the questions concerned with division of legal authority into (for our purposes) legislative, executive and judicial: Who wields power, by what authority, over what subjects, and to what degree? This horizontal metaphor gives one the perspective of the administrator, the wielder of power: What are the principles and rules that facilitate the effective and due administrative process that will facilitate good administration and effective and efficient policy outcomes? By vertical, I mean the questions as to how power should be

imposed on society, on individuals, on people. This vertical metaphor gives one the perspective of the person subjected to power: What are the principles and rules that vindicate or protect the rights, dignity and humanity of the person, as an individual and as a member of society? What, consistent with good administration, protects the individual, and her or his rights, human dignity and autonomy? There is no easy division between these two “directions” of power. The perspectives intersect and overlap.

The recognition that the subject of the law is power and its control also enables the appreciation of two important considerations: that the boundaries of the domains of those who wield it are not clear lines, but spaces in the sense of conclusions drawn from evaluation; and that how power should be imposed or inflicted on people must necessarily be expressed by rules and principles to a significant degree in human terms, not in wholly abstractedly definitional language, if it is to reflect societal will, if it is to be ultimately coherent, and if it is to protect the individual’s dignity, and so protect society and its humanity.

I will be returning to this distinction between the human and the experiential (on the one hand) and the depersonalised, abstracted and reductionist (on the other). It is central to what I wish to say this evening. Articulation of rule, clarity, precision, logic, logical order, and coherent taxonomical form of abstractedly expressed rules are all of cardinal importance. But they are not the essence of law. There is a limit to definitional expression. Little, if anything, of basal importance can be defined exhaustively, as opposed to described and articulated. Text has its limits. Often, the leaving of the experientially informed principle or rule at the appropriate degree of generality to be judged against the facts creates stability of principle, and the most certainty that can reasonably be expected. Pound hinted at this when he said “law must be stable and yet it cannot stand still.”<sup>4</sup>

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<sup>4</sup> Pound, R., *Interpretations of Legal History* (Cambridge University Press, 1967) at 1.

In understanding how the foundations of a field of law shape the law and give it context, an indispensable consideration for reflection is the judicial technique employed in developing, adapting and applying principle. Fundamental to the development of administrative law has been equity. This has not only been evident in the use of equitable remedies of the declaration and the injunction, but also in the utilisation of the techniques of equity, and the equitable cast of mind in developing, articulating and applying principle.

For modern Australian society with its legal framework rooted in English law and an 18<sup>th</sup> century Euro-American division of power reflected in the first three chapters of our Constitution, the contours and techniques of the control of public or state power can be seen from the infancy of the modern state in the 16<sup>th</sup> and 17<sup>th</sup> centuries.

The history of the development of the writs of certiorari and mandamus in the years 1600-1750 has been helpfully traced by others.<sup>5</sup> This was a powerfully turbulent period, with the wrenching away of royal power by revolution, civil war, later constitutional settlement, the development of a trading and maritime empire, and the beginning of the industrial revolution. The impact of the economic and political forces on individuals through the exercise of power was enormous. As people were affected by functions such as control of programmes for the poor and poor relief, the enclosures of lands, and the drainage of marshes by justices of the peace and sewer commissions, new remedies beyond the criminal and quasi-criminal were required. This pre-industrial development of the law saw the recognition of the need for specialised knowledge and for a field of free operation or discretion bound, or controlled, by

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<sup>5</sup> See Henderson, E.G., *The Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press, 1963). See also Jaffe, L. L. and Henderson, E.G., 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345; de Smith, S.A., 'The Prerogative Writs' (1951) 11 *Cambridge Law Journal* 40; and Jenks, E., 'The Prerogative Writs in English Law' (1923) 32 *Yale Law Journal* 523.

general rules of law informing the legality of the task and the limited, but important, scope of judicial review of legality.<sup>6</sup>

This notion of limited judicial review was worked out in the 17<sup>th</sup> and early 18<sup>th</sup> centuries, especially in connection with the agencies of local government. Central to this process (and still central to our 21<sup>st</sup> century conceptualisation of the control of power) was “jurisdiction”, that is, authority.

Early in her valuable historical review of mandamus and certiorari, Edith Henderson comments on the lack of clarity of this conceptualisation of jurisdiction and the refusal of the courts to allow jurisdictional *definition* to create a gateway for apparent injustice. She said:<sup>7</sup>

The damage done to modern British administrative law by the survival of an obsolete principle of review was less in injustice to litigants than in a need for conceptual fuzziness to avoid injustice.

I will return to “conceptual fuzziness” when I discuss the technique of equity and the place that a necessary absence of definitional precision has in a satisfactory and stable doctrinal structure: the recognition of fluidity of law (or fuzziness, if one likes) as part of the over-all cohesive stability and certainty of the law. The dislike of “conceptual fuzziness” and the preference for clear definitional structures are features of the way some people think.<sup>8</sup> It is often the unstated fault line in the differences and disagreements about law and legal analysis – how far definition and expression are useful, or necessary, and the best way to embody a particular law or concept – whether in rule, principle or value. Different people approach, think about, and conceptualise the law with greater or lesser emphasis on granular detail, taxonomy, definition, principle, and values. It is of great value to the development of

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<sup>6</sup> Henderson, E.G., *The Foundations of English Administrative Law*, above n 4, at 3.

<sup>7</sup> Henderson, E.G., *The Foundations of English Administrative Law*, above n 4, at 7.

<sup>8</sup> McGilchrist, I., *The Master and his Emissary* (Yale University Press, 2009).

legal principle that these differences in mental approach, these different casts of mind, be recognised.

The broad reach of the courts by the use of principle rather than precise definition to control power in order to prevent injustice can be seen in the sweeping expression of the scope of the writ of restitution to office, the source of mandamus, as expressed by Lord Chief Justice Coke in *James Bagg's Case*:<sup>9</sup>

...to this Court of [King's Bench] belongeth authority, not only to correct errors in judicial proceedings, but other errors, and misdemeanours extra-judicial, tending to the breach of the peace or oppression of the subjects, or the raising of faction, controversies, debates, or to any manner of misgovernment, so that no wrong or injury either public or private can be done, but that this shall be reformed or punished by due course of law.

One sees the foundational strength of such sweeping ideas, reminding one that the central function of judicial power is protective in the control of power, in a modern echo in the judgment in *Kirk*:<sup>10</sup>

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. ...

[Citations omitted.]

Let me begin with the Constitutional structure. Section 75(v) of the Constitution places the exercise of all power wielded by officers of the Commonwealth under the judicial control of the High Court, and, practically speaking, under the control of other courts created under Chapter III which are conferred with jurisdiction under s 75(v). Though expressed in

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<sup>9</sup> (1615) 11 Co 93b at 98; 77 ER 1271 at 1277-1278.

<sup>10</sup> *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1; 239 CLR 531 ('*Kirk*') at [99].



procedural terms,<sup>11</sup> s 75(v) cannot be undermined by Parliament. In *Plaintiff S157*, the Court made clear that the jurisdiction of the Court to grant relief under s 75(v) cannot be taken away and has an entrenched minimum standard of judicial review.<sup>12</sup> The entrenchment and reality of that was expressed recently, in powerful terms, by the majority in *Graham and Te Puia*,<sup>13</sup> in their expression of a minimum entrenched standard of judicial scrutiny as to lawfulness and legality. As Gleeson CJ said in *Plaintiff S157*,<sup>14</sup> this secures a basic element of the rule of law, and that question is not, to paraphrase the plurality in *Plaintiff S157*,<sup>15</sup> to be analysed with verbal or logical quibbles. The principles of control rest upon lawful authority, upon jurisdiction, which in turn depend (in respect of power sourced in statute) upon statutory authority delimited by common law rules of statutory interpretation and upon the whole of the common law and its values. The content, and protected and protective force and strength, of s 75(v) come from the recognition in the *Communist Party Case*<sup>16</sup> that the Constitution is an instrument framed against the common law and so the rule of law; from the nature of judicial power; and from the monopoly of judicial power recognised by *Marbury v*

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**<sup>11</sup> Original Jurisdiction of High Court**

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

<sup>12</sup> *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476 (*'Plaintiff S157'*) at [5], [98] and [103]-[104].

<sup>13</sup> *Graham v Minister for Immigration and Border Protection* and *Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33; 347 ALR 350 (*'Graham'*) especially at [39]-[49]; see also *Bodruddaza v Minister for Immigration and Border Protection* [2007] HCA 14; 228 CLR 651.

<sup>14</sup> *Plaintiff S157* at [5].

<sup>15</sup> *Plaintiff S157* at [98].

<sup>16</sup> *Australian Communist Party v Commonwealth* [1951] HCA 5; 83 CLR 1.

*Madison*.<sup>17</sup> For Sir Owen Dixon, the common law was the ultimate Constitutional foundation.<sup>18</sup> This is so as it encases and protects s 75(v).

The protection of the federal judicature in its independence and authority is achieved by a number of common law constitutional doctrines principally related to the nature of judicial power and the limitation on federal courts exercising power other than the judicial power of the Commonwealth (or non-judicial power which is incidental thereto); and the prohibition on bodies other than federal or State courts exercising the judicial power of the Commonwealth.

The protection of the State judicatures and their independence and authority is achieved by a number of constitutional doctrines resting on *Kable*<sup>19</sup> and *Kirk*. These are not cases just dealing with aspects of criminal law or jurisdiction. They are part of the edifice of the control of public power in Australian society. The profoundly important development of the protection of the institutional integrity of the State judicatures by *Kable* and later cases<sup>20</sup> and of the protection of the supervisory role of the State Supreme Courts (and so, ultimately, the High Court) by the mechanism of jurisdictional error by *Kirk*, mean that State power, like Commonwealth power, is subject to the control of legality and lawful authority by the

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<sup>17</sup> *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803); for its significance, see Gleeson JT and Yeazerski RA “The Separation of Powers and the Unity of the Common Law” in Gleeson JT et al *Historical Foundations of Australian Law* Vol 1 ch 12

<sup>18</sup> Dixon, “The Common Law as an Ultimate Constitutional Foundation” (1957) 31 *Australian Law Journal* 240; Dixon, Sir O., *Jesting Pilate* (Law Book Company, 1965) at 203 et seq.

<sup>19</sup> *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51 (‘*Kable*’).

<sup>20</sup> *Kirk* at 580-581 [98]-[100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46; 223 CLR 575; *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31; 218 CLR 146; *Forge v Australian Securities and Investments Commission* [2006] HCA 44; 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532; *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; 240 CLR 319; *South Australia v Totani* [2010] HCA 39; 242 CLR 1; *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181; *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1; *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; 252 CLR 38; and see especially *Kirk* at 580-581 [98]-[100]; and see French, R. CJ, “Essential and Defining Characteristics of Courts in an Age of Institutional Change”, Speech to Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013.

judicial power. This is no more, and no less, than the Constitutional expression of the Rule of Law.

The above constitutional structure has, for the purpose of the present discussion, two important features: first, the whole and one common law of Australia; and, secondly, the nature of judicial power.

The unity of the common law of Australia was conceptualised and authoritatively declared by the High Court in a series of cases decided during the same period as *Kable* and succeeding cases were being decided.<sup>21</sup> The importance of the wholeness and unity of the common law of Australia lies in the reality that the basal questions of legality, authority and the very conceptualisation of lawfulness and law come from the common law, and its deployment by the exercise of judicial power by and through, ultimately, s 75(v) at both Commonwealth and State level. The Constitution and the lawfulness of the exercise of power from it is grounded on the common law as a unitary conception. As such, the common law unifies the principles of control of power in a federation to a common body of principles.

The second important feature is judicial power. The authority and limits of the judicial power are rooted in the monopoly of its exercise by the judicature. *Graham* and *Te Puia* contain fundamentally important reminders of first principle.<sup>22</sup> Most importantly, taken from *Marbury v Madison* and emphasised in *Quin* by Brennan J,<sup>23</sup> it is emphatically the province and function of the judicial branch of government to declare and enforce the law, including

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<sup>21</sup> *Kable* at 112-113 per McHugh J; *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520 at 562-566; *Lipohar v The Queen* [1999] HCA 65; 200 CLR 485 at 500 [24] per Gleeson CJ, 505 [43] and 507-508 [50]-[51] per Gaudron, Gummow and Hayne JJ and 551-552 [167] per Kirby J; *Eso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; 201 CLR 49 at 61-62 [23] per Gleeson CJ, Gaudron and Gummow JJ; *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503 at 514-515 [2] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 at 593-594 [210] per Kirby J; *Kirk* at 581 [99] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

<sup>22</sup> *Graham* at 359-362 [39]-[49].

<sup>23</sup> *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1.

its own limits, through the judicial process and the grant of judicial remedies. Whilst that emphatic monopoly was in the first decades of the 19<sup>th</sup> century in the United States not uncontroversial,<sup>24</sup> by 1901 in this country it was seen as entrenched by s 75(v) and has been so since.<sup>25</sup> That monopoly is sometimes seen as elusive. The authority of Parliament to vest power in judicial and non-judicial bodies to do what appear to be similar tasks leads to the subtlety of cases such as those of the “chameleon” doctrine. There are functions or powers that can only be given to courts, and some that can only be given to administrators or the executive. But many can be conferred on either.<sup>26</sup>

Much of the difficulty in reconciling the “chameleon” case doctrine is removed if one appreciates that the character of the repository of the power is critical to the characteristics, and so the nature, of the power wielded by the repository. This is particularly so of judicial power. A central aspect of judicial power is that it is as much about how it is administered as about what it deals with. The inability to define judicial power exhaustively comes from its nature as power, and from its essential character, as protective in what it does and how it does it. It is central to understanding the nature and character of judicial review of administrative action, and so of administrative law, to appreciate this protective feature of judicial power. Judicial power is the only form of public power that has as part of its essential character a protective nature. Parliamentary power is the expression in command of the will of the majority in the democratic process. Executive power is the execution of that Parliamentary

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<sup>24</sup> Melhorn Jr., D.F., *Lest We Be Marshalled: Judicial Power and Politics in Ohio, 1806-1812* (University of Akron Press, 2003).

<sup>25</sup> *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803); *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 35-36 per Brennan J; *Corporation of the City of Enfield v Development Assessment Corporation* [2000] HCA 5; 199 CLR 135 at [39]-[49] per Gleeson CJ, Gummow, Kirby and Hayne JJ. See also *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16; 158 FCR 325 at [3]-[4] per Allsop J, and cases citing it, such as *Obeid v The Queen* [2015] NSWCCA 309; 91 NSWLR 226 at 249 [118].

<sup>26</sup> *Re Dingjan; Ex parte Wagner* [1995] HCA 16; 183 CLR 323 at 360 per Gaudron J. See also *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* [1926] HCA 58; 38 CLR 153 at 176 per Isaacs J; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; 123 CLR 361 at 373 per Kitto J; *R v Quinn; Ex parte Consolidated Food Corporation* [1977] HCA 62; 138 CLR 1 at 18 per Aickin J; *R v Hegarty; Ex parte City of Salisbury* [1981] HCA 51; 147 CLR 617 at 628 at 632; *Precision Data Holdings Ltd v Wills* [1991] HCA 58; 173 CLR 167 at 189.

will and the conforming and lawful policies of the elected government. No part of either such power is necessarily protective of individuals, groups or society, except through choice, or will.

The broad features of judicial power were expressed by Griffith CJ in *Huddart, Parker* as “the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.”<sup>27</sup> But, the protective character of this power comes not only from the fact that the determination of rights will be effected and protected (for the individual, and thus for the benefit of society), but also from the way that is done – the judicial process.

The judicial process forms part of the character and definition of the power. It is not just a power to settle justiciable controversies, but it is also a power which must be, and must be seen to be, exercised fairly, impartially and equally in accordance with the judicial process. There is a constitutional requirement of fairness in the judicial process. The restrictions of time and space for this evening prevent any further examination of the nature of this protective power. Reference need only be made here to *Nicholas v The Queen*<sup>28</sup> and *Bass v Permanent Trustee Co Ltd*.<sup>29</sup>

When one combines the character of judicial power, with the emphatically expressed role of the judicature in *Marbury v Madison* and *Quin* and the place of the common law in the Constitution, and of the Constitution in the common law, one sees the political and constitutional foundation of the controlling power of the judicature over public power. Its monopoly is Constitutional, but so are its limits. One sees from this the requirement of the necessary legality of all public power, of Parliaments and Executives of all polities within the

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<sup>27</sup> *Huddart, Parker & Co Pty Ltd v Moorehead* [1909] HCA 36; 8 CLR 330 at 397.

<sup>28</sup> [1998] HCA 9; 193 CLR 173 at 208-209 [74].

<sup>29</sup> [1999] HCA 9; 198 CLR 334 at 359 [56].

Federation being held to necessary legality, adjudicated by the exercise of judicial power, by courts of the Commonwealth and the States.

This political and constitutional foundation sees the deep Constitutional relationships between Parliament through statute, the Executive through statutory and inhering executive authority and Courts through the exercise of judicial power and the common law.

The values that inhere in public law come from societal foundations, from humanity, human society, and in our legal system, from the common law. They are honesty; a rejection of unfairness; an insistence on essential equality; and respect for the integrity and dignity of the individual.

Each goes to the core of what we understand humanity and the individual to be, and to what is expected when power is exercised against people. Dignity lies at the foundation of self, and ultimately informs the rejection of unfairness.

The concern of the common law to prevent the exercise of power which is arbitrary, capricious, or unreasonable can be seen to reflect a concern with rejecting unfairness. This is the reasonable expectation of individuals that power will not be exercised against them in a way that fails to respect their integrity and dignity; that it will be exercised reasonably.

These values of equality, fairness, dignity and reasonableness do not emerge as iron-clad and immutable law through some constitutional forge. They have not been constitutionalised into rigid conceptions; they are societal and human norms and values. They are not defined. They are values from human society which inform the common law, judicial power, and the

judicial method and task, and so they take their place in the living human Constitutional relationships, such as Parliament's assumed respect for justice.<sup>30</sup>

The encasing or infusing of power and its exercise with these values and considerations can be seen in countless aspects of administrative law.

The first and most obvious examples are the principles of natural justice and procedural fairness. The debate as to whether the requirement for fairness in procedure (in how executive power is executed) is sourced in the common law or statute may be seen to collapse into the same point. The Court in the exercise of judicial power, against the background of the common law's informing values of justice and fairness, demands clear language for procedural fairness to be qualified or denied. Justice and fairness in process and the reasonableness (in the legal sense) of the exercise of power are working assumptions of Parliamentary expression, to be directly confronted if to be qualified or to be seen as absent.<sup>31</sup>

Fairness in how people are treated is human and contextual, taking account of the human context and circumstances. Thus, a tribunal charged with assessing the legitimacy of the claims of an asylum seeker is required to conduct itself apparently fairly and dispassionately. In a case where a young man, with a less than cogent story of persecution under the Refugee Convention based on his responsibility for the pregnancy of a girl who lived next door, had been subjected to strongly worded, indeed moralising, denunciations by the Tribunal member, the Full Court concluded that there was apprehended bias and so a failure to accord procedural unfairness. This conclusion was drawn from the appearance of a passionate, as

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<sup>30</sup> *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; 224 CLR 44 at 57 [26] per Gleeson CJ.

<sup>31</sup> See in particular *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; 246 CLR 636 at 666 [97].

opposed to dispassionate, exhibition of conduct that was an affront to the dignity of the applicant.<sup>32</sup>

The linking of, indeed the intertwining of, the human and the legal, is seen most clearly in the cases on procedural fairness. There the touchstone is the human conception of fairness. A sense of unfairness is as much an emotional response as a legal one. By emotion, I do not mean the whims of a heart; I mean the stirring of feelings informed by justice, equality, decency, dignity and practical humanity. A lack of fairness can be explained and articulated, indeed principles of approach in designated kinds of circumstances can be expressed; but fairness cannot be defined. The requirement on a court to ensure that a litigant in person understands court procedure, what is happening, what issues need to be addressed, and what choices he or she has reflects such basic conceptions when faced with the exercise of (judicial) power.<sup>33</sup>

The modern expression of legal unreasonableness by the High Court in *Li* is of signal importance.<sup>34</sup> It is clear that the legal and the human are not to be divorced or seen as part of separate universes. One moves from the human to the legal, but without loss of humanity, without moving from a real to an entirely abstracted world. The legal expression of this and the legal technique involved must reflect this humanity. This is not the domain of formulary and definition, of abstraction or Platonic essence of error. Power is sourced in lawful authority and is wielded in a human context and particular factual circumstances. In this process, definition and taxonomy are useful, to a point. They provide indications of

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<sup>32</sup> *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80. I said at [5]: “The fair treatment, and apparent fair treatment, of an applicant called to give evidence and present arguments in a hearing under the *Migration Act*...involves the recognition of the dignity of the applicant (the subject of the exercise of power) in how the hearing is conducted. That recognition is an inhering element of fairness. Fairness, and its appearance, is (subject to clear statutory qualification, in the light of Parliament’s “assumed respect for justice”: *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; 224 CLR 44 at 56-57 [26], and to any impinging Constitutional consideration) an inhering requirement of the exercise of state power.”

<sup>33</sup> See *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; 216 FCR 445; *Hamod v State of New South Wales* [2011] NSWCA 375.

<sup>34</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 (*‘Li’*).



circumstances where error is clear: relevant and irrelevant considerations, asking the wrong question, error of law. But a search for exhaustive definitional clarity is not only chimeric, but misleading.

From these general notions I would like to turn to some illustrations through the cases of these ideas. Before doing so I will say something more about wholeness and indefinability; abstraction and taxonomy; and the technique of equity. This discussion is important because within it lie the explanations for the differences between, and among, many scholars and judges as to the nature and proper scope and operation of administrative law.

In *Jenyns case*,<sup>35</sup> Dixon CJ, McTiernan and Kitto JJ described the technique of equity in deciding cases of undue influence, abuse of confidence or other circumstances of conscience. What is called for was a precise examination of the facts, a scrutiny of the exact relations between the parties, and the mental capacity of the donor. They said:<sup>36</sup>

Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition.

They then cited Lord Stowell's generalisation concerning the administration of equity:<sup>37</sup>

A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case.

Thus, one sees wholeness and context applied against principle in one (equity), and taxonomy, definition and rule in the other (common law). This expression of common law

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<sup>35</sup> *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113 at 118-119.

<sup>36</sup> *Jenyns* at 119.

<sup>37</sup> *The Juliana* (1822) 2 Dods 504 at 522; 165 ER 1560 at 1567.

technique reflects doctrinal development in a system of procedure dominated by the jury. Let me try to draw some of this together for public power in some discussion of jurisdictional error.

The well-known passage from the reasons of Justices McHugh, Gummow and Hayne in *Yusuf* (with which reasons Gleeson CJ agreed) as to “what is meant by ‘jurisdictional error’”,<sup>38</sup> was not exhaustively definitional. They first referred to the categories (the taxonomy) in *Craig*.<sup>39</sup> These kinds of defined error were embraced by the concept, but were not exhaustive. It is to be noted that in *Craig* one “category” was “at least in some circumstances, to make an erroneous finding”. No real clue, however, was given as to how the non-definitional was to be discerned. Nevertheless, the refusal to define or categorise exhaustively is important.

In *Kirk*,<sup>40</sup> the Court adopted the language of Professor Jaffe that ‘jurisdiction’ is not a metaphysical absolute (and so not a discernible, definable conception) but simply an expression of the gravity of the error. Referring to *Aala*<sup>41</sup> as to the difficulty of drawing any bright line distinction between errors within and outside authority, jurisdictional error is the making of a decision outside the limits of authority.

More assistance is given by *Hossain*.<sup>42</sup> Once again (this time in the reasons of the plurality – Kiefel CJ, Gageler and Keane JJ) Professor Jaffe was invoked; the language of jurisdictional error as a reflection of the function of the court in holding repositories of power to their authority. This comes from the political and constitutional foundation which I have discussed. Jurisdiction is the scope of authority conferred. Jurisdictional error is the exercise

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<sup>38</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 at 351 [82].

<sup>39</sup> *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at 179.

<sup>40</sup> *Kirk* at 570-571 [64] and see 573-574 [71]-[73].

<sup>41</sup> *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82 at 141 [163].

<sup>42</sup> *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1 (*Hossain*).

of power beyond the conferred authority. The characterisation of the error as jurisdictional, as one taking the exercise of power beyond the source, the jurisdictional authority, depends on the gravity of the error. The discernment of the extent of departure depends (if the source of power be statutory) on the statute and its construction, against the common law and its values. Importantly, the plurality referred to the common law principles which inform the construction of statutes referred to in the important passage in *Plaintiff S10/2011*,<sup>43</sup> and they added the following which reflects the importance of the whole, of the real, and which sounds a warning about abstractionism:<sup>44</sup>

... 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 “decision-making is a function of the real world.”

In giving content to the need for the necessary gravity their Honours lighted on “materiality”:<sup>45</sup>

The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.

Ordinarily, they said, error cannot be material unless it could have made a difference to the decision.

The Court in expressing itself as to jurisdictional error has accepted a degree of definition of qualifying errors but qualified such with a more general category of any error which amounts

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<sup>43</sup> *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; 246 CLR 636 at 666 [97].

<sup>44</sup> *Hossain* at 8-9 [28].

<sup>45</sup> *Hossain* at 9 [29].

to a material breach of an express or implied condition of the valid exercise of the power.<sup>46</sup> Thus abstracted taxonomy is embraced within the whole.

To understand what errors might be material to be jurisdictional, once again we revert to the statute and to the common law. But, what authority has the court? By what judicial technique does it work? What is the range of errors of repositories of power? Here one finds the shifts and movements of which I spoke earlier.

The decision in 2013 in *Li* made clear, once and for all, that legal reasonableness or an absence of legal unreasonableness was an essential element of lawful decision making power. Parliament is to be taken to intend that statutory power will be exercised reasonably.<sup>47</sup> The three judgments used different expressions from different cases in elucidation. In *Singh*<sup>48</sup> and *Stretton*,<sup>49</sup> the Full Court sought to emphasise (what must be taken to be implicit in the three judgments) that the various expressions of the matters in so many cases were not definitions but explanations or articulation of a concept of legal unreasonableness, that is, unreasonableness that is sufficiently grave as to take the decision outside the justifying source of the power. Legal unreasonableness is not gauged exhaustively by textual formulae or categories or definition.

The social and human foundation of legal unreasonableness can be seen in the way some judges have articulated the concept. Power is put in human context and anthropomorphised: for example, the exercise of a power according to the rules of reason and justice, not private opinion; according to law, and not humour; and within the limits that an honest and

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<sup>46</sup> *Hossain* at 9 [31], employing *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 22 at [23]; and see Aronson M et al *Judicial Review of Administrative Action and Government Liability* (6<sup>th</sup> ed) sec 1.8 pp 19-24.

<sup>47</sup> *Li* at [26], [29], [63] and [88].

<sup>48</sup> *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437.

<sup>49</sup> *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11, 237 FCR 1 (*'Stretton'*) at 3-5 [2]-[13].

competent person would confine herself. Reasonableness is a translation of the human to the legal. As Gageler J said in *SZVFW*:<sup>50</sup>

... Reasonableness is itself a traditional conception of the common law – a translation of “the human into the legal.” Reasonableness is not exhausted by rationality; it is inherently sensitive to context; it cannot be reduced to formulary. In the discernment of unreasonableness, “[t]here are no talismanic words that can avoid the process of judgment.”

[Citations omitted.]

The political and Constitutional foundations of legal unreasonableness and its content and limits can be seen in its limited but irreducible nature of the demand for legality.

The broad conception of legal unreasonableness encompasses the whole decision – how it is reached, its evident and intelligible justification, or not; whether it is unreasonable or plainly unjust, not as a personal view, but that it could not be viewed as otherwise; the legitimacy of the reasoning process and fact finding – not assessed by a process of appellate review but whether such reasoning process or fact finding are legally open. I sought to express it thus in *Stretton* as follows:<sup>51</sup>

The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and

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<sup>50</sup> *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 357 ALR 408 at 423-424 [59].

<sup>51</sup> *Stretton* at 5-6 [11]-[12].

purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. ...

Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.

Let me move to two subjects which display the interwoven nature of the political and social foundations of administrative law and the importance of the breadth of the doctrine of legal unreasonableness: the review of findings of fact in judicial review; and the challenges of decisions in which the protection of the greater good wreaks devastating effects on the lives of individuals. It is within these two subjects that one sees so very clearly much being borrowed from the technique of equity.

What might be said to be the traditional view was that fact finding, par excellence, was a field of activity broadly quarantined from review. As Mark Aronson said in 2016, this absence of factual review was the critical factor in making judicial review “procedurally easy, fast and cheap”.<sup>52</sup> The notion of legality (and legal reasonableness) has developed to include a rejection of serious irrationality or serious illogicality in *Applicant S20/2002*,<sup>53</sup> *SGLB*,<sup>54</sup> *SZMDS*,<sup>55</sup> and *Li*. This necessarily encompasses how facts are found. This is a qualitative

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<sup>52</sup> Aronson, M. I., “The Growth of Substantial Review: The Changes, their Causes, their Consequences” in Bell, J. et al, *Public Law Adjudication in Common Law Systems: Process and Substance* (Bloomsbury, 2016) at ch 6 113-143.

<sup>53</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 198 ALR 59 at 71-73 [53]-[60].

<sup>54</sup> *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12 at 20-21 [38].

<sup>55</sup> *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611.

review, directed to the legality of the decision, not to the correctness of the facts. If the statute demands (as the common law presumes) factual finding without serious irrationality or illogicality or caprice, and if it demands an attendance to the correct task, the fact finding process will have to be examined with some care to assess whether there was probative material, whether the approach was irrational or illogical or lacking in apparent justification, or whether the process otherwise displays legal error.

A judge of the Federal Court once said to me: “It is the Tribunal’s job to get the facts wrong.” It was a pungent way of saying that fact finding was within jurisdiction. Few would put it thus today.

There is a class of case that comes to the Federal Court, either from the Minister personally and directly, or from a delegate via the Administrative Appeals Tribunal, that is of significant importance and difficulty. These are the exercises of power by decision to cancel, or not revoke automatic cancellation of, visas of non-citizens by reference to past criminality or the failure to pass what is called the “character test”. The provisions are detailed and various.<sup>56</sup> The cases often raise significant human hardship involved in the removal of people from Australia when, quite often, they have lived here for a considerable period.

I do not seek to comment on the underlying government policy which is often expressed as the protection of, or giving effect to the expectations of, the Australian community. The cases do throw up, however, the importance of context, circumstances and expressed reasons in examining the legality of the decision. For instance, one can take it from the statute that the Minister must consider all the representations put by the non-citizen. The usually carefully expressed and comprehensive reasons (often the inference being drawn up for the Minister’s adoption, which I do not say as a criticism) usually touch on every aspect of those

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<sup>56</sup> See *Migration Act 1958* (Cth), ss 501-501J.

representations at one level of generality or another. But has the Minister considered them? Is the formality of expression sufficient? This consideration should be undertaken by a contextual process which is not formalistic, but which requires the reality of consideration and the confronting of consequences. In *Hands*, I said:<sup>57</sup>

...[W]here decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people. Such considerations do not detract from, indeed they reinforce, the recognition, in an assessment of legality, that those entrusted with such responsibility be given the freedom of lawful decision-making required by Parliament.

May I finish with a final comment on certainty? Limited defined rules no doubt give certainty and simplicity – but only to the process as defined. If one conceptualises legality as a broader conception that involves controlling power over humans by reference to words drawn from life and experience that struck the likes of Lord Halsbury,<sup>58</sup> Chief Justice Latham,<sup>59</sup> Justice Kitto,<sup>60</sup> and Chief Justice Gleeson<sup>61</sup> as appropriate: that is according to reason and justice, not private opinion, according to law, not humour, and within the limits that an honest and competent person would confine him or herself, that is legal and regular and not arbitrary, vague and fanciful, then the search for precisional certainty of definition can be seen as both chimeric and misdirected. The rule of law is not so confined. It is at the limits that it is most necessary to control power; and the limits are not reducible by formula to points or lines.

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<sup>57</sup> *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [3].

<sup>58</sup> *Sharp v Wakefield* [1891] AC 173 at 179.

<sup>59</sup> *Shrimpton v Commonwealth* [1945] HCA 4; 69 CLR 613 at 620.

<sup>60</sup> *R v Anderson; Ex parte Ipec-Air Pty Ltd* [1965] HCA 27; 113 CLR 177 at 189.

<sup>61</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] FCA 30; 198 ALR 59 at [9].



Limited defined rules are often written using language as closed as possible. By “closed”, I mean language that is not open-textured;<sup>62</sup> I mean language that is abstractedly precise, that forms lines and boundaries, but is not sufficiently general or experiential to allow a conception to live within it.<sup>63</sup> Textually imposed certainty, especially using closed language can lose something – the relational, the experiential and value-based aspects of principle, and the need to understand context in order to provide a realistic and appropriate answer to a legal question about human engagement. Control of power cannot be reduced to formula. This, it is submitted, is the importance of the refusal of the High Court to taxonomize exhaustively.<sup>64</sup>

In Australia, the foundation of the control of public power is s 75(v), containing the related notions of jurisdictional authority and jurisdictional error, mandating an irreducible minimum standard of the lawfulness of *all* public power through *Marbury v Madison*, *Quin*, *Plaintiff S157*, *Graham*, *Te Puia*, *Kable* and *Kirk*. Such a central and fundamental Constitutional conception lives in the common law, in statutes construed by reference to the common law, and by a judicial technique in the exercise of the protective judicial power looking to the substance of the exercise of power, not its form, by analogy with the techniques of equity. It is not reducible to lists, categories and formulae of application.

This is not to deny certainty. It is to enshrine it: the certainty that all state power is amenable to control by the only state power that has as defining characteristics fairness, impartiality and equality.

Sydney

4 April 2019

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<sup>62</sup> As to which, see Campbell, J. and Campbell, R., “Why statutory interpretation is done as it is done” (2014) 34 *Australian Bar Review* 1 at 9-10.

<sup>63</sup> See the reference by Gageler J in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 357 ALR 408 at 418-419 [42] to the “studied generality” of the language in *Warren v Coombes* [1979] HCA 9; 142 CLR 531.

<sup>64</sup> See for example, *Kirk* 239 CLR at 573[71] and 574[73]