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**NEW TRICKS FOR OLD DOGS: THE LIMITS OF JUDICIAL REVIEW OF  
INTEGRITY BODIES**

**THE JAMES SPIGELMAN ORATION 2017**

**26 OCTOBER 2017\***

1. It is a great honour and privilege to be invited here today to deliver the fourth annual James Spigelman oration. My immediate predecessor as Chief Justice and I were in the same set of chambers for many years and we became close colleagues and good friends. Notwithstanding, I approached this lecture with some trepidation. Jim was and indeed is a great lawyer and one of his particular areas of expertise was administrative law. I claim neither of those attributes and I know Jim's good nature will make him tolerant of any error I commit in delivery of this paper. I have been inspired in my choice of topic today by an address Jim Spigelman gave at the 2004 National Lecture Series for the Australian Institute of Administrative Law.<sup>1</sup> In a speech that has inspired countless academic papers,<sup>2</sup> spurred heated debate<sup>3</sup> and granted its theme to a later administrative law conference,<sup>4</sup> he proposed recognition of "integrity" as "a useful way to conceptualise a universal governmental function".<sup>5</sup> While he located this function within each of the existing branches of government, the popularity of the concept is no doubt attributable to the rise of independent institutions that explicitly embody

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\* I express thanks to my Research Director, Ms Bronte Lambourne, for her assistance in the preparation of this address.

<sup>1</sup> James J Spigelman AC, "The integrity branch of government" (Speech delivered at 2004 National Lecture Series for the Australian Institute of Administrative Law, Sydney, 29 April 2004). An edited version of the speech is published in: J J Spigelman AC, "The integrity branch of government" (2004) 78 *Australian Law Journal* 724.

<sup>2</sup> See eg, Anita Stuhmcke and Anne Tran, "The Commonwealth Ombudsman: an integrity branch of government?" (2007) 32(4) *Alternative Law Journal* 233; Julie Kinross, "The transmission of the public value of transparency through external review (2012) 71 *AIAL Forum* 10; David Solomon, "The integrity branch – Parliament's failure or opportunity?" (2013) 28(2) *Australasian Parliamentary Review* 36; Laura Grenfell, "An Australian spectrum of political rights scrutiny: "Continuing to lead by example?" (2015) 26 *Public Law Review* 19; see also the papers in (2012) 70 *AIAL Forum*.

<sup>3</sup> See eg Wayne Martin AC, "Forewarned and four-armed: Administrative law values and the fourth arm of government" (2014) 88 *Australian Law Journal* 106 and Chris Wheeler, "Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia" (2014) 88 *Australian Law Journal* 740.

<sup>4</sup> The Australian Institute of Administrative Law Forum No 70, October 2012.

<sup>5</sup> Spigelman, above n 1, 725.

this integrity function. It is the rise and continuing expansion of those institutions which I think makes consideration of the issues raised in this paper worthwhile.

2. Since around the 1970s, Australia has seen a proliferation of statutory oversight bodies charged with investigating impropriety, corruption and maladministration in governmental functions and with handling citizens' complaints about administrative decision-making. As Spigelman identified, the concern of these integrity bodies is not limited to outright corruption but extends to ensuring "that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and the purposes for which those powers were conferred, and for no other purpose".<sup>6</sup> In other words, integrity comprises a concern with legality, fidelity to purpose and fidelity to public values.<sup>7</sup>
3. In the federal sphere, key integrity bodies include the Commonwealth Ombudsman, the Australian Human Rights Commission, Information and Privacy Commissioners and the Auditor-General. In New South Wales, in addition to the state equivalents of many of these offices there is the Independent Commission Against Corruption (ICAC) and the Law Enforcement Conduct Commission. Crime Commissions in both settings, though not strictly accountability watchdogs, "tend to play a fundamental role in anti-corruption work due to natural links between official corruption and organised crime".<sup>8</sup> Royal commissions also exhibit key integrity functions when established to investigate abuses of power by public officials. Further, the power of these bodies are not limited to investigations of public officials. In many cases they extend to investigations of other persons whether as a result of them being involved in improper conduct concerning public officials or public functions, and sometimes as a result of commissions of inquiry directly directed to abuses of powers or functions by non-government persons, an example being the Royal Commission into Institutional Responses to Child Sexual Abuse.
4. Professor John McMillan, who must surely be in the running for title of "most positions held as head of an integrity body" is the current Acting NSW Ombudsman, former Australian Information Commissioner, former

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<sup>6</sup> Ibid 726.

<sup>7</sup> Ibid 725; see also Martin, above n 3, 116.

<sup>8</sup> A J Brown and Brian Head, "Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia's Integrity Systems" (Paper presented to the Australasian Political Studies Association Conference, University of Adelaide, 29 September - 1 October 2004) 4.

Commonwealth Ombudsman and former Acting Integrity Commissioner. He identifies the primary characteristics of such bodies as being that they: are established by statute; are independent and not subject to government direction; possess extensive statutory powers to conduct investigations, either upon complaint or as an own motion investigation; and have the power to produce reports which are often published, either by the body themselves, through a Minister, or through Parliament.<sup>9</sup> These reports even if not acted upon, can cause significant reputational damage to the persons the subject of them.

5. With the exception of auditors-general and royal commissions, none of the cited bodies existed before 1974, when the office of the NSW Ombudsman was established. A number of reasons have been cited for this sudden expansion. First, the rise of integrity bodies mirrored the rise of the global anti-corruption movement which saw a growth in the public consciousness of the importance of principles such as transparency and accountability in governance. A similar shift in focus also influenced the establishment of royal commissions, “prior to 1972, 60 per cent of all Commonwealth royal commissions were policy/advisory type inquiries. Since then the trend has been for royal commissions to be appointed mostly for inquisitorial/investigatory roles”.<sup>10</sup> Even since the Ombudsman was established there has been a notable broadening of focus from individual dispute resolution to wider investigations of corruption or other misuses of power.<sup>11</sup>
6. Secondly, new oversight bodies were sought to compensate for the shortcomings of the traditional branches of government. As government regulation increased in size and complexity there was a resultant escalation of activity at the interface between government and society.<sup>12</sup> Judicial review was no longer able to handle the increased caseload, nor was it the appropriate forum for citizens seeking inexpensive and speedy redress for smaller administrative complaints, a phenomenon highlighted in the Kerr Committee report which was presented to Parliament in 1971.
7. This breakdown of the traditional branches of government and the explosion of new accountability bodies has led many to question whether

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<sup>9</sup> John McMillan, “Rethinking the Separation of Powers” (2010) 38 Federal Law Review 423, 435.

<sup>10</sup> Scott Prasser, “Australian Royal Commissions and Public Inquiries: Their Use and Abuse and Proposals for Reform” (Paper presented at the Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives Conference, University of Windsor, Canada, 26-28 May 2011) 5.

<sup>11</sup> John McMillan, “Commonwealth oversight arrangements – re-thinking the Separation of Powers” (2014) 29(1) Australasian Parliamentary Review 32, 33.

<sup>12</sup> McMillan, above n 9, 432.

the longstanding framework for the separation of powers needs updating. My purpose is not to advocate a particular way of thinking but to consider how these different taxonomies affect the question, which is my focus today: who is responsible for holding integrity bodies to account? Who guards the guardians?

8. Without a doubt the rise of these new integrity bodies represents a disruption to the traditional constitutional framework. There are arguments for placing oversight agencies within any of the three branches of government. Most commonly, they are assigned to the executive branch, a view reinforced by early cases concerning investigatory bodies. In *Clough v Leahy*, in 1904, the High Court observed that it had “been the practice ... for many years, for the Crown, from time to time, to appoint Commissioners to make inquiry concerning matters as to which the Executive Government thinks it desirable that information should be collected, to be made use of in the administration of the affairs of the country, or for the guidance of Parliament”.<sup>13</sup> This is a view that was reiterated on many occasions. In *Huddart Parker & Co v Moorehead*, Justice O’Connor noted that “the power of inquiry for the purpose of administration and ... informing the legislature, is an essential part of the equipment of all executive authority”.<sup>14</sup>
9. This characterisation is easy to reconcile with the policy focus of the early royal commissions, however, the waters start to muddy when considering commissions that investigate offences and misconduct. For this reason, statutory investigative bodies have at times found to be impermissibly exercising judicial power. This was the case in *Brandy v Human Rights and Equal Opportunity Commission* where the binding or conclusive nature of the Commission’s determinations rendered its power judicial.<sup>15</sup>
10. *Balog v ICAC* was a case concerning statutory interpretation of the *ICAC Act* and not the separation of powers, nevertheless, the Court observed “how inappropriate it would be” for a “Commission intended to be primarily an investigative body”, and not being required to conform to the rules of evidence, “to report a finding of guilt or innocence”.<sup>16</sup> Yet this case also demonstrates the inappropriateness of placing integrity bodies

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<sup>13</sup> (1904) 2 CLR 139, 153.

<sup>14</sup> *Huddart Parker and Co Proprietary Limited v Moorehead* (1909) 8 CLR 330, 377. Note however, the power of inquiry is not a prerogative power: *Clough v Leahy* (1904) 2 CLR 139, 156-7.

<sup>15</sup> (1995) 183 CLR 245.

<sup>16</sup> (1990) 169 CLR 625, 322; see also *Chairperson, Aboriginal And Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163.

within the executive branch. The Court noted that the primary function of such bodies is to “facilitate the actions of others” as distinct from implementing policy.<sup>17</sup>

11. As McMillan states “watchdog agencies do not formulate policies, provide services or regulate society” and furthermore, “they have a statutory independence from other executive agencies and from ministerial direction”.<sup>18</sup> As such, they do not fit comfortably within the executive branch.
12. Figures like the Ombudsman and the various Information, Privacy and Integrity Commissioners are formally officers of Parliament, to which they report and are directly accountable. As such, Peter Wilkins proposes a theory of watchdogs as satellites of Parliament, “in orbit of Parliament without being an integral part of it”.<sup>19</sup> Nevertheless it would be artificial to assign integrity bodies to the legislative branch; their powers are not restricted to questions of policy informing legislation.
13. Proponents of a fourth branch like Bruce Ackerman argue that “it is a mistake to view corruption as if it were just another social problem. A failure to control it undermines the very legitimacy of democratic government” and as such it “should be a top priority for drafters of modern constitutions”.<sup>20</sup> While this may be sound advice for new constitutions, others argue that it is dangerous to superimpose a fourth branch onto our existing constitution. Chief Justice Martin of Western Australia warns that a fourth branch “carries the risk that the efficacy of the checks and balances that have characterised relations between the three recognised branches of government, and which have stood the test of time, may be undermined”.<sup>21</sup> The fear is that a fourth branch would stand outside the traditional separation of powers and therefore outside the system of mutual accountability contained in our constitution. It is therefore necessary to consider, in the amusing metaphor of Chief Justice Martin: “what mechanisms are in place to prevent those

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<sup>17</sup> (1990) 169 CLR 625, 636. When a similar question arose in the context of the separation of powers, but instead concerning a regulatory authority, the determination of whether a person had engaged in conduct constituting a criminal offence was not seen as an exercise of judicial power, this was because the body was responsible for regulating broadcasting services and enforcing licence conditions unlike ICAC whose investigations are facilitative: *Australian Communications and Media Authority v Today FM* (2015) 255 CLR 352, 374.

<sup>18</sup> McMillan, above n 9, 440.

<sup>19</sup> Peter Wilkins, “Watchdogs as Satellites of Parliament” (2015) 75(1) *Australian Journal of Public Administration* 18, 23.

<sup>20</sup> Bruce Ackerman, “The New Separation of Powers” (2000) 113 *Harvard Law Review* 633, 694.

<sup>21</sup> Martin, above n 3, 124.

watchdogs from savagely attacking innocent visitors who happen to be within the perimeters of their guarded territory”?<sup>22</sup>

14. It should first be noted that there are very good reasons for ensuring that there are mechanisms of accountability applied to watchdog agencies. First, the powers exercised by such bodies are, as the second reading speech of the *ICAC Act* describes, “formidable”.<sup>23</sup> These statutory powers of investigation can be coercive and intrusive in a way that is open to abuse. They most notably include the power to conduct coercive interrogations under oath in which the privilege against self-incrimination is suspended, but also, to name just a few, powers of search and seizure, the ability to record private conversations, to make recommendations regarding prosecution or disciplinary action and to prosecute for contempt.
15. Second, these bodies are hardly known to be free from public controversy. In the last few years, former High Court Justice Dyson Heydon was accused of apprehended bias when leading the Royal Commission into Trade Unions, the ICAC was heavily criticised for its decision to investigate Crown Prosecutor Margaret Cunneen and, most recently, the NSW Ombudsman and NSW Crime Commission came to clashes over a report that had potential to influence the race for the next Police Commissioner. Regardless of whether you think these criticisms are well-founded or not, they raise the question of whether there is a need for a channel of independent review of investigatory bodies, even if merely for the sake of maintaining public confidence.
16. We can immediately eliminate the executive as a review body. In the name of independence, integrity bodies are not subject to ministerial direction. Without this feature, the system “collapses into supervision of the executive by itself”.<sup>24</sup> So it is necessary to turn to Parliament. Parliamentary oversight takes two forms, first in the form of parliamentary committees and second in the form of independent inspectors who report to committees and are themselves given far-reaching investigatory powers. These inspectors only exist at the state level, and in NSW, only for the ICAC and the Law Enforcement Conduct Commission.

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<sup>22</sup> Ibid 109.

<sup>23</sup> New South Wales, *Hansard*, Legislative Assembly, 26 May 1988, 675 (Nick Greiner, Premier).

<sup>24</sup> Lisa Burton and George Williams, “The Integrity Function and ASIO’s Extraordinary Questioning and Detention Powers” 38(3) *Monash University Law Review* 1, 27.

17. There are a number of limitations to parliamentary review. First, for a person aggrieved by the actions of an investigative agency, redress relies on attracting the interest of a parliamentary committee or Inspector rather than having a claim as of right. Furthermore, the standing parliamentary committees are often statutorily precluded from investigating *specific* conduct and are only charged with reviewing broader culture and practices,<sup>25</sup> albeit select committees can be established. Secondly, accountability to Parliament is not appropriate for integrity bodies that have jurisdiction over Parliament or MPs;<sup>26</sup> review must be independent. Thirdly, Parliament has no power of direction over the integrity body, nor can it determine or enforce the legality of integrity body actions as a court can. Fourthly, the effectiveness of an inspector relies on a well-chosen appointment and the thoroughness with which he or she chooses to pursue the role.<sup>27</sup> Finally, parliamentary committees have confronted difficulties in accessing operational information when statutory secrecy provisions clash with parliamentary privilege,<sup>28</sup> a tension that has not been finally resolved and significantly weakens powers of review.
18. As Justice Brennan stated in *Ainsworth v Criminal Justice Commission*: the report of a Parliamentary Committee “does not supersede or set aside a report produced ... by [a] Commission. A failure by the Commission to accord natural justice to a person whose reputation is damaged is not ‘cured’” by a subsequent hearing before the Committee.<sup>29</sup>
19. The pressing question is whether judicial review can offer more? To answer this question, it is necessary to properly map the contours of the supervisory jurisdiction by tracing its historical expansion in three key areas: the type of powers reviewed, the type of errors reviewed and the type of remedies granted. It should be noted that my remarks are confined to the inherent jurisdiction since my focus is largely upon integrity bodies operating in the state sphere.
20. Prior to doing so, it is necessary to confront a question which I think needs to be asked, namely to what extent should these bodies be the

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<sup>25</sup> See eg *Ombudsman Act 1974* (NSW), s 31B; *Independent Commission Against Corruption Act 1988* (NSW), s 64; *Police Integrity Commission Act 1996* (NSW), s 95.

<sup>26</sup> Wheeler, above n 3, 740.

<sup>27</sup> James Wood AO QC, “Ensuring Integrity Agencies Have Integrity” (2006) 53 *AIAL Forum* 11, 17.

<sup>28</sup> Alex Hickman, “Parliamentary privilege and statutory office holders: some recent developments in Western Australia” (2013) 28(2) *Australasian Parliamentary Review* 94,

<sup>29</sup> (1992) 175 CLR 564, 593 (*Ainsworth*).

subject of judicial review. On the one hand it could be argued that such review exposes the bodies in question to harassment and interferes with their functions by unmeritorious claims designed to frustrate or stifle a legitimate inquiry. However, more than countervailing this consideration is, I think, the fact that these bodies, particularly having regard to the coercive powers they generally have and the fact that reports even if not directly affecting legal rights can directly damage a person's reputation and commonly act as a precursor to further acts which may affect such rights, makes at least some form of judicial review necessary if individuals' fundamental rights are to be protected.

## EXPANSION OF JUDICIAL REVIEW

21. The first respect in which judicial review has expanded is in regard to the type of bodies or powers that the courts will review. Administrative law developed in a setting where the business of local government was conducted by bodies in semi-judicial guises, namely justices of the peace. This led to an unfortunate association of the availability of the prerogative remedies of certiorari and prohibition with bodies who were "judicial". In the early days, it does not appear that this was intended as a word of limitation. In 1882, Lord Justice Brett warned that

*"the Court should not be chary of exercising [the power of prohibition], and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament".<sup>30</sup>*

22. The concern of the prerogative writ jurisdiction was clearly to police the boundaries of public power wherever that was exercised. As early as 1700, the King's Bench declared that it "would examine the proceedings of all jurisdictions erected by Act of Parliament ... to the end that ... they keep themselves within their jurisdictions".<sup>31</sup> Nevertheless, a strand of jurisprudence developed, beginning with a series of cases in the 1890s that distinguished judicial acts from administrative ones, holding that the latter were not controllable by the prerogative writs.<sup>32</sup> In 1906 in *R v Woodhouse*, Lord Justice Vaughan Williams urged that "the phrase 'judicial act' must be taken in a very wide sense" and "the true view of

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<sup>30</sup> *R v Local Government Board* (1882-83) LR 10 QBD 309, 321.

<sup>31</sup> *R v Glamorganshire Inhabitants* (1700) 1 Ld Raym 580.

<sup>32</sup> See eg, *Sharp v Wakefield* [1891] AC 173; *R v Sharman* [1898] 1 QB 578.



the limitation would seem to be that the term ‘judicial act’ is used in contrast with purely ministerial acts”.<sup>33</sup> His articulation of the scope of judicial review was simply that “there must be the exercise of some right or duty to decide”.<sup>34</sup>

23. Despite this attempt to steer the judicial tide away from a strict interpretation of bodies exercising judicial power, after the *Electricity Commissioners Case* in 1924,<sup>35</sup> the condition had stuck. In that case, Lord Justice Atkin famously said: “Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division”.<sup>36</sup> It was subsequently held that Lord Atkin’s use of the conjunction “and” rather than “or” signified that the duty to act judicially was a “superadded characteristic”.<sup>37</sup>
24. This view prevailed for much of the 20<sup>th</sup> Century. In Australia, its mark can be seen in cases like *R v Commissioner of Patents; Ex Parte Weiss* where the High Court held that the decision of the Commissioner of Patents in granting a patent was not amenable to prohibition as he formed “part of the administrative organization established by statute for carrying out a function of the Crown”.<sup>38</sup> That this would be a reason for precluding judicial review is foreign to modern ears.
25. In 1963, the Privy Council in *Ridge v Baldwin* finally corrected the “gloss” that had been put upon Lord Atkin’s dictum,<sup>39</sup> finding that it was “impossible to reconcile with earlier authorities”.<sup>40</sup> Since then, the requirement of a duty to act judicially has largely disappeared.<sup>41</sup> The qualification of an effect upon legal rights, however, has remained. To understand the genesis of this requirement, it is necessary to turn to the development of procedural fairness in administrative law.
26. The concept of *audi alteram partem* or the right to be heard, was applied and developed in two main lines of authority: first, in legal proceedings, particularly in summary proceedings before justices and second, in

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<sup>33</sup> [1906] 2 KB 501, 535.

<sup>34</sup> *Ibid.*

<sup>35</sup> *R v Electricity Commissioners* [1924] 1 KB 171.

<sup>36</sup> *Ibid.* 205.

<sup>37</sup> *R v Legislative Committee of the Church Assembly* [1928] 1 KB 411, 415.

<sup>38</sup> (1939) 61 CLR 240, 258 (Dixon J).

<sup>39</sup> [1964] AC 40, 74.

<sup>40</sup> *Ibid.* 75.

<sup>41</sup> See eg, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 399 (Spigelman CJ).

cases where a person was deprived of office without notice or a hearing.<sup>42</sup> Thus, natural justice was associated with the curial process of “judicial” bodies on the one hand or with decisions that affected property, rights or livelihood on the other. A famous formulation of the test focusing on property rights is found in *Cooper v Wandsworth*, “that a tribunal which is by law invested with power to affect the property of one of Her Majesty’s subjects, is bound to give such subject an opportunity of being heard before it proceeds”.<sup>43</sup> In *Wood v Woad*, the principles of natural justice were applied to bodies adjudicating “upon matters involving civil consequences”.<sup>44</sup>

27. Since natural justice was associated with “judicial” bodies, authorities having a duty to afford procedural fairness were described as having a duty to act judicially. Thus the condition of an effect upon legal rights and the duty to act judicially converged. The question of whether procedural fairness was implied became the same question as whether the prerogative writs were available; such was the case in *Electricity Commissioners*.
28. In Australia, the decision of *Testro Bros v Tait* applied Lord Atkin’s test to find that an inspector who was statutorily appointed to investigate and report on a group of companies, with the consequence that they may be wound up on the basis of the report, was not required to afford procedural fairness because the Act imposed “no obligation upon an inspector to act judicially ... or to conduct his investigations by a process analogous to the judicial process”.<sup>45</sup> After *Ridge v Baldwin*, which came down between hearing and judgment in *Testro*, where Lord Reid confirmed that the judicial character of the duty was only inferred “from the nature of the duty itself”,<sup>46</sup> Australian authorities eventually dropped the requirement of judicial character.<sup>47</sup>
29. However, as we know, development of the test for the implication of procedural fairness did not halt there as it did for the availability of certiorari. In *Kioa v West* it was accepted that a duty to afford procedural fairness arose “in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear

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<sup>42</sup> Harry Woolf et al, *DeSmith’s Judicial Review* (7<sup>th</sup> ed, Thomson Reuters, 2013) 349.

<sup>43</sup> (1863) 14 CB(NS) 180, 190 (Willes J).

<sup>44</sup> (1873-4) LR 9 Ex 190, 196 (Kelly CB).

<sup>45</sup> *Testro Bros Proprietary Limited v Tait* (1963) 109 CLR 353, 363 (McTiernan, Taylor and Owen JJ) (*Testro Bros*).

<sup>46</sup> [1964] AC 40, 76.

<sup>47</sup> See eg *Banks v Transport Regulation Board* (1968) 119 CLR 222; *Twist v Randwick Municipal Council* (1976) 136 CLR 106.

manifestation of a contrary statutory intention”.<sup>48</sup> This statement of principle must be qualified only to the extent that legitimate expectations have fallen somewhat out of fashion in recent years.

30. Two other respects in which judicial review has expanded should be mentioned briefly before we consider how these developments have affected the availability of judicial review of integrity bodies.
31. First, for many years the “pure theory” of jurisdiction prevented courts from reviewing errors which occurred in the course of the decision-making process. This theory was propounded by the Queen’s Bench in *R v Bolton* which held that the court’s enquiry must be limited to whether the decision-maker “had jurisdiction to inquire and determine”,<sup>49</sup> which was ascertainable “on the commencement, not at the conclusion of the inquiry”.<sup>50</sup>
32. In *Colonial Bank of Australasia v Willan*, the enquiry was framed as one of “manifest defect of jurisdiction”,<sup>51</sup> which involved a question of “whether the inferior Court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of [it]”.<sup>52</sup> In England, this line of authority was overturned in *Anisminic* which effectively dispensed with the concept of jurisdictional error.<sup>53</sup> In Australia, the expansion of jurisdictional error to include errors in the course of decision making was confirmed in *Craig v South Australia*.<sup>54</sup>
33. Secondly, as the restrictive conditions governing the grant of the prerogative writs began to frustrate the courts’ ability to police the limits of power, the equitable remedies of declaration and injunction came to supplement the supervisory jurisdiction. The necessity of bringing these remedies to aid in judicial review is evident in the judgment of *Dyson v Attorney-General* which, in 1911, resurrected the Court of Exchequer’s equitable jurisdiction to grant declarations against the Crown.<sup>55</sup> In that case, Lord Justice Farwell held that “it would be a blot on our system of

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<sup>48</sup> (1985) 159 CLR 550, 584 (Mason J); see also, *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170 (Denning MR).

<sup>49</sup> [1841] 1 QB 66, 75.

<sup>50</sup> *Ibid* 74.

<sup>51</sup> (1873-74) LR 5 PC 417, 442.

<sup>52</sup> *Ibid* 444.

<sup>53</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 WLR 163.

<sup>54</sup> (1995) 184 CLR 163; see also, *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82 which confirmed that breach of procedural fairness also went to jurisdiction.

<sup>55</sup> [1911] 1 KB 410.

law and procedure” if declaration was not available such that there “is no way by which a decision on the true limit of power ... can be obtained”.<sup>56</sup>

34. This sentiment was echoed by Justice Gaudron in *Corporation of the City of Enfield v Development Assessment Commission* where she held that the rule of law demanded that courts “grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise”.<sup>57</sup>
35. It is unclear when exactly these equitable remedies came to be used in judicial review but the inclusion of “injunction” in s 75(v) of the Constitution would suggest that the use of that remedy in public law was common enough at the turn of the century.<sup>58</sup> As declarations and injunctions have gradually become fixtures in the judicial review armoury they have come to be seen as part of the inherent jurisdiction of superior courts.<sup>59</sup> However, at least in the case of declarations in the Supreme Court, it is questionable whether the source of the power is statutory. It is arguable that the Supreme Court of a State had no power to make bare declarations of right until amendments were made to s 10 of the *Equity Act 1901* (NSW) by s 18 of the *Administration of Justice Act 1924* and the introduction of similar pieces of legislation in other States in the Commonwealth.

## THE LIMITS OF JUDICIAL REVIEW OF INTEGRITY BODIES

36. Returning then to the review of integrity bodies, it is apparent how some of these early restrictions on judicial review could severely hamper the ability of the courts to supervise the legality of conduct by investigatory bodies. Crucially, such bodies are not “judicial” bodies in the strict sense, despite adopting many of the inquisitorial powers and practices of courts, nor, in most cases, do the reports they prepare have a direct effect on legal rights.
37. In light of this, I would like to consider some of the ways in which the actions of integrity bodies have historically fallen, and in some cases continue to fall, outside the parameters of judicial review. In particular, by reason of the procedural fairness implication; the unavailability of

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<sup>56</sup> 421.

<sup>57</sup> (2000) 199 CLR 135, 158.

<sup>58</sup> See further, Lisa Burton, “Why these three? The significance of the selection of remedies in s 75(v) of the Australian Constitution” (2014) 42(2) *Federal Law Review* 253, 271-2.

<sup>59</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581.

prerogative relief; limited access to information; and, most significantly, the statutory ousting of judicial review.

### Entitlement to Procedural Fairness

38. First, as was demonstrated in *Testro Bros*, traditionally, investigators who were to provide reports which did not directly affect rights but rather informed executive action were not bound by the rules of procedural fairness. However, as the test for procedural fairness began to relax, investigatory bodies were caught within its scope. In *In Re Pergamon Press Ltd*, Lord Denning observed, again in respect of a statutorily appointed investigator of a company:

*"It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings ... they are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report ... But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions..."*<sup>60</sup>

39. And so it is the case with the reports and activities of integrity bodies. In *Mahon v Air New Zealand*, it was recognised that there was a duty to hear relevant evidence from a person whose "interests", including career and reputation, may be adversely affected by a finding of a Royal Commission, although in that case economic rights were directly affected since an adverse costs order had been made.<sup>61</sup> By the time of *Glynn v ICAC* in 1990, it was accepted that "there could be little argument that [the ICAC had] an obligation to provide a fair and unbiased hearing, and an obligation to sufficiently inform parties, who might be the subject of adverse findings, of the matters they should expect to meet".<sup>62</sup>
40. *Annetts v McCann* and *Ainsworth v Criminal Justice Commission* were two landmark cases which solidified the right of a person whose reputation is likely to be affected by the findings of a public inquiry to have a full and fair opportunity to show why the findings should not be

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<sup>60</sup> [1971] Ch 388, 399.

<sup>61</sup> [1984] AC 808, 820.

<sup>62</sup> (1990) 20 ALD 214, 215.

made, subject to contrary statutory intention.<sup>63</sup> The Court in *Ainsworth* held that “the law proceeds on the basis that reputation itself is to be protected”.<sup>64</sup>

41. Nevertheless the content of procedural fairness remains flexible, as Justices Gaudron and Gummow said in *Aala* “it is trite that, where the obligation to afford procedural fairness exists, its precise or practical content is controlled by any relevant statutory provisions and, within the relevant legislative framework”,<sup>65</sup> and this is for good reason. One particular concern in the context of integrity body legislation is that disclosure of adverse information may compromise confidential sources or whistle-blowers.<sup>66</sup> As the plurality observed in *National Companies and Securities Commission v News Corp*, a broad duty of disclosure may frustrate the investigatory purpose of a hearing: “for an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry”.<sup>67</sup> A further consideration was that the right of a party to call evidence, cross-examine witnesses and make submissions “would run counter to the need in many cases for a hearing to be conducted with expedition”,<sup>68</sup> particularly where the inquiry was conducted “to protect the public from dealings which may themselves be carried out swiftly and in secret”.<sup>69</sup>
42. It is also important to remember, as the majority held in *Chaffey v ICAC*, that a right to procedural fairness does not equate to a right to have proceedings conducted in such a way as to minimise any damage to reputation.<sup>70</sup>

### Availability of Remedies

43. On the whole, the modern application of procedural fairness to investigative commissions strikes a fair balance. However, while the grounds of review may have developed to account for the changing

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<sup>63</sup> (1990) 170 CLR 596, 599 (Mason CJ, Deane and McHugh JJ), 608 (Brennan J).

<sup>64</sup> (1992) 175 CLR 564, 577.

<sup>65</sup> *Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82, [60]; see also *Kioa v West* (1985) 159 CLR 550, 632-633; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 652-653.

<sup>66</sup> See Chris Wheeler, “Review of Administrative Conduct and Decisions in NSW Since 1974 – an ad hoc and incremental approach to radical change” (Speech presented at the 2012 National Administrative Law Conference, Adelaide, 19 July 2012).

<sup>67</sup> *National Companies and Securities Commission v News Corporation Limited* (1984) 156 CLR 296, 323-4.

<sup>68</sup> *Ibid* 323.

<sup>69</sup> *Ibid* 311.

<sup>70</sup> (1993) 30 NSWLR 21, 28.

landscape of the exercise of public power, the remedies have proved less adaptable.

44. One of the earlier cases dealing with the availability of the prerogative writs against a respondent with investigative and inquisitorial functions was *Re Grosvenor and West-End Railway Terminus Hotel* in 1897.<sup>71</sup> There, Lord Escher held that since the nature of the inquiry was only to examine into and ascertain facts and report an opinion, “even if [the inspector] should overstep the authority which he has he would not be liable to the writ of prohibition”.<sup>72</sup>
45. In *R v Coppel; Ex Parte Viney Industries*, a precursor to *Testro Bros* with substantially similar facts, the Full Court of the Supreme Court of Victoria held that it could not depart from *Re Grosvenor* which had “stood for over 60 years and during this period ha[d] governed the nature of inspections”.<sup>73</sup> Prohibition was denied by the Victorian Court because “it is not the report or opinion of the inspector expressed in it, but action which others may or may not decide to take, that will affect the position of the company”.<sup>74</sup>
46. The seeds of a more flexible test were planted in the dissenting opinions in *Testro Bros*. Justice Kitto held that the report itself prejudiced rights “by placing them in a new jeopardy”.<sup>75</sup> This was so “notwithstanding that an adverse report will do no more than expose him to a possibility not previously existing of a deprivation of rights by the exercise of a discretionary power by another authority”.<sup>76</sup> Though notably, he contrasted the report of the inspector with the report of a royal commission which, he observed, “is a report and nothing more”.<sup>77</sup> Meanwhile, Justice Menzies held that if the investigation were limited to obtaining information for the Minister upon which he may base his decisions and actions “the intervention of the Court could not be invoked to control the investigation, no matter how authoritative its procedures, how searching its probing and how likely it might be in the circumstances to lead unjustly to loss of business, loss of reputation or adverse proceedings”.<sup>78</sup> However, the fact that an adverse finding in the

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<sup>71</sup> (1897) 76 LT 337 (*Re Grosvenor*).

<sup>72</sup> *Ibid* 338.

<sup>73</sup> [1962] VR 630, 633.

<sup>74</sup> *Ibid* 636.

<sup>75</sup> (1963) 109 CLR 353, 368.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* 366.

<sup>78</sup> *Ibid* 373.

report established a ground for winding up the company in court was, in his opinion, sufficient to affect the legal position of the company.

47. In the Privy Council case of *R v Criminal Injuries Compensation Board*, Lord Chief Justice Parker noted the expansion of the writ of certiorari over the years “to meet changing conditions”, pointing out that the condition of an effect upon legal rights was really just a recent development stemming from the older condition that the writ was only available against inferior courts: “the only constant limits throughout were that it was performing a public duty”.<sup>79</sup> The Court supported a looser test whereby a “determination may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering ... legal rights or liabilities” or where “there may be some subsequent decision to be satisfied”.<sup>80</sup>
48. In *Brettingham-Moore*, the High Court accepted that the fact that a report “is not self-executing or that the discretion of the Executive is interposed between it and any actual consequence” would not prevent relief.<sup>81</sup>
49. Summarising these authorities, Justice Stephen in *R v Collins; Ex Parte ACTU Solo Enterprises* framed the test as being satisfied in one of three ways: first, where the report, of its own force, affects rights; second, where the report satisfies some condition precedent to the exercise of power which affects rights; and third, where the report places rights in a new jeopardy or subjects them to a new hazard.<sup>82</sup> The report of a royal commission did not satisfy any strand of this test because the Minister could take action against the applicant “with or without such a report, and even, no doubt, in direct opposition to it”.<sup>83</sup>
50. This finding was crucial to the outcome in *Ainsworth*, a case to which I will return in more detail later. There the Court found that even though the *Gaming Machine Act* made reputation a matter to be taken into account in determining whether a licence should be granted, the damning report of the Criminal Justice Commission against the Ainsworth group of companies could not be quashed by certiorari

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<sup>79</sup> [1967] 2 QB 864, 882.

<sup>80</sup> Ibid 884.

<sup>81</sup> *Brettingham-Moore v Warden, Councillors and Electors of Municipality of St Leonards* (1969) 121 CLR 509, 522.

<sup>82</sup> (1976) 8 ALR 691, 695.

<sup>83</sup> Ibid 699.



because the companies could still be granted a licence even in direct opposition to any recommendations the report made.<sup>84</sup>

51. However, the question of whether the executive could act contrary to the recommendations of a report eventually mutated into a question of whether the ultimate decision maker could ignore the report. In *Hot Holdings v Creasy*, the majority of the High Court found that “while it may be true that the *content* of the ... report and recommendation does not bind the Minister, this does not mean that the report and recommendation ... is not something which the Minister is *bound to have regard* in exercising his discretion”,<sup>85</sup> as such, the report had a sufficient “legal effect upon rights to attract certiorari”.<sup>86</sup>
52. This was a significant weakening of the nature of an effect upon legal rights, which effectively aligned the test for certiorari with the *Peko-Wallsend* test for mandatory considerations.<sup>87</sup> Meanwhile one articulation of the test in *Ainsworth*, that the report is “a step in a process capable of altering rights, interests or liabilities”,<sup>88</sup> continues to be deployed with varying results.
53. Two Full Court of Western Australian decisions concerned disciplinary action against police officers which resulted from investigations of the Anti-Corruption Commission. Under sections 21 and 22 of the *ACC Act* the ACC could refer allegations and forward their report to an independent agency or appropriate authority for further action.<sup>89</sup> Under these provisions the ACC recommended to the Commissioner of Police that the applicants be removed from office and the Commissioner acted upon this.
54. In *Parker v Miller*, Chief Justice Malcolm held that the findings, conclusion and recommendation of the ACC “were intended to be a step in the process of altering rights, interests or liabilities”,<sup>90</sup> while Justice Ipp held that the findings were “capable of causing far-reaching prejudice... result[ing] from the weight that others may attach thereto”; he continued, “[a]s can be seen in the present case, the Commissioner acted immediately upon the findings”.<sup>91</sup>

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<sup>84</sup> (1992) 175 CLR 564, 581.

<sup>85</sup> (1996) 185 CLR 149, 170.

<sup>86</sup> *Ibid* 165.

<sup>87</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>88</sup> (1992) 175 CLR 564, 580.

<sup>89</sup> *Anti-Corruption Commission Act 1988* (WA).

<sup>90</sup> [1998] WASCA 124.

<sup>91</sup> *Ibid*.

55. In *Parker v ACC*, Justice Murray observed that Justice Ipp had “rested his view that prerogative relief was available ... upon the proposition that the reports made were available and were indeed relied upon by the appropriate authority to support the disciplinary action”.<sup>92</sup> Justice Murray held that the ACC’s recommendations may not be a precondition to disciplinary action but were a step in the process capable of affecting rights. Notably, he also referred to the fact that the Commissioner did expressly ground his action in the report.
56. The suggestion that factual causation is relevant in determining whether a report affects legal rights would seem to be an even weaker version of the test but one that can only be applied after the right has finally been affected. These cases raise questions as to the effect of, for instance, s 114A of the *ICAC Act* which provides that, where the ICAC finds that a public official has engaged in corrupt conduct, disciplinary proceedings may be taken and the authority determining the disciplinary proceedings is not required to investigate whether that conduct has occurred.<sup>93</sup> This is a stronger provision than those found in the *ACC Act* and yet this does not seem to render every finding of corrupt conduct by the ICAC amenable to certiorari. Must the actual train of events be set in motion?
57. In *Byrnes v Marles*,<sup>94</sup> the Victorian Court of Appeal chose to construe the *Ainsworth* “step in a process test” by reference to the test in *Bond v Australian Broadcasting Tribunal*, which concerned the meaning of the word “decision” under the ADJR Act.<sup>95</sup> It is not clear that this is a perfect analogy. The decision in issue was a decision by the Legal Services Commissioner to treat a complaint as a disciplinary complaint which then enlivened the investigatory powers of the Commissioner. While the Court held that this may render the decision a condition precedent in a limited sense, it did not necessarily follow from the decision that compulsive powers would be used.<sup>96</sup> This would suggest that the decision must affect legal rights rather than being “capable” of affecting legal rights.
58. *Eastman v Miles* concerned the report of a judge which was directed to be made if, after the conviction of a person, a doubt arose as to their guilt.<sup>97</sup> The statutory provision stated that the Executive, on the report of such judge, shall dispose of the matter as appears just. The Court held

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<sup>92</sup> (Unreported, Supreme Court of Western Australia Full Court, Pidgeon, Murray and Wheeler JJ, 31 March 1999)

<sup>93</sup> *Independent Commission Against Corruption Act 1988* (NSW), s 114A.

<sup>94</sup> (2008) 19 VR 612.

<sup>95</sup> *Ibid* 630-1.

<sup>96</sup> *Ibid* 632.

<sup>97</sup> (2007) 210 FLR 417.

that certiorari did not lie against the judge's report since there was no obligation on the executive to make a decision on the report.<sup>98</sup> Aronson, Groves and Weeks criticise this decision arguing that the report should have been construed as a mandatory consideration since courts "should be reluctant to interpret an Act as getting a judge to engage in a wholly useless exercise".<sup>99</sup>

59. In South Australia, s 273 of the *Local Government Act* establishes a scheme whereby the Minister for Local Government may take certain action on the basis of a report of the Auditor-General or the Ombudsman or on information provided by the ICAC.<sup>100</sup> In *City of Port Adelaide Enfield v Bingham*, the Court interpreted this provision as rendering the Ombudsman's report a statutory precondition to the alteration of rights.<sup>101</sup> In contrast to any test of factual causation, Justice Stanley held that "the test is only concerned with potentialities".<sup>102</sup> The outcome of this case, "admittedly a first instance decision", must mean that the actions of certain integrity bodies in South Australia are significantly more open to relief by certiorari than in other states.
60. In *Plaintiff M61*, the High Court hinted at a further evolution of the test, leaving open the question of whether certiorari would lie where the decision-maker *might* but *need not* take a recommendation into account.<sup>103</sup>
61. As can be seen from a review of these recent authorities, the state of the law concerning the availability of certiorari against bodies conducting investigations and preparing reports is unsatisfactory and inconsistent. There are three points to note about the availability of certiorari against integrity bodies, each of which find some articulation in *Ainsworth*.
62. First, while the implication of procedural fairness has been liberalised, the availability of certiorari remains tied to legal rights. At some point, the writ of prohibition seems to have abandoned its requirement of an effect on legal rights. While prohibition and certiorari have always been viewed as two sides of the same coin,<sup>104</sup> in *Annetts v McCann*, the High Court was happy to award prohibition where the only interests grounding

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<sup>98</sup> Ibid 432.

<sup>99</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action* (6<sup>th</sup> ed, Thomson Reuters, 2017) 869.

<sup>100</sup> *Local Government Act 1999* (SA), s 273.

<sup>101</sup> [2014] SASC 36, [17].

<sup>102</sup> Ibid.

<sup>103</sup> *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358-9.

<sup>104</sup>

that remedy were damage to reputation or the legitimate expectation in being afforded procedural fairness.<sup>105</sup> In *Ainsworth*, the Court confirmed that prohibition would have been available to prevent the report being published in breach of the rules of natural justice, but that after publication, prerogative relief was unavailable.<sup>106</sup> As Justice Basten observed in *Police Integrity Commission v Shaw*, “a case in which procedural fairness has not been accorded is likely to be the kind of case where the prosecutor will not have the opportunity to seek prohibition”.<sup>107</sup> This can leave a breach of procedural fairness without satisfactory remedy.

63. Secondly, the most convincing reason why certiorari requires a decision affecting legal rights is not historical but in the very nature of the order. As Justice Brennan stated: “Quashing annihilates the legal effect of an act or decision ... if an act or decision has no legal effect, there is nothing to quash”.<sup>108</sup> However, as the nature of the effect on legal rights becomes weaker and weaker, it is questionable whether this understanding of the remedy still accords with its modern use. Furthermore, cases like *Greiner v ICAC* indicate that courts are willing to issue declarations that reports, which are not amenable to certiorari, are nonetheless “a nullity”.<sup>109</sup> Is there any functional distinction between declaration and certiorari in these cases?
64. Thirdly, the Court in *Ainsworth* held that the “blackening” of the appellants’ reputations was a practical effect rather than a legal effect.<sup>110</sup> Courts have repeatedly had to deal with the fact that the ability to inflict reputational damage is a powerful and destructive tool that should be exercised with “grave responsibility”.<sup>111</sup> The line between practical and legal effects can also be hard to draw. In *Balog v ICAC*, the High Court held that a construction of the *ICAC Act* which did not give the Commission a right to make findings of criminal guilt was to be preferred. One of the reasons for this was because “where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred”.<sup>112</sup> In restating this principle, Justice Einfield said: “if there is a valid construction of the Act that does

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<sup>105</sup> (1990) 170 CLR 596, 599.

<sup>106</sup> (1992) 175 CLR 564, 581.

<sup>107</sup> (2006) 66 NSWLR 446, 462.

<sup>108</sup> (1992) 175 CLR 564, 595.

<sup>109</sup> (1992) 28 NSWLR 125,148-9 ;See Basten JA’s comment in *Police Integrity Commissioner v Shaw* (2006) 66 NSWLR 446, 462.

<sup>110</sup> (1992) 175 CLR 564, 581.

<sup>111</sup> Chaffey

<sup>112</sup> (1990) 169 CLR 625, 635-6.

not trample on common law rights such as the right to be treated innocent until guilt is proven ... then that construction should be adopted".<sup>113</sup> Despite finding that the Ombudsman *had* made invalid findings of guilt and therefore had presumably abrogated the right to be treated innocent until proven guilty, Justice Einfield went on to find "the report itself does not affect legal rights".<sup>114</sup> These findings are difficult to reconcile.

65. Furthermore, it may often be the case that fundamental rights have been abrogated, for instance by compelling testimony without the privilege against self-incrimination in circumstances where procedural fairness has not been afforded, but once the right has been abrogated, it is only the report itself that can be challenged.
66. Of course, certiorari and prohibition are not the only form of relief available to litigants, but the remaining remedies are not without limitations. The unavailability, in most cases, of mandamus is understandable, either because decisions to conduct investigations are generally discretionary and the question of resource allocation political or because it will have limited practical utility.<sup>115</sup>
67. An order for injunction faces many of the same issues as prohibition with regard to timing. Courts have also demonstrated reluctance to "impede the conduct of executive inquiries into matters of public importance".<sup>116</sup> Very often the weight of the public interest in shining light on misconduct will outweigh the risk of damage to reputation in the balance of convenience test for an interlocutory injunction.<sup>117</sup>
68. After this point, the only remedy remaining is declaration. I mentioned before that there may be very little functional difference between declaration and certiorari where the reports of integrity bodies are concerned. Where this distinction becomes crucial, however, is where the court's jurisdiction is ousted by a privative clause. This is an issue to which I will turn in a moment.
69. Before considering the final two limitations on judicial review of integrity bodies, however, it is necessary to make another historical detour to

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<sup>113</sup> *Chairperson, Aboriginal And Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163, 173.

<sup>114</sup> *Ibid* 191.

<sup>115</sup> See *Ainsworth* (1992) 175 CLR 564, 595; *Chairperson, Aboriginal And Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163, 192.

<sup>116</sup> *Hammond v Commonwealth* (1982) 152 CLR 188, 199.

<sup>117</sup> See *Aboriginal Legal Rights Movement Inc v South Australia* (1995) 64 SASR 558; *Kaldas v Barbour* [2016] NSWSC 1880.

consider the extent to which the Constitution actually enshrines mutual accountability, and particularly judicial review of administrative action, within the separation of powers.

## SEPARATION OF POWERS

70. An examination of the early jurisprudence on Ch III reveals a strong concern to insulate the judicial power of the Commonwealth. In a series of cases between 1909 and 1918,<sup>118</sup> the High Court had already staked out a set of functions exclusively exercisable by the judiciary. This was based both on the structural separation of powers in the first three Chapters of the Constitution and the fact that s 71 was exhaustive in its terms.<sup>119</sup> By 1918, in *Alexander's Case*, Chief Justice Griffith held that “any attempt to vest any part of the judicial power of the Commonwealth in any body other than a Court is entirely ineffective”.<sup>120</sup> The trend of these cases culminated, of course, in the *Boilermakers* doctrine which held not only that the judicial power was to be exclusively exercised by Ch III courts but that Ch III courts could not exercise non-judicial power.<sup>121</sup>
71. As Fiona Wheeler has pointed out, “[t]he exclusive vesting of federal judicial power in Chapter III courts, although suggested by s 71 of the Constitution, draws decisive force from our inherited legal traditions and the need to promote the supremacy of law over arbitrary power”.<sup>122</sup> While these early cases were primarily concerned with the institutional allocation of power, a variety of themes began to emerge all indicative of a purposive approach to constitutional interpretation which relied on unearthing the defining or essential characteristics of courts.
72. The first, emanating directly from *Boilermakers*, was the incompatibility doctrine. In *Grollo v Palmer*, the majority held that “no function can be conferred [on a judge] that is incompatible either with the Judge’s performance of his or her judicial functions or with the proper discharge

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<sup>118</sup> *Huddart Parker and Co Proprietary Limited v Moorehead* (1909) 8 CLR 330; *New South Wales v Commonwealth* (1915) 20 CLR 54 (*The Wheat Case*); *The Waterside Workers’ Federation of Australia v J W Alexander Limited* (1918) 25 CLR 434 (*Alexander’s Case*).

<sup>119</sup> See eg, *New South Wales v Commonwealth* (1915) 20 CLR 54, 90, 93.

<sup>120</sup> (1918) 25 CLR 434, 442.

<sup>121</sup> *R v Kirby; Ex Parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

<sup>122</sup> Fiona Wheeler, “The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia”, (1997) 23 *Monash University Law Review* 248, 253.

by the judiciary of its responsibilities as an institution exercising judicial power".<sup>123</sup>

73. Secondly, there was the doctrine of legislative usurpation or interference. In the *BLF Case*, the Court held that while "Parliament may legislate so as to affect and alter [substantive] rights in issue in pending litigation ... it is otherwise when the legislation in question interferes with the judicial process itself".<sup>124</sup> In *Lim v Minister for Immigration*, the plurality held that the grants of legislative power did not "extend to the making of a law which requires or authorises the courts ... to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".<sup>125</sup> In determining what these essential characteristics are, recourse is to be had to the common law and to history.<sup>126</sup>
74. Finally, there was the development of an entrenched supervisory jurisdiction independent of s 75(v) of the Constitution, the seeds of which are to be found in *R v Coldham*.<sup>127</sup> In that case, the High Court held that it was not open to it "to abrogate both its own jurisdiction and the constitutional rights of the citizen" by treating the determination of a non-judicial body on a question of jurisdiction as conclusive.<sup>128</sup> In *Plaintiff S157*, the Court picked up this jurisprudence and employed it in one strand of reasoning to limit the powers of Parliament to create privative clauses.<sup>129</sup> Quite apart from the provisions of s 75(v), the Court held that is it "beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power".<sup>130</sup>
75. While there is a distinction between the constitutional protection of courts' decisional independence in a specific case, the protection of the courts' institutional independence and integrity and the protection of the courts' supervisory jurisdiction, they are all variations on a theme concerned with defining the essential characteristics of the judicial power. In *Plaintiff S157* conclusive determination of the limits of jurisdiction was one manifestation of an essential judicial power.

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<sup>123</sup> (1995) 184 CLR 348, 365; this principle was applied on the facts in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

<sup>124</sup> (1986) 161 CLR 88, 96.

<sup>125</sup> (1992) 176 CLR 1, 27.

<sup>126</sup> *Ibid*; see also *Leeth v Commonwealth* (1992) 174 CLR 455, 485 (Deane and Toohey JJ).

<sup>127</sup> (1983) 153 CLR 415.

<sup>128</sup> *Ibid* 429.

<sup>129</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>130</sup> *Ibid* 484 (Gleeson CJ).

76. In the context of the states, the courts have reiterated that there is no constitutional separation of powers.<sup>131</sup> Nevertheless, a similar principle has been developed which centres on the defining characteristics of a State Supreme Court as that term is defined in the Constitution. In this way, at least two of the constitutional doctrines discussed have been translated into “a more limited and amorphous version” in the state sphere.<sup>132</sup>
77. In *Kable*, the incompatibility doctrine in its institutional manifestation found root in the State context by reasoning that first, under s 73 State Supreme Courts form part of the integrated system of law exercising federal judicial power and second, that the term “Supreme Court of [a] State” within s 73 therefore has a defined content which the Supreme Courts must continue to meet.<sup>133</sup>
78. In *Kable*, “institutional integrity” was one defining characteristic. In *Kirk*, the High Court identified another, namely the power “to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error”.<sup>134</sup> In this way, the entrenched supervisory jurisdiction was translated into the state context.
79. It may still be an open question whether the doctrine of legislative usurpation or interference has a state corollary. In the *NSW BLF Case*, the NSW Court of Appeal emphatically denied that it did since State Parliaments have plenary power and there is no constitutional separation of powers.<sup>135</sup> However, this case was decided before *Kable*. In *Duncan v ICAC*, the High Court held that legislation retrospectively enlarging the jurisdiction of ICAC was permissible as a substantive change in the law;<sup>136</sup> this implies, however, that legislative interference in the judicial process may not be.
80. This potted history of the separation of powers at federal and state levels aims to demonstrate the central constitutional importance of the

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<sup>131</sup> *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders' and Labourers Federation Of New South Wales v Minister For Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ), 400-1 (Kirby P), 407 (Glass JA) 409 (Mahoney JA), 418-9 (Priestley JA) (*NSW BLF Case*); *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 118 (McHugh J) (*Kable*).

<sup>132</sup> Anne Twomey, “The Constitutional Legacy of the High Court under Chief Justice French (2017) 91 *Australian Law Journal* 23, 26.

<sup>133</sup> (1996) 189 CLR 51; see also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 75-6.

<sup>134</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 566.

<sup>135</sup> (1986) 7 NSWLR 372, 381 (Street CJ), 400-1 (Kirby P), 407 (Glass JA), 409 (Mahoney JA), 418-9 (Priestley JA).

<sup>136</sup> (2015) 256 CLR 83, 98.



duty and power, exclusively conferred on the courts, to declare and enforce the law, particularly the law affecting the extent and exercise of government power.<sup>137</sup> To what extent is this protected with regard to the powers of integrity bodies?

### Access to Information

81. One situation in which the question of the entrenched supervisory jurisdiction may arise with respect to integrity bodies is the inability to access information necessary to identify and litigate jurisdictional error. Many of the statutes governing integrity bodies contain secrecy provisions which prevent disclosure of operational information, including to courts. There are good reasons for confidentiality, particularly in anti-corruption investigations, but it is a fine balance to strike which weighs the effectiveness of an investigation against the transparency of the body itself.
82. This was an issue that arose before the Court of Appeal in *A v ICAC* which, among other provisions, concerned s 111 of the *ICAC Act*.<sup>138</sup> The appellant company had been issued a summons by the ICAC which it attempted to challenge by arguing that the documents sought lacked relevance to the investigation. Because it had not yet been informed of the nature of the allegation being investigated, and was not entitled to be informed until the commencement of compulsory examination, the challenge on the ground of relevance could not be made out.
83. The appellant argued that s 111 – which provided that officers of ICAC were not required to produce documents or divulge information relating to the exercise of their functions in court – deprived the court of an important aspect of its supervisory jurisdiction, contrary to the principle in *Kirk*. The Court found that s 111 did not meet the threshold in *Kirk*; while it may create evidentiary difficulties for the appellant it did not wholly deprive the Court of jurisdiction.<sup>139</sup> Historically, cases have shown that the legislature may validly regulate the method and burden of proving facts without usurping judicial power,<sup>140</sup> as such, “the ability to obtain the production of documents by a compulsory process in a

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<sup>137</sup> See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J).

<sup>138</sup> (2014) 88 NSWLR 240.

<sup>139</sup> *Ibid* 278.

<sup>140</sup> *Ibid* 255-6 Basten; 278 (Ward JA); see also *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12; *Nicholas v The Queen* (1998) 193 CLR 173, 188-9.

particular case is not an essential or defining characteristic of [the Supreme Court]”.<sup>141</sup>

84. Similar issues are faced by plaintiffs seeking statements of reasons or orders for discovery under the court rules.<sup>142</sup> In *Cunneen v ICAC*,<sup>143</sup> a statement of reasons was sought, under r 59.9(4) of the Uniform Civil Procedure Rules, for the ICAC’s decision to investigate allegations and hold a public inquiry. The ICAC argued that such an order would offend s 111. Factors which affected the exercise of discretion of the Court at first instance in refusing the order included that the ICAC would fail to comply; that a statement of reasons would be prejudicial to an investigation in its early stages by requiring premature disclosure of material; that there was no common law duty to provide reasons; and that a judicial review challenge would be better timed after the release of the report.<sup>144</sup> On appeal, it was held that even if the statement of reasons was not a document caught by s 111 per se, it would require disclosure of other documents and material that were caught by the provision.<sup>145</sup>
85. In *SA v NSW Crime Commission*,<sup>146</sup> Justice Fagan applied the jurisprudence regarding s 111 of the *ICAC Act* to s 80 of the *Crime Commission Act*. He held that “even if s 80 was not an absolute legislative bar to an order for production of reasons ... it would be a powerful consideration [in the exercise of discretion] against making such an order”.<sup>147</sup>
86. Notably, the schedule of exempt bodies in the *NSW Freedom of Information Act* contains a comprehensive list of the State’s integrity bodies.<sup>148</sup> Where an FOI request relates to one of the broad functions set out in the schedule, the body is not required to consider or deal with the request and there can be no review of a request refusal.<sup>149</sup>
87. What is evident from these cases is, as Sarah Howe and Yvonne Haigh have observed: “First, the ability of the applicant to discharge their

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<sup>141</sup> (2014) 88 NSWLR 240, 278.

<sup>142</sup> See *Corruption and Crime Commission of Western Australia v Allen* [2012] WASCA 242 for a case concerning an order for pre-action discovery.

<sup>143</sup> [2014] NSWCA 421.

<sup>144</sup> *Ibid* [143].

<sup>145</sup> *Ibid* [157].

<sup>146</sup> [2015] NSWSC 1979.

<sup>147</sup> *Ibid* [27].

<sup>148</sup> *Freedom of Information Act 1989* (NSW) Sch 2.

<sup>149</sup> See *Independent Commission Against Corruption v McGuirk* [2007] NSWSC 147; *Hall v Independent Commission Against Corruption* [2008] NSWADT 271.

burden of proving a legal error ... is compromised by lack of access to evidence”; and second, lack of access to information makes it difficult to understand the decision’s justification which “can be the impetus for an applicant commencing a Supreme Court action in circumstances where the applicant is ill equipped to see its futility”.<sup>150</sup>

88. Interestingly, the situation may be different for integrity bodies operating at the Commonwealth level due to the High Court’s entrenched jurisdiction under s 75(v), though the question will be one of substance and degree. In the recent High Court decision of *Graham v Minister for Immigration*, the majority of the Court held that the question of whether a law transgressed the constitutional limitation expressed in *Plaintiff S157* required examination of both the legal and practical operation of the law.<sup>151</sup> Section 503A(2)(c) of the *Migration Act* provided that the Minister could not “be required to divulge information which was relevant to the exercise of his power ... to any person or to a court if that information was communicated by a gazetted agency on condition that it be treated as confidential”.<sup>152</sup> The Court held that the provision prevented it from “obtaining access to a category of information which, by definition, [was] relevant to the purported exercise of power”<sup>153</sup> and thus operated to “shield the purported exercise of power from judicial scrutiny”.<sup>154</sup> A crucial factor was the inflexibility of the provision which withheld information from the Court regardless of its importance to the review.<sup>155</sup>
89. Any attempt to apply this reasoning at the state level would have to confront the High Court’s rejection of an argument based on institutional integrity, which employed much of the same reasoning as in *A v ICAC*.<sup>156</sup> It is notable that the Court exclusively grounded its decision in s 75(v).

### Privative Clauses

90. The final and most important limitation on judicial review is the effectiveness of privative clauses which oust the jurisdiction of courts to supervise the activity of integrity bodies. It is common practice for both

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<sup>150</sup> Sarah Withnall Howe and Yvonne Haigh, “Anti-Corruption Watchdog Accountability: The Limitations of Judicial Review’s Ability to Guard the Guardians” (2016) 75(3) *Australian Journal of Public Administration* 305, 309.

<sup>151</sup> [2017] HCA 33, [48].

<sup>152</sup> *Ibid* [3].

<sup>153</sup> *Ibid* [52].

<sup>154</sup> *Ibid* [53].

<sup>155</sup> *Ibid* [61]-[62].

<sup>156</sup> *Ibid* [29]-[37].

Commonwealth and state legislatures to include privative provisions within the governing legislation of government watchdogs.<sup>157</sup>

91. While the question has not been properly tested at the Commonwealth level, it is likely that since the separation of powers prevents a non-judicial body from exercising judicial power by conclusively determining the limits of its own jurisdiction,<sup>158</sup> judicial review of integrity bodies would be preserved regardless of the remedy sought.
92. It might be thought, in light of *Kirk*, that state provisions were also no longer effective;<sup>159</sup> however, a closer consideration of the test formulated in *Kirk* would appear to fall short of protecting judicial review of bodies that only investigate and report.
93. Before considering *Kirk* in greater detail, it is necessary to briefly consider the history of the privative clause at a state level. *Australasian Colonial Bank v Willan* is often cited as an early example of courts giving a limited construction to a privative clause. In that case, the Court held that a privative clause did not absolutely “deprive the Supreme Court of its power to issue a writ of certiorari”, however, a court would not quash the order removed “except upon the ground either of a manifest defect of jurisdiction ... or of manifest fraud”.<sup>160</sup>
94. As we saw before, in this notion of “manifest defect of jurisdiction” may be sourced the origins of the modern concept of jurisdictional error.<sup>161</sup> Yet undoubtedly, “[b]oth in theory and in substance, the ground of manifest defect of jurisdiction” is much narrower than “the ever-evolving early 21<sup>st</sup>-century Australian concept of jurisdictional error”.<sup>162</sup>
95. As Chief Justice Gleeson observed in *Plaintiff-S157*, “the echoes of what was said by the Privy Council in *Willan* are discernible [in *R v*

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<sup>157</sup> See eg, *Royal Commissions Act 1917* (SA), s 9; *Police Integrity Act 2008* (Vic), s 109; *Ombudsman Act 1976* (Cth), s 33; *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 222; *Australian Information Commissioner Act 2010* (Cth), s 35.

<sup>158</sup> See *R v Coldham* (1983) 153 CLR 415, 429; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484.

<sup>159</sup> See eg, WMC Gummow AC, “A Fourth Branch of Government” (2012) 70 *AIAL Forum* 19, 24: “The upshot of these decisions [*Kirk* and *Public Service Association of SA Incorporated v Industrial Relations Commission (SA)*] is that notwithstanding what in some respects is the fluid nature of State constitutional arrangements, a State ‘integrity branch’ would not be immune from judicial oversight”

<sup>160</sup> (1873-74) LR 5 PC 417, 442.

<sup>161</sup> Stephen Gageler SC, “Impact of Migration Law on the Development of Australian Administrative Law” (2010) 17 *Australian Journal of Administrative Law* 92, 96 fn 27.

<sup>162</sup> Oscar I Roos, “Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*” (2013) 35 *Sydney Law Review* 781, 803.

*Hickman*]].<sup>163</sup> In *Hickman*, Justice Dixon formulated the famous rule of interpretation regarding privative clauses, namely that a decision to which such a clause refers is limited to one that is a bona fide attempt to exercise power, relates to the subject matter of the legislation, and is reasonably capable of reference to the power given to the body.<sup>164</sup>

96. *Hickman* was concerned with the operation of s 75(v), but in its application to the states it was simply a rule of interpretation, a presumption: “that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied”.<sup>165</sup> Of course, “access to the courts” is a very broad statement of the protection, it has always been limited by reference to the type of *error* and in most statements of the principle to the type of *remedy*, so in *Public Service Association of South Australia v Federated Clerks’ Union of Australia*, the High Court held that “a clause which is expressed only in general terms may be construed so as to preserve the *ordinary jurisdiction* of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted by failure to exercise jurisdiction or by an act in excess of jurisdiction”.<sup>166</sup>
97. It is such references to the “ordinary jurisdiction” and the “prerogative writs” that would seem to prove problematic when dealing with privative clauses in integrity body legislation since, as discussed, litigants are often limited to relief by way of declaration. Nonetheless, throughout the period that *Hickman* governed the interpretation of state privative clauses, a number of cases were brought against integrity bodies whose governing legislation contained such clauses. Two cases in South Australia sought declaratory orders against royal commissions in spite of s 9 of the South Australian *Royal Commissions Act*. In *ABC v Jacobs*,<sup>167</sup> s 9 was held to capture declarations and the Court moved on to a consideration of *Hickman*, however, the alleged error did not meet the *Hickman* test and thus the clause ousted jurisdiction. A special leave application in *Trevorrow v South Australia* met a similar fate.<sup>168</sup> Interestingly, in both cases the Court appears to proceed on the assumption that if a *Hickman*-type error were made out, the clause

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<sup>163</sup> (2003) 211 CLR 476, 487.

<sup>164</sup> *R v Hickman; Ex Parte Fox* (1945) 70 CLR 598, 615.

<sup>165</sup> *Public Service Association (SA) v Federated Clerks’ Union* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ); *Darling Casino Limited v New South Wales Casino Control Authority* (1997) 191 CLR 602, 633 (Gaudron and Deane JJ).

<sup>166</sup> (1991) 173 CLR 132, 160.

<sup>167</sup> (1991) 56 SASR 274.

<sup>168</sup> [1997] 17 Leg Rep SL2b.

would not prevent declaratory relief. However, it is equally possible that the Courts simply did not get to this question. On the other hand, at least two actions against an Ombudsman for declaratory relief were found to be excluded due to the clear language of the privative clauses and the courts undertook no consideration of *Hickman* at all.<sup>169</sup>

98. The issue is one of the level of generality at which the principle is expressed. So in *McGee v Gilchrist-Humphrey*, another case concerning s 9 of the *Royal Commissions Act* (SA), the Full Court of South Australia articulated the presumption as being that “Parliament is unlikely to have intended to confer a power ... and to put the exercise of that power beyond *any means of control* by this Court”.<sup>170</sup> If the emphasis is purely upon the type of error, integrity bodies will not be shielded from review for jurisdictional error, if emphasis is placed on the type of error *and* the remedial jurisdiction of the court, they will largely escape supervision.
99. And so we come to *Kirk*. The constitutionally entrenched jurisdiction in *Kirk* seems to be grounded in two lines of reasoning. On the one hand, the permissible operation of privative clauses has always developed by reference to the type of error. In *Willan* it was “manifest defect of jurisdiction”, in *Hickman* it was *mala fides* and want of jurisdiction and in *Kirk* it was jurisdictional error. This aligns with the supervisory function of the courts to avoid the creation of “islands of power immune from supervision and restraint”.<sup>171</sup> In *Kirk*, jurisdictional error was defined by reference to the idea expressed in *Coldham* and *Plaintiff S157* that a “tribunal of limited jurisdiction should not be the final judge of its exercise of power”.<sup>172</sup> If it is this characteristic – “the power to grant relief on account of jurisdictional error”<sup>173</sup> – that is constitutionally entrenched, the reports of integrity bodies will not be immune from review.
100. However, the High Court in *Kirk* also undertook an originalist exercise, by reference to *Willan*, in order to define the content of “a State Supreme Court” by reference to its jurisdiction at federation.<sup>174</sup> As many

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<sup>169</sup> *Ainsworth v Ombudsman* (1988) 17 NSWLR 276; *Alice Springs Town Council v Watts* (1982) 5 ALD 1.

<sup>170</sup> (2005) 92 SASR 100, 105.

<sup>171</sup> (2010) 239 CLR 531, 581.

<sup>172</sup> *Ibid* 570; see *R v Coldham* (1983) 153 CLR 415, 429; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484.

<sup>173</sup> (2010) 239 CLR 531, 581.

<sup>174</sup> *Ibid* 580.

commentators have questioned, how far does this originalist exercise go?<sup>175</sup>

101. The Court was clearly not concerned with the type of *error* for which courts reviewed at federation since it protected review of breaches of procedural fairness which would certainly not have come under the *Willan* concept of “manifest defect of jurisdiction”.
102. Nor does it appear that the Court was concerned with the type of *powers* which courts reviewed at federation. As discussed earlier, judicial review was confined to bodies exercising judicial or quasi-judicial power. The impugned body in *Kirk* was the Industrial Court, but later cases have applied the principle to non-judicial bodies. In *South Australia v Totani*, the High Court held that “State legislative power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the executive government of the state, its ministers or authorities”.<sup>176</sup> It is also notable that this restatement of the *Kirk* principle omits any reference to the prerogative writs.
103. Nonetheless, it would appear that the Court in *Kirk* was concerned with the type of remedies exercised at federation since it made explicit reference in certain formulations of the principle to prerogative relief and to the availability of certiorari in *Willan*.<sup>177</sup> Is the entrenched jurisdiction also confined by the circumstances in which prerogative relief was granted at federation? If a plaintiff sought prohibition to prevent the release of a report which was prepared in excess of jurisdiction, would such review fall outside the entrenched jurisdiction because it is not an exercise of power that affects legal rights?
104. The entrenched jurisdiction clearly does not occupy exactly the same territory as the judicial review jurisdiction at federation but where its boundaries align and depart is not yet clear.
105. As Lord Reid observed in *Ridge v Baldwin*, until recently we did not have a developed system of administrative law “so it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedure are

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<sup>175</sup> See eg, Leslie Zines ‘Recent Developments in Chapter III: Kirk v Industrial Commission of NSW and South Australia v Totani’ (Paper presented at Centre for Comparative Constitutional Studies/Australian Association of Constitutional Law Seminar, Melbourne Law School, 26 November 2010); Nicholas Gouliaditis, ‘Privative Clauses: Epic Fail’ (2010) 34 *Melbourne University Law Review* 870, 876; Roos, above n 162; Luke Beck, “What is a ‘Supreme Court of a State’?” (2012) 34 *Sydney Law Review* 295.

<sup>176</sup> (2010) 242 CLR 1, 27.

<sup>177</sup> (2010) 239 CLR 531, 566, 580-1.

largely inapplicable to cases which they were never designed or intended to deal with".<sup>178</sup> But when one seeks to map this modern, dynamic field of law onto the Constitution one will inevitably run into difficulties. In many ways, our modern notions of accountability have outgrown our constitutional framework. As the landscape of public power continues to evolve, with the soft power of integrity bodies growing in importance, the question of whether we protect our modern expanded concept of accountability or limit the safeguarded territory to the much smaller ground it occupied in 1901 is a challenge we must increasingly confront.

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<sup>178</sup> [1964] AC 40, 72-3.