

Mark Leeming*

JUDICIAL REVIEW OF VICE-REGAL DECISIONS: *SOUTH AUSTRALIA v O'SHEA*, ITS PRECURSORS AND ITS PROGENY

I INTRODUCTION

This article is about vice-regal power, which (relevantly for present purposes) is a species of executive power, and is intended to encourage critical thinking about aspects of the relationship between it and judicial power and legislative power. The article looks to litigation from South Australia – some well-known, some perhaps less so – which provides insights into the legal analysis. Considerations of space require it to be selective, rather than comprehensive. I have tried to choose examples with a contemporary flavour: notably, a Royal Commission inquiring into a particular named union, and the exercise of vice-regal power following a closely fought Senate election marred by the fact that many ballots had been lost.

II GOVERNOR OF SOUTH AUSTRALIA CASE

In his George Winterton Memorial Lecture,¹ Professor Geoffrey Lindell reminded an audience in Sydney of the important and remarkable early decision of the High Court in *The King v The Governor of the State of South Australia*.² He did so in the Banco Court of the Supreme Court of New South Wales. That decision seems an appropriate point to start a lecture in the moot court of the Law School of the University of Adelaide.

The *Governor of South Australia Case* is remarkable in a number of ways. It was heard in the original jurisdiction of the High Court over four days and decided the following day in a judgment of the Court given by Barton J. I cannot readily bring to mind another important early decision of the High Court where Griffith CJ did not write. On the other hand, the restrained decision of the Court did not end the

* Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney. I wish to acknowledge the considerable assistance provided by Ms Amy Knox in the preparation of this paper. Paper presented to the Australia Institute of Administrative Law (SA Chapter) at the University of Adelaide, 15 April 2014.

¹ Geoffrey Lindell, 'Judicial Review and the Dismissal of an Elected Government in 1975: Then and Now?' (2014) 38 *Australian Bar Review* 118, 120.

² (1907) 4 CLR 1497 ('*Governor of South Australia Case*').

controversy; ultimately there was a second hearing and decision, later in 1907, and a further election.

Although the proceedings are briefly mentioned in *Sue v Hill*,³ it is probably as well to review the facts. Mr Joseph Vardon, who had been government leader in the Legislative Council, sought a writ of mandamus directed to the Governor of South Australia requiring him to perform his duty under the *Commonwealth Constitution* after the inconclusive 1906 federal general election. The question, as Mr Vardon saw it, was whether or not s 15 of the *Constitution* applied. Section 15 in the form it took prior to the 1977 amendment provided that:

If the place of a senator *becomes vacant* before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session ... the Governor of the State, with the advice of the Executive Council ... may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever happens first.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed *shall be certified by the Governor of the State to the Governor-General*.⁴

It will be seen that not only does s 15 of the *Commonwealth Constitution* give an important role to the State Governor, it also uses language which reflects the imposition of a duty upon him or her.

The half Senate election of three senators for the State of South Australia in 1906 was challenged in the Court of Disputed Returns (constituted by former Prime Minister Barton J) and it was declared that the election of the third senator, Mr Vardon, who had run on an anti-socialist platform, was ‘absolutely void’. That came about in this way. The result declared by the returning officer was Josiah Symon, 33 597; William Russell, 31 796; Joseph Vardon, 31 489; Dugald Augustus Crosby, 31 455; Reginald Pole Blundell, 31 366.⁵ Thus second, third, fourth and fifth were separated by only 430 votes. Despite his coming a very close fourth, Crosby was *not* the petitioner. He had in fact been placed third after the first count, but had died before a recount had been completed.

³ (1999) 199 CLR 462, 478-479 [20]–[22].

⁴ *Australian Constitution* s 15 (emphasis added).

⁵ See *Blundell v Vardon* (1907) 4 CLR 1463, 1464.

Justice Barton was confronted by a series of alleged irregularities, and a large threshold problem, which is familiar to this audience in 2014.⁶ All of the ballot-papers for the Division of Angas – over 9 000 votes – had been accidentally destroyed. Did that prevent a recount of the remainder? Barton J held that that ‘remarkable occurrence’ did not stand in the way of a statutory recount of the votes cast in the other six South Australian Divisions, with the Angas votes being accepted as they stood on the return.

His Honour then ruled progressively on a series of challenges to 828 votes of doubtful formality (some had been initialled on the front instead of on the back, some had not been initialled at all, some had not been marked in the squares on the left hand side of the paper, but on the right hand side of the paper opposite the names, or with crosses in squares, or with diagonal lines – so it is a leading case on such points). Professor Geoffrey Bolton wrote that Barton J ‘brought the commonsense of an experienced politician’ to these questions.⁷ The result at that stage was that the third South Australian senate seat fell to be decided between Vardon with 31 640 votes and Crosby with 31 638 (Blundell had 31 560 votes).

There were 21 voting papers which had been rejected because they were initialled on their face and had not been folded. That they had been wrongly initialled was the fault of the presiding officer. Finally, there were 179 totally uninitialled papers, all of which had been excluded, also through the fault on the part of the officials administering the election. The *Commonwealth Electoral Act 1902* (Cth) in the form it then took permitted Barton J to have regard to those votes with a view to determining whether, if they had been admitted, they would have affected the result.⁸ Had the 21 been counted, only two were for Vardon, and none were for Crosby, so that Vardon’s majority would have increased to four. However, Barton J also held that the 179 were all ‘honest attempts to vote’, and had they been counted, ‘Vardon’s majority of two over Crosby would have been converted to a minority of four’. His Honour declared on 1 June 1907 that ‘the election of Vardon to have been absolutely void’.

The South Australian Parliament was in session. It and the Governor formed the view that s 15 applied to the ‘vacancy’ caused by Barton J’s decision. The Governor thereupon forwarded a message to the Legislative Council and Legislative Assembly advising that he had been advised that there was a vacancy within the meaning of s 15 to be filled in accordance with that section. Accordingly, there was a joint sitting in Adelaide for the purposes of electing a senator. Mr Vardon wrote to the Governor

⁶ In the 2013 Federal Election, some 1370 WA Senate ballot papers were lost, leading to the result being declared void. See *Australian Electoral Commission v Johnston* (2014) 251 CLR 463; See also Joint Standing Committee on Electoral Matters, Commonwealth Parliament, *The 2013 Federal Election – Report on the Conduct of the 2013 Election and Matters Related Thereto* (2015).

⁷ Geoffrey Bolton, *Edmund Barton: The One Man for the Job* (Allen & Unwin, 2000) 305.

⁸ Cf *Commonwealth Electoral Act 1918* (Cth) s 365 and *Australian Electoral Commission v Johnston* (2014) 251 CLR 463, 475 [9] but cf 476 [12].

saying that s 15 had no operation in relation to a void election such as had been declared by Barton J. In case he was wrong about that, he also put his name forward to the chambers. Both the Governor and the chambers of Parliament rejected Mr Vardon's approaches. On 11 July 1907, the two chambers elected Mr JV O'Loghlin to fill the vacancy.

On the following day, 12 July 1907, Barton J granted, on the application of Mr Vardon, an order nisi for mandamus to the Governor to cause a writ to be issued for a new election, on the basis that s 15 did not apply. That is to say, the High Court (which had only existed for 4 years) ordered the Governor of a State to show cause why he should not be compelled to perform a duty imposed upon him under the *Constitution*. I return to this below, but this was no small step. To put it in perspective, consider three things. First, the New South Wales Premier, Joseph Carruthers (discussed below), had complained earlier that year to his Governor that it seemed that 'Federal authorities ... have no constitutional right to interfere in any way within the area of action reserved to the States under the Imperial legislation conferring their respective Constitutions.'⁹ Secondly, it should be recalled that State Governors were, in 1907, powerful representatives of the Crown in the Australian colonies with important law-making roles, and the States were still smarting from having been excluded from the Imperial Conference (contrary to Winston Churchill's recommendation). And thirdly, recall that it is only 21 years ago that the House of Lords heard seven days of argument in *M v Home Office*¹⁰ and concluded that the courts were able to grant injunctions against the Crown.

The matter came on rapidly, and was heard in Sydney, over four days in the first week of August 1907. This was decades before s 78A of the *Judiciary Act 1903* (Cth) was in force, and – remarkably to 21st century eyes – there was a serious argument whether the Commonwealth Attorney-General would be permitted to intervene. It was only a question as to the construction of the *Constitution* and its effect upon the composition of the Senate! (He was permitted to be heard.) The High Court accepted that there was a 'vacancy' within the meaning of s 21 of the *Constitution*, which required notification to the Governor of the relevant State. The High Court was prepared to *assume*, without deciding, that there was a duty imposed upon the Governor to issue a writ, deriving from ss 7, 9, 11 and 12 of the *Constitution* (as will be seen, the assumption was in fact made out). Barton J then said for the Court:

But the question remains: To whom does he owe this duty? A somewhat analogous duty is cast upon the State Governors under the Constitutions of the States, all of which provide that upon a dissolution of the Houses of Assembly the writs for a general election are to be issued by the Governor. It has never been suggested that if the Governor failed to issue the writs a mandamus would lie from a State Court to compel him to do so. There is, of course, a remedy in such a case but it

⁹ See Anne Twomey, *The Chameleon Crown* (Federation Press, 2006) 21, where the letter is reproduced.

¹⁰ [1994] AC 377.

is to be sought from the direct intervention of the Sovereign and not by recourse to a Court of law.

...

The duty, therefore, is one of the duties which the Constitutional Head of a State owes to the State (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties – duties of imperfect obligation – are familiar to students of Constitutional Law.¹¹

Curiously, the decision is perhaps best known for the proposition that a Governor of State is not an “officer of the Commonwealth” within the meaning of s 75(v) and the conferral of power to issue writs of mandamus by the *Judiciary Act* is controlled by the *Constitution*.¹² This is ironic, since seemingly nothing turned on it. It was not necessary for jurisdiction, for plainly there was a matter arising under the *Constitution* within the meaning of s 76(i), in respect of which s 30 of the *Judiciary Act* had conferred jurisdiction upon the High Court.

Justice Barton said that the duty was cast upon the Governor as Head of the State. He said that:

the same reasons which prevent a Court of law from ordering the Sovereign to perform a constitutional duty are applicable to a case where it is alleged that the Constitutional Head of a State has by his omission failed in the performance of a duty imposed on him as such Head of the State.¹³

The High Court refrained from expressing a view as to whether in the circumstances there was a ‘vacancy’ within the meaning of s 15.

Mr Vardon’s challenge having been dismissed, Mr O’Loughlin tried to assume his seat in the Senate. His litigation having failed, Mr Vardon petitioned the Senate for a declaration that O’Loughlin had not been duly elected. The Senate referred a question to the High Court, which on 20 December 1907 determined the question it had left unanswered in August 1907, holding that s 15 had no application where a third senator had never been elected. The purported appointment of Mr O’Loughlin by the South Australian legislature collided with the ‘dominant provision’ of s 7 of the *Constitution*, requiring senators to be directly chosen by the people of the State.¹⁴ Once again, one sees the familiar process of reconciling all the provisions of a statute, so as to

¹¹ *Governor of South Australia Case* (1907) 4 CLR 1497, 1511.

¹² See Leslie Zines, *Cowen and Zines’ Federal Jurisdiction in Australia* (Federation Press, 3rd ed 2002) 50.

¹³ *Governor of South Australia Case* (1907) 4 CLR 1497, 1512-1513.

¹⁴ *Vardon v O’Loughlin* (1907) 5 CLR 201.

determine which is the leading provision, and which is subordinate.¹⁵ Messrs Vardon and O’Loughlin contested the new election ordered by the Governor, and Mr Vardon won and served until 1913. Shortly after the 1913 election (said to have been marred by foul play) Mr Vardon died of a cerebral haemorrhage. He was later described in the *Australian Dictionary of Biography* by an unlikely trio of adjectives: ‘plodding’, ‘broadminded’ and even ‘cosmopolitan’.¹⁶

There is a remarkable modernity about the decision. Put to one side the facts which recall those leading to the recent Western Australian Senate election. There is no suggestion that the fact that it was the *Governor* who was subject to an obligation imposed by the *Constitution* for that reason was not amenable to judicial review. The decision turned on the nature of the duty, not the identity of the repository. The High Court went straight to the particular function of relevance – a highly political one – and concluded that this was one which the Courts could not enforce.

III SOUTH AUSTRALIA V O’ SHEA

Move forward precisely 80 years, but remain in South Australia. Both the present Chief Justice of South Australia and his immediate predecessor appeared in *South Australia v O’Shea*.¹⁷ Mr O’Shea had been convicted of many indecent assaults against many young children over many years. Section 77A of the *Criminal Law Consolidation Act 1935* (SA) permitted a judge to direct that an offender serve an indeterminate sentence, rather than any fixed term of imprisonment, if declared to be incapable of controlling his sexual instincts. A direction was made. A person subject to a direction was not to be released unless (relevantly) ‘the Governor is satisfied, on the recommendation of the Parole Board, that he is fit to be at liberty and terminates his detention’. The Parole Board, after hearing from Mr O’Shea and appropriate medical practitioners, recommended his release.

The Full Court of the Supreme Court of South Australia had declared (Cox and O’Loughlin JJ, Zelling ACJ dissenting) that the refusal to follow the recommendation of the Parole Board was void for breach of natural justice, because the Governor-in-Council had failed to “hear” Mr O’Shea.¹⁸

There were two appeals heard by the High Court. That by Mr O’Shea may be put to one side: it was on a minor aspect of the legislative scheme which was unanimously dismissed without the State being called upon. The main appeal was the State’s appeal from the split decision of the Full Court which had held void the Governor’s

¹⁵ See *Institute of Patent Agents v Lockwood* [1894] AC 347, 360; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [70].

¹⁶ Malcolm Saunders, ‘Vardon, Joseph (1843-1913)’ in National Centre for Biography (ed), *Australian Dictionary of Biography* (Australian National University, 1990) vol 12.

¹⁷ (1987) 163 CLR 378 (*O’Shea*).

¹⁸ *R v Nelson; ex parte O’Shea* (1986) 44 SASR 507.

decision to take no action on the Parole Board's recommendation. The High Court allowed that appeal by majority, dividing 4:1. Each of the four judgments is distinct; it is probably uncontroversial to state that the concurring reasons of Mason CJ and the dissenting reasons of Deane J have proven to have been most influential.

The joint reasons of Wilson and Toohey JJ (which appear to have been written first) focussed upon the statutory scheme which reflected the 'duality' described by Lord Scarman in *Re Findlay*¹⁹ whereby both the Parole Board and the Secretary of State need to concur. Broadly speaking, the particular facts of the case were assessed by the Parole Board, in accordance with a regime that provided for procedural fairness to the prisoner. But beyond that broader political considerations informed the decision of the Governor in Council. As they said, 'beyond that he is in the Government's hands, which must accept political responsibility for his release'.²⁰ Their Honours distinguished *FAI Insurances Ltd v Winneke* where the Cabinet was not involved and broader questions of the public interest did not arise.²¹ Evidence was led from the Bar table of the South Australian practice for all matters tendered to the Governor by the Executive Council were first submitted to Cabinet for approval, contrary to what had been assumed by Cox J. Their Honours held that Mr O'Shea had no right to contribute to the political decision to be taken by Cabinet confirmed by the Governor-in-Council. The statute conferred an 'unfettered discretion' upon the Governor, which is to say, one to which no duty attached. Further, Mr O'Shea was found to have no interest or legitimate expectation, no more than a mere hope, so that *Kioa v West*²² was inapplicable.

Mason CJ emphasised that the duty to act fairly in the making of administrative decisions was a common law duty, subject to any clearly manifested contrary statutory intention. His Honour said:

This common law duty is capable of applying to the Governor in Council, there being nothing in the relationship between the governor and the executive which inhibits the existence of such a duty: *FAI Insurances Ltd v Winneke*. That decision stands as authority for the proposition that the mere vesting of decision-making authority in the Governor in Council is not a sufficient manifestation of intention to exclude the common law duty.²³

There was an echo of the argument accepted in the *Governor of South Australia Case*. Mason CJ had regard to the fact that recommendations to the Governor in Council, in South Australia, were based on a Cabinet decision, not a decision by the responsible Minister. The argument was that a court could not require Cabinet to give particulars of its possible objections so that Mr O'Shea might meet them; nor could a court

¹⁹ [1985] AC 318.

²⁰ *O'Shea* (1987) 163 CLR 378, 402.

²¹ (1982) 151 CLR 342.

²² (1985) 159 CLR 550.

²³ *O'Shea* (1987) 163 CLR 378, 386.

pronounce a decision invalid because Cabinet had not given such particulars. So it was said there could be no derivative enforceable obligation to accord procedural fairness at the later stage, when the Governor made his or her recommendation in accordance with Cabinet's decision.

Chief Justice Mason rejected the submission that because the public interest to which the South Australian Cabinet would have regard, involved 'some aspects of political or policy judgment, it lies outside the ambit of the doctrine of natural justice or the duty to act fairly'. His Honour considered that any submission which Mr O'Shea wished to make on a matter of public interest could have been made to the Board, and in that way forwarded to Cabinet and the Governor in Council, so as to ensure procedural fairness. His Honour held the Governor to be subject to a duty to accord procedural fairness, but treated its content as relatively low. He said that there was:

[n]o persuasive reason why the courts should not, in an appropriate case, require as an incident of natural justice or the exercise of a duty to act fairly that there be placed before Cabinet by the responsible Minister the written submissions of the individual affected by the decision to be made ...²⁴

In effect, that makes the presence of a duty the default position. Nevertheless, Mason CJ ultimately allowed the State's appeal, but on a very narrow basis on the particular facts. Because Mr O'Shea had not claimed to have made any submission to the Parole Board on a matter of public interest, it followed that no breach of natural justice or breach of the duty to act fairly had been established.

In contrast, Brennan J sourced his analysis in statute. He said whereas here statute provides for the facts to be ascertained and evaluated by a Board, and for the Board to report and recommend to the decision-maker, 'prima facie there is no room for an implication that the power to make the decision is conditioned on the giving of an opportunity for a further hearing'. To anticipate something to which I shall return, that is styled as advancing a question of statutory construction, but it is in fact, if you think about, it a proposition about the common law – for the rules (or perhaps more accurately the process) of statutory construction are mostly common law rules, modified by statutes (notably, interpretation acts). His Honour said that:

[t]he Minister is not bound to hear an individual before formulating or applying a general policy or exercising a discretion in a particular case by reference to the interests of the general public, even when the decision affects the individual's interests. When we reach the area of Ministerial policy giving effect to the general public interest, we enter the political field.²⁵

Therefore, like Wilson and Toohey JJ, Brennan J found there was no duty.

²⁴ Ibid 387.

²⁵ Ibid 411.

Justice Deane dissented. He too relied upon standards of procedural fairness which he described as ‘accepted as fundamental by the common law’. I want to return below to what is meant by this phrase, which reminds the reader of Sir Owen Dixon’s paper, ‘The Common Law as an Ultimate Constitutional Foundation’.²⁶ He observed that the fact that the power was vested in the Governor-in-Council no longer could be taken, of itself, to have excluded ‘both the common law requirements of procedural fairness and the possibility of effective legal challenge to the validity of the actual legal decision’. I will also return to this link between duty and remedy below; it is in stark contrast to Barton J’s ‘duties of the imperfect obligation’. He emphasised the ‘essentially formal character of the process of actual decision-making by the Governor’,²⁷ and the generality of the view expressed in *Kioa v West* that common law rules of procedural fairness extend to control any administrative decision which is made pursuant to statutory power, in the absence of a clear contrary legislative intention, which directly affects the rights, interests, status or legitimate expectations of a person. His Honour rejected the submission that the absence of an obligation on the part of Cabinet to provide reasons denied a right of hearing.

Once again, aspects of *O’Shea* are remarkably modern. Chief Justice Mason had noted that the statutory regime ‘represents a marked departure from the common law’, one of whose basic principles was that an offender should be given a sentence appropriate to his crime and no more. However, the arguments were purely administrative, and there was no anticipation of the constitutional arguments based on Chapter III of the *Commonwealth Constitution* resulting in the limitations upon State legislative power manifested in *Kable v Director of Public Prosecutions (NSW)*²⁸ and *Fardon v Attorney-General (Qld)*.²⁹ A similar issue arose last year in the Supreme Court of the United Kingdom in *Osborn v Parole Board*.³⁰ Yet, of course, *O’Shea* is in many ways properly regarded as a constitutional case – it is about the regulation of executive power, in a politically sensitive area, by the exercise of judicial power qualifying the legislation by which it is conferred. I have elsewhere referred to what I regard as the unduly narrow approach to ‘constitutional law’ within the Australian legal system, which, by focussing on the *Commonwealth Constitution*, emphasises areas which are now settled law, and detracts from some of the most important and stimulating issues presently litigated in State and federal courts.³¹

O’Shea shows administrative law in transition. It is not surprising that different judges adopted different approaches. It is conventional now to refer to the ‘apparently

²⁶ Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 *Australian Law Journal* 240.

²⁷ *O’Shea* (1987) 163 CLR 378, 416.

²⁸ (1996) 189 CLR 51 (*Kable*’).

²⁹ (2004) 223 CLR 575 (*Fardon*’).

³⁰ [2013] 3 WLR 1020, noted Philip Murray, ‘Procedural Fairness, Human Rights and the Parole Board (2014) 73 *Cambridge Law Journal* 5.

³¹ See Mark Leeming, ‘The Federal and State Courts on Constitutional Law: The 2013 term (paper presented 14 February 2014) 3–4, available at <http://ssrn.com/abstract=2398682>.

prevailing view' that until 1981, the exercise of power by a representative of the Crown was not reviewable.³² There was a distinction between an exercise of power by a Minister pursuant to a statute and an exercise of power by a Governor on the advice of a Minister, which was not. That distinction has been abandoned as a matter of law in Australia by what was decided in *R v Toohey; ex parte Northern Land Council*³³ and *FAI v Winneke*.³⁴ The different strands in the reasons in *O'Shea* demonstrate that the position did not seem so clear at the time. We look back on landmark decisions with the substantial advantage of hindsight. Many such decisions were not regarded as remarkable at the time.

IV ANALYSIS OF VICE-REGAL EXERCISES OF POWER

Those two extended South Australian examples set the scene for a recapitulation of the various obstacles which have historically been perceived to prevent judicial review of vice-regal decisions. I start from the broadest and move progressively to those that are narrower.

A Jurisdiction

The first is whether there is jurisdiction. Only if a Court has jurisdiction to decide a controversy to which the Governor is a party can his or her exercises of power be reviewed judicially. To return to Barton J's duties of imperfect obligation, the approach adopted in *Commonwealth v Mewett*³⁵ was that of Dixon J in *Werrin v Commonwealth*,³⁶ whereby the duty of imperfect obligation was made perfect by the creation of a jurisdiction in which the Commonwealth and those acting on its behalf were amenable to suit.³⁷ When there is a matter within the meaning of ss 75 and 76 of the *Constitution*, such that the court is exercising federal jurisdiction, immunity is not available to a State.³⁸ More generally, the 20th century States and 19th century colonies had largely abrogated the immunities from suit inherited from England, commencing with a South Australian Act of 1853: the *Claims Against the Local Government Act* No 6 of 1853.³⁹ Moreover, the reasoning in *Kirk v Industrial Court (NSW)*⁴⁰ ensures that State courts have supervisory jurisdiction to review for 'jurisdictional error' which includes cases when the duty has been breached. Questions remain about the terminology in, and the metes and bounds of, *Kirk*, but it is clear

³² *Stewart v Ronalds* (2009) 76 NSWLR 99, 111 [39].

³³ (1981) 151 CLR 170.

³⁴ (1982) 151 CLR 342.

³⁵ (1997) 191 CLR 471.

³⁶ (1938) 59 CLR 150, 167-168.

³⁷ See Mark Leeming, *Authority to Decide* (Federation Press, 2012) 256-261.

³⁸ *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

³⁹ See Leeming, above n 37, 237-239.

⁴⁰ (2010) 239 CLR 531 ('*Kirk*').

that that constitutionally entrenched supervisory jurisdiction is an analogous State counterpart to ss 75(iii) and (v).⁴¹

B *Remedy*

The second historically perceived obstacle, which is closely related to the first, is remedy. Traditionally, mandamus, prohibition and certiorari were unavailable against a vice-regal officer. But this question is a distraction, once it is appreciated that the availability of declaratory relief against the Attorney-General will be sufficient save in cases of reserved powers and those cases are unlikely to be apt for judicial review.⁴² Another mechanism (which indeed reflects Barton J's reasoning in the *Governor of South Australia Case*) may be seen in *Chief Justice of the Cayman Islands v The Governor (Cayman Islands)*,⁴³ where there was a referral to the Privy Council for advice as to whether the Governor was entitled to extend the appointment of a judge of the Grand Court. It is a fortunate fact about the Australian legal system that since federation, coercive orders have tended not to have been required to be issued against the executive.

C *Identity of the donee*

The third obstacle was the identity of the donee: was the fact that power had been conferred upon a *Governor* decisive? There are two distinct issues here which it is important not to conflate. The main question is one of general law. As was noted in *O'Shea, FAI v Winneke* had dispelled the idea that the fact that power was conferred on the Governor was fatal to judicial review at common law. That had been anticipated by Joseph Carruthers, here in Adelaide, in 1897:

[w]e do not want the Governor to have the power to do wrong; we want to have him limited by the terms of the Constitution Act, and kept to the straight paths by a Federal Judiciary.⁴⁴

Joseph Carruthers was referring to the office now known as the Governor-General, and he was in terms dealing with the exercise of prerogative powers (following a careful account of those powers by Barton J). His point remains sound. There was a strongly held view (notably, reflected in s 75(iii) and s 75(v)) that the executive be accountable and subject to judicial review, irrespective of the source of the

⁴¹ There is a large question, not addressed in this paper, as to the extent to which privative clauses in State law may be more effective than those in federal laws.

⁴² Cf *Dyson v Attorney General* [1912] 1 Ch 158, as Gibbs CJ noted in *FAI* at 351. Again, it is a large question and outside the scope of this paper whether the more modern remedies, such as orders pursuant to ss 65 and 69 of the *Supreme Court Act 1970* (NSW), and ss 27, 29 and 31 of the *Supreme Court Act 1935* (SA) have altered the position.

⁴³ [2012] UKPC 39; [2014] AC 198.

⁴⁴ *Official Report of the National Australasian Convention Debates*, Adelaide, 29 March 1897, 914 (Mr Joseph Carruthers).

executive power exercised. As Owen Dixon said, ‘the thesis of *Marbury v Madison* was obvious’ to the framers of the *Australian Constitution*.⁴⁵ Fullagar J regarded it as axiomatic.⁴⁶ An immunity on the part of the Governor was *not* something relied upon in the *Governor of South Australia Case*, yet it took many decades for that idea to be dispelled. The same pattern has been charted by Justin Gleeson and Robert Yezerski, in ‘The Separation of Powers and the Unity of the Common Law’.⁴⁷ It is easy to under-appreciate the creativity of the early High Court – it is to be recalled that the High Court defied the Privy Council in *Baxter v Commissioners of Taxation (NSW)*,⁴⁸ two months prior to hearing the *Governor of South Australia Case*. However, for much of the 20th century, more traditional English ideas returned. A snapshot of the position is given by Peter Hogg:

It is clear from these cases that the attitude of the courts towards review of a decision by an official who is empowered to act ‘if he is satisfied’ or ‘if it appears to him’ that a certain state of affairs differs according to whether the official is the Crown Representative or not.⁴⁹

Representative was *R v Martin*,⁵⁰ where reliance was placed on what Dixon J said in the *Australian Communist Party v Commonwealth*,⁵¹ namely, that where statute gave a power to declare a body to be an unlawful association where ‘the Governor-General is satisfied’ then a properly framed declaration would be ‘conclusive’. Contrast *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* which, seven years before, had permitted challenges to exercises of power conditioned upon a statutory office holder holding a particular opinion.⁵²

Although it might be thought that *FAI v Winneke* saw the end of the identity of the donee of the power being determinative, the position is complicated by some of the more recently enacted legislative regimes for judicial review. At the federal level, vice-regal decisions are excluded from the definition of ‘a decision to which this Act applies’ in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).⁵³ On the other hand, such exemptions are absent from legislation in the ACT,

⁴⁵ Owen Dixon, ‘Marshall and the Australian Constitution’ (1955) 29 *Australian Law Journal* 420, 425; Cf Leeming, above n 37, 247–8.

⁴⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263.

⁴⁷ See Justin Gleeson and James Watson (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), 297, 316–329.

⁴⁸ (1907) 4 CLR 1087.

⁴⁹ P W Hogg, ‘Judicial Review of Action by the Crown Representative’ (1969) 43 *Australian Law Journal* 215, 217.

⁵⁰ (1967) 67 SR (NSW) 404.

⁵¹ (1951) 83 CLR 1, 179.

⁵² (1944) 69 CLR 407.

⁵³ This is cognate with the exclusion of documents, other than those that relate to matters of an administrative nature, of the Governor-General from the *Freedom of Information Act 1982* (Cth), considered in *Kline v Official Secretary to the Governor General*

Queensland and Tasmania. Special provision is made in Queensland for the review of decisions of the Governor-in-Council in s 53 of the *Judicial Review Act 1991*: the respondent is to be the Minister responsible for the administration of the enactment or scheme or programme under which the decision was made or the Minister responsible for tendering advice to the Governor-in-Council. Professor Matthew Groves says that ‘it is clearly contradictory that a statute designed to provide a simpler alternative to the common law maintains an arcane exception that has disappeared from the common law itself’.⁵⁴

The inter-relationship between statute and common law is complex, but there seems to be no good reason to read down the scope of judicial review available at general law by reference to statutory regimes which are narrower, at least where it is clear that those regimes do not amount to a code exhaustive of such jurisdiction as is mandated by *Kirk*.

D Source of power

The fourth and most interesting obstacle is also influenced by the ‘decision under an enactment’ formula in the *ADJR Act*. Is there something different about vice-regal exercises of power *pursuant to statute*, as opposed to exercises of power *unsupported by statute*?

The powers exercised by State governors have a wide range of sources:

- First, a small number of powers are conferred directly by the *Commonwealth Constitution* (such as in the *Governor of South Australia Case* itself).
- Secondly, there is the qualified investment of power by s 7 of the *Australia Act 1986* (Cth) and s 7 of the *Australia Act 1986* (UK).⁵⁵ That section provides that ‘all powers and functions of her Majesty in respect of a State are exercisable only by the Governor of the State’. The power to appoint and to terminate the appointment of the Governor is excluded, and if the Sovereign is personally present in the state, he or she is not precluded from exercising any of his or her powers and functions in respect of the State.⁵⁶

(2012) 88 ALJR 161.

⁵⁴ Matthew Groves, ‘Should We Follow the Gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?’ (2010) 34 *Melbourne University Law Review* 736, 751.

⁵⁵ Hereafter referred to as the ‘*Australia Acts 1986*’.

⁵⁶ There are large questions as to the meaning of ‘in respect of a State’: see Anne Twomey, *The Australia Acts 1986* (Federation Press, 2010) 261-263. For example, the extrinsic materials suggest that the awarding of ‘honours’ fell within the Queen’s personal prerogatives and is therefore outside of s 7(2) at the State level, and (presumably) remains with the Sovereign at the Commonwealth level.

- Thirdly, there are very important powers (including assenting to bills and proroguing Parliament) conferred by the State Constitutions.
- Fourthly, there are many powers conferred by legislation and delegated legislation, sometimes on the Governor in Council, sometimes upon the Governor acting upon the recommendation of a Minister. There are different practices in different States.⁵⁷ Mostly it is State legislation and delegated legislation, but some federal statutes confer powers (an example is the *Commonwealth Electoral Act*).
- Fifthly, there remain powers which lack (or appear to lack) a statutory source, commonly known as ‘prerogative’ powers. Dr Evatt divided these powers into (a) rights to do certain things without statutory authority (for example, declare war, coin money, incorporate by royal charter, pardon offenders and confer honours), (b) immunities and privileges such as priority of payment and immunity from suit (which have been very influential in this country) and (c) property rights such as the rights to escheat, to treasure trove and to precious metals confirmed by s 379 of the *Mining Act 1992* (NSW).⁵⁸
- Sixthly, there are also separate delegated powers, including the delegation to State Governors of the power to approve the retention of the title ‘Honourable’ in cases falling within established criteria.⁵⁹

To anticipate what follows, some of the foregoing are what Allsop J described as ‘governmental powers’, such as the powers relating to the assembling and dissolving of Parliament, assenting to statutes, to appoint and dismiss executive and judicial and military officers, and many others.⁶⁰

Hence the force of Fiona Wheeler’s observation long ago that:

[t]he prerogative powers of the Crown are not a homogeneous group; ... they are both diverse in nature and exercisable in a wide variety of circumstances ... the question whether or not a particular prerogative decision is amenable to the supervisory jurisdiction of the courts (and on what grounds) should depend

⁵⁷ For example, in *Watson v South Australia* (2010) 278 ALR 168, 173 [23], Doyle CJ reiterated the South Australian practice relied on in *O’Shea* (which diverges from that in New South Wales) that all advice to the Governor-in-Council is based upon Cabinet recommendation, and all available ministers ordinarily attend ordinary Executive Council meetings.

⁵⁸ Considered in *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195.

⁵⁹ See Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 628, referring to the letter from Sir Robin Janverin, Buckingham Palace dated 25 July 1991.

⁶⁰ James Allsop, ‘The Control of the Executive by the Courts’ [2002] *Federal Judicial Scholarship* 17 at [15].

upon the nature and effect of the decision itself, not upon the application of pre-determined classifications. The traditional immunity from the view of the manner of exercise of prerogative power was such a pre-determined classification writ large.⁶¹

Now, the source of a power may matter for some purposes. If the source is the *Commonwealth Constitution* or federal law, then the court whose jurisdiction is invoked by an applicant seeking judicial review will be exercising federal jurisdiction (hence, the High Court had jurisdiction to hear and determine the *Governor of South Australia Case* because the duty for which Mr Vardon contended was sourced in the Constitution). If statute provides a regime for judicial review (as in Queensland and Tasmania and the ACT and at the federal level), then again it may be important, because the statutory regime may turn upon the source of the power (famously, as in ‘decision under an enactment’ in the *ADJR Act*).⁶²

But generally speaking, there is no sound reason for the rules within a legal system as to the amenability to judicial review in respect of such a heterogeneous group of powers to be determined by the source of the power. The heterogeneity has nothing to do with the source of the power. The right to royal metals (or for that matter to royal fish such as sturgeons and whales) and the power to dismiss a government are all ‘prerogative’ ie, sourced in common law, but vastly different considerations attend their susceptibility to judicial review. Conversely, the power to grant a licence to conduct an insurance business and to prorogue Parliament are both sourced in statute, but again very different considerations apply to their being the subject of judicial review. As much has long been recognised.

V COMMON LAW AND STATUTE LAW

Two considerations underlie the proposition that the availability of judicial review is indifferent to the source of power.

The first is simply stated. It would be strange if a prerogative power, which is capable of being modified or supplemented or extinguished by statute, is *less* susceptible to judicial review than a power created by statute. As Heydon J wrote in *PGA v The Queen*,⁶³ ‘the courts are masters of the common law, but servants of statutes’. There would be a want of coherence for the legal system to especially immunise non-statutory powers from, say, a duty to act fairly, but to insist upon clear language before the same was true of powers sourced in statute.

⁶¹ Fiona Wheeler, ‘Judicial Review of Prerogative Power in Australia: Issues and Prospects’ (1992) 14 *Sydney Law Review* 432, 473.

⁶² See for example the jurisdictional limits identified by the High Court in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 (*ADJR Act*) and *Griffith University v Tang* (2005) 221 CLR 99 (*Judicial Review Act 1991* (Qld)).

⁶³ (2012) 245 CLR 355, 404-5 [133].

The second takes longer to expose. Particularly in this area, identifying a clear-cut distinction between common law and statute is an arid exercise. Much of our legal system is an amalgam of statute and common law, and the ‘prerogative powers’ of Governors are an excellent example.

Take for example another subject matter (also of present interest), royal commissions into the activities of nominated trade unions.⁶⁴ In February 1904, the New South Wales Governor, acting on the advice of the Executive Council, by letters patent appointed a royal commission for a ‘diligent and full inquiry into the formation, constitution and working of the Machine Shearers and Shed Employés Union, Industrial Union of Employés’ and, inter alia, ‘whether the registration of that union prevented the Industrial Arbitration Court from doing complete justice’. This led to a challenge by the secretary of the union, Mr Leahy, who was summoned to appear before it, but who refused to be sworn or to give evidence, for which he was prosecuted. Among other things, he challenged the validity of the exercise of prerogative power by the Governor to create the Commission. He said that the issue of letters patent was ‘an unconstitutional and illegal exercise of the prerogative of the Crown when affecting individual rights’, and indeed succeeded in the Full Court of the Supreme Court of New South Wales, which found that the Commission was ‘unlawful and illegal’.⁶⁵ Something of the flavour of the decision may be seen by what Darley CJ said:

Here we have a thrice defeated litigant first obtaining a select committee of the Legislative Assembly, of which committee he is the chairman, to enquire into the subject-matter of the litigation, followed by the appointment of a Royal Commission, of which at first he is made president and the members he had selected for the select committee of the House made members. Common decency at last prevailed, and led to the alteration of this, and after having been made a member of the Royal Commission, he is finally excluded, his nominees, however, remaining as members, a District Court Judge being nominated president. Is it to be wondered at that the successful litigant refused to give evidence or appear before such a tribunal with its enormous powers of discovery and encroachment upon their private offices and places of business?⁶⁶

That decision was overturned by the High Court.⁶⁷ The litigation illuminates the relationship between prerogative powers, statute and judicial review.

First, Mr Leahy’s litigation was a *collateral* challenge to the exercise of executive power, arising out of his prosecution. He could have maintained it as a defence before the magistrate, but chose to bring separate proceedings in the Supreme Court’s supervisory jurisdiction. Notwithstanding the fragmentation of the criminal trial, such litigation is well-established in appropriate circumstances (a powerful

⁶⁴ Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014).

⁶⁵ *Ex parte Leahy* (1904) 4 SR (NSW) 402 (*Leahy*).

⁶⁶ *Ibid* 415.

⁶⁷ *Clough v Leahy* (1905) 2 CLR 139.

consideration in such cases is whether there is a question of public interest going beyond the particular circumstances of the prosecution).⁶⁸

Secondly, it was not necessary to join the Governor even though it was the Governor's exercise of power which was impugned. It was sufficient to join the Attorney-General. Prohibition against the magistrate, or declaratory relief, in the case of *Sankey v Whitlam*, was sufficient.

Thirdly, neither the Supreme nor the High Court had any difficulty in asserting a jurisdiction to exercise judicial review of the Governor's decision. They differed in the outcome because, as Griffith CJ put it, it was not for the courts to rule on the propriety of executive action, but merely its lawfulness. It is a reminder of the boldness of courts in the Australian legal system in the first decade of the last century. That boldness was noted by, among others, Professor Harrison Moore in an article in the *Columbia Law Review*;⁶⁹ recall again that it was not until 1947 that it was possible to sue the Crown in England for tort.⁷⁰

Fourthly, the prosecution was under the *Royal Commissioners Evidence Act 1901* (NSW), which created an offence for a witness to refuse to be sworn when summoned by a Royal Commissioner. However, the power to establish the commission had no statutory base. The same structure remains in New South Wales and South Australia 110 years later. Royal Commissions are established by the Governor pursuant to an exercise of a prerogative power, which is supplemented by statute. The power to inquire and investigate is 'an essential part of the equipment of all executive authority'.⁷¹ However, that power to investigate did not extend to coercive powers.⁷² Coercive powers are sourced in statute (and only apply if the commissioner is a specified person, such as a judge or former judge).⁷³ The power is sourced at common law but regulated and supplemented by statute.

⁶⁸ As there was in *Sankey v Whitlam* (1978) 142 CLR 1 and *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, 134 [25].

⁶⁹ Harrison Moore, 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500. It had been anticipated, to a similar audience, by Andrew Inglis Clark, in 'The Supremacy of the Judiciary under the Constitution of the United States, and under the Constitution of the Commonwealth of Australia' (1903) 17 *Harvard Law Review* 1, although the focus of the latter was federal legislative power.

⁷⁰ See *Commonwealth v Mewett* (1997) 191 CLR 471, 542-545.

⁷¹ *Huddart Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330, 370.

⁷² See *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

⁷³ NSW s 15; SA ss 10-11. Hence s 5 of the *Royal Commissions Act 1923* (NSW) provides that:

[w]henever the Governor by letters patent under the Public Seal issues a Royal Commission to any person to make any inquiry, the provisions of this Act shall apply to and with respect to the inquiry.

It would appear that the South Australian counterpart (*Royal Commissions Act 1917* (SA)) proceeds on the same basis.

The same interplay between common law and statute may be seen in an example well outside the area of judicial review. In *Stewart v Ronalds*⁷⁴ a Minister whose commission was withdrawn by the Lieutenant Governor (acting on the advice of the Premier) sued the State and a barrister who had conducted an investigation into the alleged misconduct.⁷⁵ The direct source of power to remove a Minister was unclear. Arguably it was found in s 35E of the *Constitution Act 1902 (NSW)*⁷⁶ although that section was not styled as a conferral of power. At best, power is conferred by implication. There was no doubt that the power existed, to be exercised by the Governor on the advice of the Premier.

The legal meaning of s 35E is informed by the context, in which two things assumed prominence. First, the section replaced s 47 of the *Constitution Act* in 1987, which had provided that appointments of officers liable to retire from office on political grounds, ‘which appointments shall be vested in the Governor alone’, a textual copy from s 35 of the *Constitution Act 1855*. Secondly, the meaning of ‘vested in the Governor alone’ meant the Governor on the advice of the Minister; the notion of responsible government is an essential backdrop to construction. In short, s 35E was held to bear a legal meaning which is very different from its literal meaning.

In summary, prerogative powers exercised by the Governor tend to be ancient; *new* prerogative powers have long since ceased being created in the Australian legal system! If there is a statutory source, statute may simply proceed on the basis that they exist and confirm their existence (s 7 of the *Australia Acts* is a good example), although quite often it may modify them.

VI SOURCE OF OBLIGATION TO ACCORD PROCEDURAL FAIRNESS

Now if the source of the obligation to accord procedural fairness is statute, something repeatedly reaffirmed by Brennan J, then a difficulty arises in relation to judicial review of non-statutory exercises of vice-regal power.

Two things may immediately be said about Brennan J’s view on statutes as the source of the obligation. The first is that, at least from the perspective of litigation in courts other than the High Court, it must be taken to be a minority view. Intermediate appellate courts have long regarded the position as settled,⁷⁷ particularly by reference to what was said by a majority of the Court in *Annetts v McCann*:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate

⁷⁴ (2009) 76 NSWLR 99.

⁷⁵ Ibid.

⁷⁶ ‘The Premier and other Ministers of the Crown shall hold office during the Governor’s pleasure.’

⁷⁷ See the decisions collected in *Stewart v Ronalds* (2009) 76 NSWLR 99, 115 [68]-[69].

expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.⁷⁸

The second is that this audience will be very familiar with the notion of the common law approach to statutory construction requiring words of ‘irresistible clarity’ before a duty to accord procedural fairness has been abrogated.⁷⁹ The position with a power sourced at common law is *a fortiori*. Once it be accepted that in cases where the legislature has spoken, it must speak clearly and unambiguously in order to detract from an enforceable duty to act fairly, then the case where the exercise of executive power has no statutory source is straightforward.

I referred earlier to the fact that propositions about statutory construction are really propositions about the common law. I have elsewhere⁸⁰ sought to emphasise an important passage in the reasons of four members of the High Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*:

The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai* was identified as *the interaction between the three branches of government established by the Constitution*. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that ‘the common law’ usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified

⁷⁸ (1990) 170 CLR 596, 598.

⁷⁹ See *Potter v Minahan* (1908) 7 CLR 277 and its extensive progeny (as to which Professor Dennis Pearce gave a useful review ‘Principle of Legality and Human Rights: Seeking the Hymn Sheet’ at the ANU Public Law Weekend, November 2013). There are large questions, beyond the scope of this paper, as to whether those principles have changed, or may change, and if so, how: see *Gumana v Northern Territory* (2007) 158 FCR 349, 374 [96] and *R v Janceski* (2005) 64 NSWLR 10, 23 [62].

⁸⁰ Mark Leeming, ‘The Riddle of Jurisdictional Error’ (2014) 38 *Australian Bar Review* 139, 143–144:

[t]hat is to recognise the centrality of statutory interpretation, which is an aspect (in this country) of the common law. Because a statute must be construed in its context, which includes the common law, often little turns upon whether a restriction on the exercise of power without according procedural fairness is better viewed as a default position which the statute (having been construed) has not abrogated, or alternatively as a result of the ordinary process of giving legal meaning to the legislative text.

as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.⁸¹

The emphasised words confirm that this is ‘constitutional law’ in the (broad) sense to which I earlier referred. Similarly, Owen Dixon reminded his audience in 1957 that a very distinguished Australian had opened his treatise on *The Government of England* with the words ‘The English constitution forms a part of the Common Law’.⁸² Ultimately, these rules are part of Australia’s ‘common law heritage’. Returning to South Australia in the 21st century, in *South Australia v Totani*, French CJ said that that heritage was antecedent to the Constitution and supplies principles for its interpretation and operation.⁸³ You will have noticed the echoing of Dixon in that passage.

A very recent example of the way in which basic aspects of that common law heritage affect 21st century litigation may be seen in *Achurch v The Queen*.⁸⁴ The question was whether a statute which permitted reopening of criminal proceedings in which a court had ‘imposed a penalty that is contrary to law’ applied where a decision was affected by the error identified in *Muldock v The Queen*.⁸⁵ The High Court said that it did not. The essential reasoning was that the principle of finality⁸⁶ was so deeply embedded in the legal system that it ‘should not be taken to have been qualified except by clear statutory language and only to the extent that the language clearly permits’. Another example of something ‘deeply embedded’ in our legal system is the High Court’s emphasis upon the institutional integrity of State courts.⁸⁷ In her new book, Sarah Murray has discussed, by reference to those decisions, the re-emergence of the ‘dominance of *institutional integrity*’.⁸⁸

It is no large step to hold likewise that the principle that public power should be exercised fairly when it directly affects a person is so deeply embedded in our legal system that clear statutory language is required before the obligation to accord procedural fairness is abrogated, irrespective of the source of power. That in substance is the position which has now been reached, but perhaps you may agree that there is,

⁸¹ (2012) 246 CLR 636, 666 [97] (emphasis added).

⁸² W E Hearn, *The Government of England: Its Structure and Its Development* (Melbourne, 1867) 1, cited by Dixon, above n 25.

⁸³ (2010) 242 CLR 1, 20 [1].

⁸⁴ (2014) 306 ALR 566.

⁸⁵ (2011) 244 CLR 120 (which overturned a settled approach to sentencing in New South Wales, based on a statutory standard non-parole period).

⁸⁶ That same principle of finality has long been undercut by statute. Such inquiries in New South Wales dated from s 383 of the *Criminal Law Amendment Act 1883* (NSW), which ‘pre-dated by almost three decades the first general right of appeal in criminal matters in this State’: *Sinkovich v A-G (NSW)* [2013] NSWCA 383 (18 November 2013) [23].

⁸⁷ *South Australia v Totani* (2010) 242 CLR 1, 21 [4], 48 [70] and 161 [438]; *Hogan v Hinch* (2011) 243 CLR 506, 551 [80], 554 [91]; *Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 [169], [182].

⁸⁸ See Sarah Murray, *The Remaking of the Courts* (Federation Press, 2014) 75–80.

following the reconciliation effected by *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,⁸⁹ a more satisfying account for that result.

All of that said, one reaches the conclusion that the extent to which judicial review is available turns upon the nature of the power and the directness of its impact upon the rights of the person who claims to have been denied procedural fairness. How that assessment takes place is, perhaps the most interesting and controversial area of analysis – and one that is outside the scope of this paper. It must suffice to say that some powers are so inherently governmental (reserve powers; dismissing a Minister), or general (making a legislative instrument) that it strains notions of procedural fairness to subject their exercise to an enforceable duty. For example, *Stewart v Ronalds* characterised the advice of a Premier to the Governor that he or she had lost confidence in a Minister as a ‘quintessentially political question’.⁹⁰ The absence of any duty in such cases was reinforced by the constitutional term that the Minister held office ‘during the Governor’s pleasure’.⁹¹ Thus it is that ‘subject matter immunities provide the core of modern understandings of justiciability’.⁹² More generally, in *Blythe District Hospital Inc v South Australian Health Commission*,⁹³ King CJ said:

[t]here must ... be a wide range of executive government decisions based upon policy and political considerations which are not subject to judicial review and which are not subject to a duty to provide persons affected thereby an opportunity to be heard.⁹⁴

As Professor Finn has said, the landmark cases of *CCSU* and *Peko-Wallsend* ‘have nonetheless offered catalogues of powers considered inherently unsuitable for judicial review’. You will have noticed that all three of the High Court decisions I have touched upon have been cases where the courts have *declined* to interfere with exercises of vice-regal executive power, which speaks eloquently of the deference attendant upon judicial review.

VII CONCLUSION

State of South Australia v O’Shea may be seen as a snapshot of the Australian legal system in transition, where the reasons of Mason CJ and Deane J disclose the immediate predecessors of a modern approach to judicial review of vice-regal

⁸⁹ (2012) 246 CLR 636.

⁹⁰ (2009) 76 NSWLR 99, 112 [45].

⁹¹ *Constitution Act 1902* (NSW) s 35E.

⁹² See Chris Finn, ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ (2002) 30 *Federal Law Review* 239, 252.

⁹³ (1988) 49 SASR 501, 509.

⁹⁴ *Ibid* 504.

exercises of executive power. The fact that the court was divided stands in contrast to the decisions at the beginning of the 20th century.

Prior to 1910, Australia was no nation. It had essentially no treaty-making power or international sovereign status. The Imperial Parliament regularly enacted legislation⁹⁵ and occasionally withheld, or (with equal effect) intimated that it would withhold, consent to local laws.⁹⁶ In a very real sense, the vice-regal representatives in Australia were local agents of an Imperial Crown with a powerful presence in the local legal system. It was a large thing for Australian courts then, unlike their English counterparts, to subject vice-regal power to judicial review.

Yet the local Australian courts adopted a modern approach to the exercise of executive power which resonates with the position 110 years later. Those decisions also raise most interesting questions about the true relationship between executive, legislative and judicial power; if this article causes its readers to think critically about that relationship, then one of its purposes will have been achieved.

⁹⁵ Often with its concurrence, for example, copyright legislation: see *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597, 612 but sometimes without (as in the case of the *Official Secrets Act 1911*: see Hessel Duncan Hall, *Commonwealth: A History of the British Commonwealth of Nations* (Van Nostrand Reinhold, 1971) 61).

⁹⁶ See Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 40.