THE JUSTICIABILITY OF ADMINISTRATIVE DECISIONS: A REDUNDANT CONCEPT?

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INTRODUCTION

The non-justiciability of certain executive decisions is based upon a number of notions including that of 'polycentricity', the unsuitability of certain types of power for review, deference to executive judgment, and the question of the judicially enforceable limits to power. In this article, it is argued that the concept is redundant. It is sufficient to consider whether a ground of review, invoked with an appropriate regard for the legalities merits distinction, is available. There is no further question of 'justiciability'.

A preliminary observation

It is questionable whether it has ever really made sense to talk of 'justiciability' as a discrete notion, rather than justiciability upon this or that ground. Historically, it is trite to observe that questions of the existence and limits of the prerogative powers have been justiciable since at least the upheavals of the 17th century, even while courts would steadfastly refuse to examine the manner in which those powers were exercised. Thus, even prior to the decision in *Council of Civil Service Unions v Minister for the Civil Service* ('*CCSU*'),[1] non-justiciability in relation to prerogative powers meant simply the non availability of grounds of review other than the simplest form of ultra vires.[2] *CCSU* itself established the potential availability of review of such powers for denial of procedural fairness, leaving open the question of whether the various abuse of power grounds might also be available. In short, the issue appears to be whether a decision is justiciable upon this or that ground of review, rather than the blanket availability or non availability of review. Once this point is grasped the inchoate concept of 'justiciability' becomes problematic at best. One need simply ask whether one or more grounds of review can be made out.

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1 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

2 *Case of Monopolies* (1602) 11 Co Rep 84b; *Prohibitions del Roy* (1607) 12 Co Rep 63.

INTRODUCTION: THE ELEMENTS OF JUSTICIABILITY

The currently accepted approach to the justiciability of administrative action in Australian courts turns upon a number of elements. While formal classifications of powers as non-justiciable upon the basis of their source in the prerogative or upon the status of the decision maker have largely been abandoned, exercises of non reviewable power are said to remain.[3] In some cases, a decision has been held to be outside the proper ambit of judicial review due to its complex policy nature or its 'polycentricity'. In addition, and despite the removal of any a priori immunity from review for prerogative powers in decisions such as *CCSU* in the United Kingdom and the Federal Court decision in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (‘*Peko-Wallsend*’)[4] in Australia, a number of such powers would appear to remain non-justiciable on the basis of their subject matter. The prima facie plausibility of these continued exclusions varies. For some powers, notably those involved with the administration of justice and the award of honours, it can be argued that this is little more than tradition at work, with little real basis in principle. For others, such as defence and emergency powers, there are seemingly powerful prima facie reasons why courts ought not to intervene. Nonetheless, the continuation of blanket immunities from review based on subject matter, despite persuasive academic criticism,[5] constitutes a new formalism.

Two sets of considerations are usually seen as underpinning the remaining immunities. In part, they are based upon considerations that relate to the institutional competence of courts to adjudicate upon such matters, constrained as they are by the adversarial method and the rules of evidence. In some cases, questions of judicial background and training may also be raised. These institutional concerns are most evident in discussions of 'polycentricity' and of 'policy' or 'political' questions. The second set of considerations relates to the constitutional legitimacy of judicial intervention in the types of high level and politically sensitive Executive decisions at issue. Taken together, these two strands combine to suggest a non-justiciability of high level 'policy' decisions, these usually being contrasted with more individualised decisions which are accepted as being open to review by the courts.[6] These concerns

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3 See, for example, the lists of such 'non justiciable' powers provided by Mason J in *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 218-20 (‘*R v Toohey*’), and Roskill LJ in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935, 956. These are discussed below.

4 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

5 See, in particular, Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14 *Sydney Law Review* 432, 442. Wheeler comments that 'the prerogative powers which remain in the hands of the Crown are diverse and the circumstances of their exercise infinitely varied. Whether the subject matter of a prerogative decision presents a barrier to review by the courts is thus a matter for consideration in the circumstances of each individual case'.

6 Ibid 432. Whilst commenting on recent decisions that '[I]t is the "subject matter" of a prerogative decision which provides the relevant controlling factor', Wheeler criticises blanket immunities at 442, and argues at 451, that 'non-justiciability' should be seen as turning on a more flexible distinction between types of executive decision, ie, between 'a "policy decision" because of its high policy content or essentially political nature, or, on the other hand, as an "individualised decision" determinative of individual rights and involving no (or limited) policy or political factors'. Aronson and Dyer appear to take a

are often manifested by judicial deference to executive decision-making, particularly where the courts may lack access to the full range of information upon which a decision is based. Non-justiciability is therefore a complex phenomenon that weaves together a number of strands to create a whole that is perhaps greater than the sum of its parts. The strategy of this article is now to separate these strands and analyse each in turn. It is suggested that when this is done it becomes apparent that many of these threads will bear little if any weight.

Before discussing the major elements in the notion of non-justiciability it is as well to dispose of some minor confusions. The first is the so-called 'evidential' sense of non-justiciability. In some instances, where a sensitive subject matter such as national security is involved, a plaintiff may find it very difficult to obtain and lay before the court the necessary evidential materials to discharge their burden of proof. *Church of Scientology v Woodward*[7] was such a case, and Lord Diplock in *CCSU* also alluded to the difficulty when he commented on 'action … for which the executive government bears the responsibility and alone has access to the sources of information that qualify it to judge what the necessary action is.'[8]

Such situations should not be confused with genuine non-justiciability. A lack of necessary evidentiary material can be highly unfortunate for a plaintiff, particularly when they find themselves hampered by claims of public interest immunity in their attempts to obtain that material. But the fact that a plaintiff lacks evidence does not and should not imply that a court would remain unable to determine the issue if the missing evidence were to be presented to it. It is only in the latter situation that one can speak of genuine non-justiciability.

A second spurious sense of non-justiciability is that which confuses this doctrine with a lack of jurisdiction in a particular court.[9] In *Horta v Commonwealth*,[10] the High Court ultimately found it unnecessary to address the justiciability or otherwise of the signing by the Australian government of the Timor Gap Treaty with Indonesia. In part, this was due to the way in which the matter was argued before the Court. However, the joint judgment noted that

> nothing in this judgment should be understood as lending any support at all for the proposition that, in the absence of some real question of sham or circuitous device to attract legislative power, the propriety of the recognition by the Commonwealth Executive of the sovereignty of a foreign nation over foreign territory can be raised in the courts of this land.[11]

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similar position in stating, in reliance on the judgment in *Peko-Wallsend*, that 'a matter tends towards non-justiciability as its "policy" (code for political) content increases, political institutions being more apt sites than the courts for the resolution of complex and competing claims affecting the whole community'. Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) 115.

7 *Church of Scientology v Woodward* (1982) 154 CLR 25.

8 Diplock LJ in *CCSU* [1984] 3 All ER 935, 952.

9 See discussion of this confusion in Geoff Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and G Winterton, *Australian Constitutional Perspectives* (1992) 183-6.

10 *Horta v Commonwealth* (1994) 181 CLR 183.

11 Ibid 7 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

So stated, it can be seen that the issue is not one of justiciability, but one strictly of jurisdiction. The matter may well have been reviewable, but not in the High Court. Rather, it was a matter for the appropriate international body.

A similar scenario pertained in the 'Spycatcher' litigation,[12] again in the Australian High Court. Here, the Court refused to entertain proceedings brought by the United Kingdom government to restrain the publication of memoirs written by a former MI5 operative. It was held that the action was not maintainable in an Australian court as it sought to vindicate the governmental interests of a foreign state, in violation of the rules of international law.[13] Once again, the issue was not one of justiciability but simply of jurisdiction.

INSTITUTIONAL COMPETENCE: 'POLYCENTRICITY', 'POLICY' DECISIONS AND 'POLITICAL QUESTIONS'

Non-justiciability as a function of 'polycentricity'

The stress upon polycentricity as a bar to adjudication can be traced back as far as Michael Polanyi,[14] but gained particular currency from the writings of Lon Fuller.[15] Fuller's view of justiciability flowed from his conception of the adjudicatory process. This involved the presentation of reasoned argument by two contending adversaries, before a neutral decision maker. The limits of such a process determine the kinds of dispute it is suitable to resolve. Fuller sees two such limits. First, the adjudicatory process struggles when there are multiple interests to be represented. It is best suited to the resolution of a 'simple' bipolar dispute, with the two opposed parties presenting (presumably) the best available arguments in support of their conflicting positions to the decision maker. As the number of parties increases, it becomes increasingly difficult to ensure that all interests are adequately represented and that all relevant issues are properly joined. This is the simplest sense in which a dispute may be said to be 'polycentric'.

Fuller's main focus, however, is on a deeper sense of 'polycentricity'. In this deeper sense a dispute may be said to be polycentric (many centred) when it consists of a maze of interlocking issues, such that the resolution of one issue may have profound and often unforeseen consequences for the resolution of the others. Fuller invokes the image of a spider's web:

> A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a 'polycentric' situation because it is 'many centred'—each crossing of strands is a distinct centre for distributing tensions.[16]

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12 *Her Majesty's Attorney-General In and For the United Kingdom v Heinemann Publishers Australia* (1988) 165 CLR 30.

13 Ibid 40-41 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ). Brennan J 'generally agreed' albeit on slightly different grounds. Ibid, 48.

14 Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (1951) 171.

15 Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

16 Ibid 395.

Jowell,[17] Taylor[18] and Waye[19] similarly point to the incapacity of the adjudicatory method for the resolution of complex disputes. Jowell comments that

> Polycentric problems involve a complex network of relationships, with interacting points of influence. Each decision made communicates itself to other centres of decision, changing the conditions, so that a new basis must be found for the next decision.[20]

He suggests that urban planning decisions typify polycentric problems. Taylor notes the binary nature of judicial decision making, commenting that as the issues to be resolved multiply 'a court becomes less and less an acceptably apt institutional design'.[21] Waye observes that '[p]olycentric problems involve many diffuse interests and elements which require greater flexibility to reconcile and resolve than the courts are capable of providing'.[22] She offers hotel licensing as an example where 'a normal two-party hearing in court between the licensing authority and the licensee applying legal principles may not properly deal with all these interests.'[23]

It is important to realise that Fuller's main focus was to argue that the adjudicatory method was unsuitable for the resolution of complex polycentric issues. This was so regardless of the identity of the decision maker. That is, his focus was not upon inappropriate judicial interventions, but upon inappropriate choices of dispute resolution method by administrators. In fact, Fuller did not directly address the issue of judicial review, but was concerned to argue that administrators faced with the resolution of such complex matters might well be ill served by aping court like procedures.

This point is reinforced by the observation of Fuller, and others,[24] that all decisions are polycentric to a greater or lesser degree. Even the apparently simplest of court decisions may well have unforeseen consequences, and involve a range of interests. 'Collateral damage' goes with the territory. Sentencing decisions, to give just one example, will have complex and sometimes unforeseeable ramifications for the immediate family of the person in question, as well perhaps on the victim or victims and indeed upon society more generally. To the extent that they can be foreseen, such considerations lie at the heart of sentencing discretions exercised by judges.[25]

The key point for our purposes is that it seems mistaken to say that polycentric administrative decisions are, by reason of that polycentricity alone, incapable of, or unsuitable for, judicial supervision. Thus, the oft used example of a planning decision as one involving a multitude of conflicting interests and therefore incapable of resolution by the adjudicatory method is apt to mislead. For acceptance of the availability of judicial review in relation to such a decision is not to accept that such review will actually *resolve* the issue. To assert any such proposition is simply to

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17 Jeffrey Jowell, 'The Legal Control of Administrative Discretion' (1973) *Public Law* 178–220.

18 G D S Taylor, 'The Limits of Judicial Review', (1986) 12 *New Zealand Universities Law Review* 178–203.

19 Vicki Waye, 'Justiciability' in Vicki Waye and Michael Harris (eds), *Administrative Law* (1991) 47.

20 Jowell, above n 17, 213.

21 Taylor, above n 18, 180.

22 Waye, above n 19, 49.

23 Ibid 50.

24 See, eg, John Allison, 'The Procedural Reason for Judicial Restraint' [1994] *Public Law* 452, 457.

25 This fact lies at the heart of objections to mandatory sentencing provisions.

mistake the legalities of the decision making process, properly the subject of judicial supervision, with the substantive merits of the administrative outcome, which are quite properly not for the courts.[26]

My first proposition, then, is that the spectre of polycentricity is misleading in relation to justiciability. Indeed, it is irrelevant. Even the most complex and polycentric of administrative decisions is capable of judicial supervision, as long as that supervision respects the distinction between the legalities of the decision making process and the merits of the substantive outcome. It is precisely the function of the properly formulated grounds of review to respect that distinction. There is no need, at least on this score, for the further concept of justiciability.

To take just one example, let us revisit the *Peko-Wallsend* decision. The Cabinet decision in that case, whether or not to proceed with the World Heritage listing of Stage II of the Kakadu National Park, was admittedly complex in the extreme. It is difficult to imagine how a court could approach its resolution. But the Federal Court was asked to do no such thing. Rather, it was asked some simple binary questions, each well capable of a 'yes or no' resolution. Had Peko-Wallsend Ltd ('Peko') been afforded a fair hearing? Was the decision a wholly unreasonable one? Crucially, the determination of these questions by the court remains quite analytically distinct from the resolution of the substantive executive decision. Had Peko succeeded in establishing one or more of their chosen grounds of review, the matter would simply have returned to Cabinet for redecision. In short, the mere fact that an administrative decision is itself complex and polycentric is no indication that a reviewing court will be required to resolve complex and polycentric matters beyond its procedural capabilities. It is the function of the legalities merits distinction to ensure that this does not occur. Polycentricity as a bar to justiciability is a furphy.

'Policy' decisions: A variation on the polycentric theme

A judicial refusal to review is seldom based explicitly upon the polycentric nature of the decision alone. However, this element is frequently implicit in the characterisation of a decision as a 'policy' one. In *Peko-Wallsend*, Bowen CJ described the Cabinet decision to proceed with World Heritage listing of stage two of the Kakadu National Park as one which

> involved complex policy questions relating to the environment, the rights of aboriginals, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of the respondents.[27]

In part this can be seen as a reference to the subject matter, or subject matters, of the decision.[28] However it is difficult to not to see it also as a reference to the polycentric nature of any decision to be taken by the Cabinet, in attempting to resolve the various conflicting interests at stake. Whilst the 'high level' nature of the policy matters to be

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26 Aronson and Dyer make a very similar point in their discussion of the American 'political questions' doctrine. With respect to the criterion that there must be 'judicially discoverable and manageable standards for resolving the issue' they comment that '[t]he question is wrong, because the courts' job is not to remake that decision. The courts, for example, have long engaged in judicial review of planning decisions, even those they might regard as non-justiciable on the merits. The point is that the courts do not decide these cases on the merits.' Aronson and Dyer, above n 6, 117.

27 *Peko-Wallsend* (1987) 75 ALR 218, 224.

28 The question of subject matter immunities is dealt with below.

resolved in *Peko-Wallsend* might usefully be contrasted with the 'lower level' matters involved in a planning or licensing decision, Bowen CJ's reference to the 'complexity' of the policy decisions places the emphasis directly upon polycentricity.

In the view of Sheppard J, the high status of the decision maker and the 'policy' nature of the decision were closely intertwined:

> In my opinion, the Cabinet being essentially a political organisation not specifically referred to in the Constitution and not usually referred to in any statute, there is much to be said for the view that the sanctions that bind it to act in accordance with the law and in a rational manner are political ones with the consequence that it would be inappropriate for the court to interfere with what it does.[29]

However, Sheppard J did not rest his decision on this point, holding that Peko had, in any event, received an adequate hearing. All members of the Court agreed on this.

The distinction between 'policy' and 'individualised' decisions has proved an attractive one. Sir Anthony Mason, writing extra judicially, characterised the criterion of 'justiciability' as whether the issue was one that invited a judicial, rather than a political solution. He commented that:

> The answer to that question in a given case would depend on a number of factors, not least of them being the nature and importance of the policy considerations and the degree to which it can be said that the decision is determinative of the rights or interests of an individual.[30]

Waye suggests that

> Where the decision involves a direct abrogation of individual rights, the Australian courts are more likely to find jurisdiction. But where the decision is a collective one with high policy ends and indirectly affects individual rights and expectations, intervention is less likely.[31]

Harris similarly distinguishes between 'policy' and 'individualised' decisions.[32] Wheeler suggests that this is a 'developing concept of justiciability', although this suggestion is qualified somewhat by her observation that 'it is reasonable to suppose that the particular prerogative power underlying a prerogative decision will continue to constitute a key factor in any justiciability equation.'[33]

What can it mean to say that a decision is non-justiciable because it is a 'policy decision'? To the extent that the characterisation of a decision as a 'policy' or 'political' one is a reference to ministerial responsibility it is surely inadequate. The practical shortcomings of that doctrine are too well rehearsed to require repetition here.[34] Indeed, the recognition of those shortcomings provided one of the key rationales for the expansion of judicial review in the late 20th century. Rather, it is suggested that the

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29 *Peko-Wallsend* (1987) 75 ALR 218, 227. This approach betrays some echoes of the American 'political questions' doctrine. See *Baker v Carr*, 369 US 186 (1962).

30 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 124.

31 Waye, above n 19, 56.

32 Michael Harris, 'The Courts and the Cabinet: "Unfastening the Buckle"?', [1989] *Public Law* 251, 279.

33 Fiona Wheeler, above n 5, 451. See also Aronson and Dyer, above n 6, 115.

34 Judicial review cases are replete with judicial statements that Ministerial responsibility provides an inadequate form of accountability in the context of the modern administrative State. See, eg, the comments of Bowen CJ in *Peko-Wallsend* (1987) 75 ALR 218, 223 and Mason J in *R v Toohey* (1981) 151 CLR 170, 222.

real difficulty with obtaining successful review of a 'policy' decision lies in being able to make out a ground of review.

In *Peko-Wallsend*, Wilcox J focused much of his attention on the question of whether a duty of fairness attached to the decision. He held that it did not as there was no sufficiently direct effect upon the rights, interests or legitimate expectations of Peko. Rather, this was a 'policy' decision in the sense that it turned primarily upon broad policy considerations, rather than upon the individual circumstances of the respondent. Notably, there were no adverse allegations made against Peko which might have attracted the need for an opportunity to respond. This is one way in which a 'policy' or 'political' decision may fail to attract successful review, at least on fairness grounds. Such a decision may lack both clearly adverse allegations against an individual or a sufficiently 'direct and immediate effect' upon 'rights, interests or legitimate expectations'[35] for a duty to act fairly to be implied. It may lack both.

Note, however, that the contours of the ground of review itself are sufficient to reach the result that the plaintiff does not succeed in such a case. There is no need to resort to a further, and somewhat obscure, notion of a 'policy' decision or to use the language of non-justiciability. Indeed, that language is redundant. The ground of review does all the analytic work required to reach the result.

Moreover, a judicial focus upon the particular ground of review put forward by a plaintiff avoids the dangerously imprecise strategy of denying the justiciability of a particular class of decision in toto. Had, for example, Peko been able to mount an argument that the decision to proceed with World Heritage listing was wholly beyond power, even though made entirely for reasons of high policy, that argument would surely have raised justiciable legal issues which the Court would have felt bound to entertain. As suggested above, the difficulty with review of 'policy' decisions lies not in non-justiciability per se, but in the difficulty in actually making out one or more grounds of review. The purported 'justiciability' or otherwise of a particular executive decision may be nothing more than a function of the ground of review argued. That being so, why not focus explicitly on whether or not a ground of review can be made out?

Wilcox J also referred to the subject matter of the decision, characterised as the implementation of a treaty, as an additional basis for non-justiciability. This basis of immunity is discussed below. At this point it is sufficient to observe that Wilcox J expressly referred to the remark of Mason J in *Koowarta v Bjelke-Petersen*[36] that the possibility of the High Court reviewing 'the judgment of the Executive and the Parliament that entry into a treaty and its implementation was for Australia's benefit as a course bristling with problems for the court'.[37] Once again, the obvious point to be made is that judicial review, properly conceived, should address no such issue. It is commonplace to observe that judicial review is limited to issues relating to the legality of an exercise of power, rather than the merits of any such exercise. Review by the courts might conceivably address, for example, the question of whether an exercise of the treaty making power was tainted by bad faith. However, the question of whether a treaty was 'for Australia's benefit', without more, simply raises no legal issues. At best,

35 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).
36 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
37 *Koowarta* ibid, 229, quoted by Wilcox J in *Peko-Wallsend* (1987) 75 ALR 218, 253.

a court might address the question of whether treaty entry was 'reasonably capable' of being seen to be of such benefit to the nation.[38]

Unreasonableness was the alternative ground argued in the *Peko-Wallsend* decision. This is, of course, an area where courts on more than one occasion have found it all too easy to transgress into the merits of administrative decision making. In rejecting the argument, Wilcox J drew upon the comments of Diplock LJ in *CCSU*, who had noted the difficulty in making out the 'irrationality' grounds of review in respect of an exercise of prerogative power:

> Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the consideration of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another—a balancing exercise which judges by their upbringing and experience are ill-qualified to perform.[39]

Once again, this appears to be a reference to the inability of courts, as institutions, to address the solution of polycentric disputes. Again, however, it appears on its face to elide the complexity of the substantive policy decision to be taken with the potentially less complex, and judicially soluble issue which is taken on review. To assert to a court that a legally relevant matter was not considered need not involve the court in 'weighing competing policy considerations'. Whilst both the administrator and the court must undertake an assessment of relevance in order to perform their respective constitutional roles, their tasks then diverge. The executive decision maker, having provisionally determined questions of relevance, must then proceed to undertake the polycentric task of weighing those competing considerations in the balance. A court is not required to undertake this task; indeed, it is constitutionally required to refrain from doing so. Rather, the courts task on review, having performed its own assessment of relevance, is simply to ensure that those matters adjudged by it to be legally 'relevant' were indeed taken into account by the executive decision maker.

Where the ground of review in question is 'unreasonableness' the temptation to draw a cloak of 'non-justiciability' over the executive decision in question may be strong. But there is no need for resort to such a device. Where high level 'policy' decisions are made, whether in exercise of a prerogative powers or not, it will seldom be possible to plausibly argue that a substantive outcome is 'unreasonable' in the required sense.[40] Even where defined and limited statutory powers are exercised, successful review on this basis alone is rare.

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38 See the approach of Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70.

39 Diplock LJ in *CCSU*, [1984] 3 All ER 935, 951, quoted by Wilcox J in *Peko-Wallsend* (1987) 75 ALR 218, 255.

40 *Wednesbury* unreasonableness requires 'a decision so unreasonable that no reasonable authority could ever have come to it', per Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229-30. It is well known that this standard, though seemingly high, has not proven easy to delineate with precision. It is submitted, however, that a court minded to transgress inappropriately into the merits under the guise of 'unreasonableness' review is unlikely to be constrained from doing so by considerations of justiciability.

'Political questions'

It is convenient to briefly discuss the American 'political questions' doctrine at this point.[41] Perhaps not surprisingly, this doctrine appears to betray markedly similar concerns to those underlying Anglo-Australian concepts of justiciability. The classic statement of the doctrine appears in the judgment of United States Supreme Court Justice Brennan in *Baker v Carr*.[42] Brennan J held that the indicia of a 'political question' were

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[43]

The focus in this passage on judicially manageable standards raises the issue of polycentricity, discussed above. So too, the issue of an 'initial policy decision'. The question of 'commitment to a coordinate political department' is interesting, but it will seldom be the case that an issue is wholly committed to the executive in this fashion. Indeed, as Aronson and Dyer suggest, it is usually question begging to make this claim.[44] The merits of any given exercise of executive power are of course always committed to the executive branch. This, however, says nothing as to the appropriateness of judicial supervision of any legal issues raised by a purported exercise of that power. Some scepticism is also appropriate in regard to potential 'embarrassment'. It is strange that courts accustomed to applying the law and doing justice without fear or favour in many contentious fields of social life should suffer from such an ailment. Moreover, the point can be made again that the courts should not be pronouncing on the same issue as the executive branch. Rather, their pronouncements should be limited to the relevant legal issues.

The 'political questions' doctrine has not been adopted as law in Australia. Indeed, judicial reliance upon it is comparatively infrequent.[45] Sir Anthony Mason has recently commented that the more significant use of the doctrine has been

> not to justify an outright refusal to deal with an issue, but to generate a lower level of judicial scrutiny applicable to the acts of other branches of government which fall within the realm of 'political questions'.[46]

For example, in *Gerhardy v Brown*,[47] the validity of s 19 in the *Pitjantjatjara Land Rights Act 1981* (SA) was dependent upon its answering the description of a 'special measure', which was necessary to ensure that indigenous persons equally enjoyed

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41 For a comprehensive study of this doctrine see Lindell, above n 9. See also Sir Anthony Mason 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784. Both discussions focus primarily on the use of the doctrine in constitutional disputes.

42 *Baker v Carr*, 369 US 186 (1962).

43 Ibid 217.

44 Aronson and Dyer, above n 6, 116-7.

45 See McTiernan J in *Victoria v Commonwealth*, (1975) 134 CLR 81 ('*Petroleum and Minerals Authority Case*'); Brennan J in *Gerhardy v Brown*, (1985) 159 CLR 70.

46 Mason, above n 41, 795.

47 (1985) 159 CLR 70.

human rights and fundamental freedoms. Such measures were permitted by the *Racial Discrimination Act 1975* (Cth). Brennan J held that whether s 19 answered this description was not a question for the Court, as long as the provision was 'reasonably capable' of being seen as such a measure. As long as this quite relaxed standard was met, the court would not inquire further into the merits of a particular measure.[48] This approach seems compatible with that advocated in this article, which focuses on the grounds of review, rather than relying upon blanket immunities.

The term 'political questions' is also sometimes used in a looser sense to refer to any politically controversial issue, usually accompanied by a suggestion that the courts should avoid such matters. Political controversy is thus equated with unsuitability for review. Such claims appear confused. An example is provided by recent suggestions that the Federal Court ought to have treated as non-justiciable the habeas corpus application made on behalf of asylum seekers detained by Australian service personnel onboard the MV Tampa.[49] This action was taken, on government instructions, apparently to prevent the arrival of these potential claimants within the Australian statutorily defined migration zone. Under international law, arrival within this migration zone would have triggered a right to make asylum claims. John McMillan and Robin Creyke have argued that political accountability was more than adequate in that case:

> This was a situation of accountability par excellence .... The dispute was on the front page of every Australian newspaper and many internationally. It was the big political issue of the day, focusing the attention of all national political leaders. The Prime Minister and Government were in discussion with the prime ministers of other countries, the UN Secretary General and the UN human rights commissioner. What can judicial review add to the resolution of a problem such as this?[50]

This is a surprising claim. The answer to McMillan and Creyke's rhetorical question is surely that the courts may add a concern for the individual rights, interests and legitimate expectations of the plaintiffs. Sadly, this concern is often lacking from the political process. Judicial review provides a form of accountability focussed on such rights, which, particularly in the case of the 'unpopular plaintiff', is in no sense rendered redundant by recourse to the majoritarian political process. The suggestion that courts should eschew such matters overlooks the fact that political and legal accountability are structured quite separately and ultimately directed to different concerns. They are not simply substitutes for one another. Moreover, the potential scope of an exclusion of 'political' matters from the purview of the courts is enormous. If all such political 'hot potatoes' were to be deemed unsuitable for judicial scrutiny the administrative law casebooks would be slim volumes indeed. The Tampa decision, *Ruddock v Vardarlis*,[51] involved some clear legal issues which rightly fell to be determined by the courts, including the vires of the governmental action and the consequent availability or otherwise of the writ of habeas corpus. It was entirely appropriate for the Federal Court to rule on the question of whether the government

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48 See commentary on this approach in Lindell, above n 9; see also Mason, above n 41.

49 *Ruddock v Vadarlis* (2001) 183 ALR 1.

50 Robin Creyke and John McMillan, 'No Place for Dispute in Court', *The Australian*, 25 September 2001. John McMillan has recently published a more developed version of this argument, see John McMillan, 'The Justiciability of the Government's Tampa Actions' (2002) 13 *Public Law Review* 89.

51 *Ruddock v Vadarlis* (2001) 183 ALR 1.

possessed the power to act as it did. It would have been entirely inappropriate for the Court to offer its views of the merits of such a course of action. However, the Federal Court at no stage purported to do any such thing. Indeed the judgment summary issued to accompany the Full Court decision expressly disavowed any such intent.[52]

The policy/operational distinction

The emphasis on non-reviewable 'policy' decisions has appeared in some Australian decisions which attempt to distinguish between 'policy' and 'operational' decisions.[53] The former are conceived of as higher level decisions involving the formation of basic policy positions and principles. The latter involve the implementation of policy, once formed, in its application to particular cases. Whilst such a distinction does not deal well with the phenomenon of policy creation on an incremental, case by case basis, it does accord well with the focus of judicial review upon individualised factors.

Two cases illustrate the distinction. Both arose in the context of the rationalisation of government services to country areas. In *Blyth District Hospital*,[54] the South Australian Supreme Court was asked to review a decision to withdraw a range of services, including acute care and obstetric services, from a country hospital. A denial of procedural fairness was alleged, ultimately without success. In *Shire of Beechworth v Attorney-General*,[55] a decision to close a local courthouse was the subject of challenge. This decision was held to be non-justiciable, in purported application of *Blyth*.

In *Blyth*, King CJ commented that:

> [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.[56]

However, this was not such a decision. King CJ continued:

> Even if … some such policy decisions have been taken at the highest levels of executive government, it does not follow that the particular decision under consideration is immune from judicial review on grounds of natural justice. The decision by the Commission to alter the basis of funding to the plaintiff hospital would then be an application to the particular circumstances of a general policy relating to regional hospital services … There must have been many considerations particular to the situation of the Blyth Hospital to be taken into account in deciding how such policies as might exist in relation to regional hospital development should be applied to the particular circumstances.[57]

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52 Ibid. Para 8 of the judgment summary reads as follows: 'The judges wish to make it plain that the Court's decision is not, and cannot be, concerned with either the policy or the merits of the Commonwealth's actions. That is a debate for other forums. The questions before the Court are questions of law.' Ibid 5.

53 The same distinction appears in other areas of law, eg, tort and estoppel in relation to government. This article confines itself to considering the use of the distinction in relation to the justiciablity of administrative decisions.

54 *Blyth District Hospital Incorporated v South Australian Health Commission* (1988) 49 SASR 501 ('*Blyth*').

55 *Shire of Beechworth v Attorney-General (Vic)* [1991] 1 VR 325 (Vincent J)('*Beechworth'*).

56 King CJ in *Blyth* (1988) 49 SASR 501, 509.

57 Ibid 509-10.

King CJ was thus suggesting a clear distinction between the formation of policy and its application in a particular instance.[58] Only the latter was seen as potentially giving rise to justiciable matters. The non-justiciability of the former category, those policy formative decisions 'based on policy and political considerations' would again seem to derive from a combination of the subject matter of such decisions and their polycentric nature.

The distinction between policy formation and implementation was mentioned, but not applied in *Beechworth*. The reviewability of a decision to revoke the appointment of the Beechworth courthouse as a place for the holding of Magistrates Courts was considered, again with denial of procedural fairness being the ground argued. Whilst accepting that the plaintiff council had sufficient standing to pursue the matter, Vincent J held that there was no legitimate expectation that the courthouse would remain open. His Honour held, consistently with *Blyth*, that not all decisions made in implementation of a specific policy would be immune from review. However, in this case

> the decision and the policy to which it is related cannot be so separated. The policy of rationalisation which has arisen for consideration, is one which by its very nature, would seem to involve the exercise of discretion … . The situation is not one in which administrative decisions are made or discretions are exercised in the implementation of a policy, but one in which for reasons which were later outlined, a decision to revoke the appointment of a number of courthouses was made. That decision is not properly the subject of judicial review.[59]

This appears unconvincing. It is difficult to see why it should be any more difficult to analytically separate an initial policy decision from its subsequent implementation in this instance than it was in *Blyth*. And indeed it is hard to see how the closure policy could have been implemented in practice without the making of numerous decisions involving the assessment of the individualised circumstances of each courthouse under consideration. Once the standing of the plaintiff has been conceded, there appears little reason in principle why a right to a fair hearing should not follow, where the relevant interest is affected in a sufficiently direct and immediate way. If no such effect can be shown, then it is sufficient to say that the ground of review for denial of procedural fairness is not made out.

To summarise this part of the argument, the supposed immunity from review of 'policy' or 'political' decisions, particularly those involving policy formation, is not justified. In large part, the supposed immunity trades upon the 'complexity' of these decisions, and hence upon their 'polycentricity' as discussed above. To the extent that this is justified, it amounts to saying that there are no legal issues for a court to resolve, or no 'judicially manageable standards' which can be discovered and applied to resolve the dispute. But this is to say no more and no less than simply that no ground of review can be made out. The focus should therefore be placed directly on this question. Can any of the grounds of review claimed by the plaintiff be made out on the facts? There is however a further element to claims of non-justiciability. This is the suggestion that there are remaining inherently non-justiciable subject matters, to which we now turn.

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58 Compare this distinction with the 'policy' and 'operational' distinction put forward by Gummow J in *Minster for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93.

59 Vincent J in *Beechworth* [1991] 1 VR 325, 332.

NON-JUSTICIABLE SUBJECT MATTERS

Even if the reader were willing to concede the argument so far, there is little doubt that subject matter immunities provide the core of modern understandings of justiciability. Those cases which have been seen as landmarks in the rejection of formalist bases for reviewability, in the source of the decision making power[60] or the status of the decision maker,[61] have nonetheless offered catalogues of powers considered inherently unsuitable for judicial review.

Thus, in *R v Toohey*,[62] Mason J, in the course of mounting a now famous assault on the Crown immunity doctrine, accepted that a range of prerogative powers remained outside the scope of review. These included 'the prerogative discretions of the Attorney-General to enter a *nolle prosequi*, to grant or refuse a fiat in relator action and to file an ex officio information'.[63] Mason J also referred to the exercise of the royal prerogatives relating to war and the armed services as potentially falling within this category, due to 'their character and their subject matter'.[64]

In *CCSU*, Roskill LJ identified a similar list of prerogative powers immune from review due to their subject matter. He commented that:

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[65]

It is evident that Lord Roskill did not view this list as complete.

These suggested immune or excluded powers fall into several categories. One category might be broadly described as concerned with the external relations of government. They include powers with respect to national security, both internal and external, treaty making, powers to declare war and the like. Significantly in the Australian situation, they would include powers to make intergovernmental agreements in a federal context. A further category includes a number of powers that relate to the administration of justice. Yet another category of powers might relate to the formulation of economic policy, eg, decisions in relation to interest rates. One might add the reserve powers of a Governor or Governor-General.

There are several suggested rationales for the exemption from review of such powers. In some instances it may be argued that while specific issues may indeed appear justiciable, nonetheless, the executive process simply cannot brook any delay. There may be occasions where the motivating factor appears to be a judicial reluctance to 'open the floodgates' to politically sensitive claims, however unlikely such a deluge may be in practice. Any such reluctance may find a convenient shelter behind claimed blanket immunities. On other occasions, the reluctance to review may stem from a

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60 *CCSU* [1984] 3 All ER 935; *Peko-Wallsend* (1987) 75 ALR 218.
61 *South Australia v O'Shea* (1987) 163 CLR 378; *R v Toohey* (1981) 151 CLR 170, *FAI Insurances v Winneke* (1982) 151 CLR 342.
62 *R v Toohey* (1981) 151 CLR 170.
63 Ibid 218.
64 Ibid 219–20.
65 *CCSU* [1984] 3 All ER 935, 956 (Roskill LJ).

sense of constitutional proprieties. In some cases, the issues of institutional competence discussed above may be prominent. Frequently, where a prerogative power is at issue, clearly justiciable limits to the exercise of that power may be hard to discern. It is argued, however, that none of these suggested rationales survives close examination. A more nuanced approach to individual cases, predicated upon a careful examination of the actual grounds asserted, is to be preferred.

In essence, the argument against any remaining subject matter immunities proceeds in two steps. First, it is suggested that the preservation of a priori immune subject matters remains too much a broad brush approach, redolent of formalism. The result of such automatic immunity will inevitably be that in some cases a manifest injustice will be done. Such a result is to be avoided if at all possible. The second step is to argue that where it is appropriate that a plaintiff not succeed, this failure can be more fully and rationally accounted for in terms of a failure to make out one or more grounds of review. There is no further conceptual work of the notion of non-justiciability to do in such a case. It is a redundant concept.

National security: urgency and secrecy

'National Security' powers provide a classic example of a priori 'subject matter' immunity. Frequently prerogative in nature, they are seen as the perfect exemplars of decision making when executive government must act swiftly, decisively and, on occasion, in secret. The argument against justiciablity of such powers is not that there are no justiciable issues, for example, as in *CCSU*, or that the judicial process is incapable of resolving them. Rather it is argued that such concerns are simply outweighed by the need for swift and decisive action to protect the national interest.

At first blush, this appears a powerful argument for asserting that such exercises of power are inherently non-justiciable. In fact however, the grounds of review themselves contain more than enough flexibility and variability of content to accommodate these concerns. To focus on the actual grounds argued is simply to continue the move against formalism that was begun, but not completed, in *CCSU* itself.

In *CCSU* the government argued successfully that the interests of national security overrode the otherwise applicable requirements of procedural fairness, such that there was no obligation to foreshadow the decision to prohibit union membership at the GCHQ site. This was described as a case of subject matter non-justiciability, with the result that the House of Lords had replaced the old formalism based on the source of the power with another formalism based upon the subject matter of that power. But this new formalism was not necessary to the decision in the case. An alternative analysis was possible, in terms of the unavailability of any ground of review.

The ground actually put forward in *CCSU* was denial of procedural fairness. On a conventional reading of the decision, the plaintiff union actually succeeded on this ground, until trumped by the 'subject matter immunity' argued before the House of Lords. The requirements to succeed on a procedural fairness argument are well known. First, one must demonstrate a sufficiently individualised adverse effect upon the plaintiff's interests flowing immediately from the decision under question. Secondly, one must show a breach of the flexible duty to act fairly. It would seem that the union succeeded in meeting the first requirement. The effect upon it and its members' interests was clear. Normally, this would lead to a duty to consult with the

union prior to making a decision with potentially adverse effects upon it and its membership. However, the content of such a duty is accepted to be highly variable. Does it make more sense to say that the matter was 'non-justiciable' as it involved national security or simply to say that the notoriously flexible content of the duty to act fairly was on this occasion reduced by the surrounding factual matrix to zero? The concerns regarding the need for swift and decisive action in the national interest do not result in blanket immunity, but on this occasion reduce the content of procedural fairness to nothingness. Such an analysis achieves the same substantive result but is more precise in its explication of the rationale for that outcome.

It is this greater precision in giving a rational account of a decision not to grant judicial review which is critical. It lies at the heart of the legitimacy of judicial decision making that such a rational justification be given for the decision whether to grant or to withhold a remedy. To erect a new formalism is to fall short of doing so. Crucially, a new formalism will on occasion prevent judicial intervention when it is appropriate. 'National security' is a broad cloak, capable of masking many disparate types of decisions, some of which, on their facts, may well call for judicial intervention. Where this is the case, a new formalism under the heading of 'subject matter' immunity, should not prevent that intervention.

On occasions, a more precise analysis may lead, and quite correctly, to a different substantive outcome. For example, consider the disappointing High Court decision in *Coutts v Commonwealth.*[66] Here, no genuine issue of national security was raised by the Commonwealth. The decision, to dismiss Coutts, an airforce officer, on grounds of ill health, made under Air Force Regulations, was challenged on grounds of a denial of procedural fairness. That issue should have been addressed and determined by the Court. However, a majority of the Court held that the appointment of the officer was held at the pleasure of the Crown. Thus, the decision to dismiss him could not be reviewed. This is an approach redolent of the older a priori immunities.

For Wilson J, in the 3:2 majority, the answer was

> dictated by the operation of well-established principles governing the relation to the Crown of members of the armed services …The fundamental feature of the relationship at common law is that members of the armed services hold their engagement at the pleasure of the Crown.[67]

Wilson J concluded:

> I am unable to reach a different conclusion … because of the heavily entrenched principles, supported by tradition, authority and public policy, attaching to the concept of an appointment in the armed services being held at the pleasure of the Crown. I do not think that the Court is in a position to re-evaluate the considerations of public policy so as to open the way to a different result.[68]

Brennan J, whilst commenting that the power to dismiss at pleasure was 'exceptional, perhaps anachronistic'[69] nonetheless agreed that the decision was not open to review. Dawson J commented that '[t]he rule, which has its origin in military service, is copiously supported by authority'.[70]

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66 *Coutts v Commonwealth* (1985) 157 CLR 91.
67 Ibid 98 (Wilson J).
68 Ibid 105.
69 Ibid 105 (Brennan J).
70 Ibid 120 (Dawson J).

With respect, this was a disappointing approach. The a priori immunity of this class of decision from review had little in the way of reasoned rationale. There was only the appeal to historical precedent. It is submitted that this is inadequate. Total immunity of such a class of decision echoes the ancient doctrine that 'the King can do no wrong'[71] a sentiment which has little relevance to the government of a liberal democratic society. The dismissal of the plaintiff did not take place in the context of wartime emergency. It was, in essence, routine. There was no compelling reason of principle why the rights to procedural fairness presumptively available in such a situation ought not to be have extended to him. However great the weight of ancient authority on the rights (or lack thereof) of Crown servants, the High Court may have better served the principled development of administrative justice in this instance by reconsidering that authority.

It should not be thought that the rejection of a priori subject immunities will deluge the courts in a flood of previously non-justiciable matters. In perhaps the majority of occasions where 'national security' is invoked the doctrine of procedural fairness will not be applicable at all. As noted above, it is well established that this duty is only owed to an individual or identifiable class of persons upon whom the decision at issue has a particular 'individualised' effect. Many 'national security' decisions will fail to cross this threshold for the implication of a duty to act fairly. By their nature, decisions to declare war, for example, are so generalised in their effect that the necessary plaintiff, to whom the duty of procedural fairness is owed, simply cannot be singled out. Where a prima facie duty does appear to apply, as in *CCSU*, its content may well be reduced, even to zero. Again, there is no need to rely upon a poorly conceptualised notion of non-justiciability. The same substantive result, that is, failure of any judicial review challenge, will usually be achieved, but the analysis of that failure will be more precisely articulated in terms of the structure of the ground of review.

Even where a statutory power relating to national security is under review, the concession of justiciability in principle is unlikely to lead to any judicial undermining of the national interest. As noted above, the inability to obtain the necessary evidentiary material, due to public interest immunity, may well frustrate any action. A plaintiff bearing the burden of proof is unlikely to discharge that burden without access to potentially sensitive information. If the public interest requires it, that access will be denied. More fundamentally, the recognition of justiciability, at least in principle, will not and cannot entitle a court to revisit the merits of the administrative decision in question. Discretionary powers related to national security are likely to be couched in very broad terms. As a consequence, the 'merits' of the administrative decision are likely to be very broad and so highly discretionary that it would be an extraordinary case in which a genuine legal error could be discerned. Assessment of the 'national interest' is par excellence a matter for the executive rather than the courts and the latter are fully cognizant of that fact. It would require most unusual facts for a court to conclude that 'national security' powers had been exercised for improper purposes or that an error in terms of the considerations grounds had been made. The possibility of a court second guessing the judgment of the executive as to relevance and other matters under the irrationality grounds of review is therefore remote. But this is simply to say that no ground of review would be made out. The 'relevant' and 'irrelevant' grounds would be determined by the nature of the national interest in question, and the unlikelihood of judicial intervention would be explained simply in

71 *Feather v The Queen* (1865) 6 B & S 257, 295, 122 ER 1191, 1205.

terms of the difficulty in demonstrating that the executive action involved an incorrect assessment of that relevance in the context of a broad discretionary power.

Nonetheless, there will inevitably be occasions, hopefully rare, where broad discretionary powers are blatantly misused. Indeed, it may be suggested that the retention of broad subject matter immunities gives an implicit 'green light' for such misuse, were a particular executive government so minded. By contrast, the acceptance that genuine abuse will always be reviewable may provide a powerful disincentive to abuse of the powers of high office. 'Internal' security is an interesting category, particularly if courts were to find themselves confronting the exercise of powers contained in draconian legislation by an authoritarian administration. More immediately, courts may find themselves facing similar questions in relation to migration and 'border protection' legislation. Without doubt, the determination of the national interest in relation to the exercise of such powers will involve a broad, balancing and discretionary process within which legal error will not be easy to discern as long as required statutory procedures are followed. However, if individual civil liberties and human rights are overridden by executive action with little in the way of plausible 'national interest' justification a point is reached in which judicial intervention is appropriate. The rejection of automatic immunity from review makes this intervention possible. And this is the key justification for such a rejection. A more transparent assessment of the legal merits of an applicant's case is more than simply intellectually desirable. More fundamentally, it enables the court to calibrate its response to the individual facts of the case before it, rather than rely upon pre-conceived and sometimes ill-adapted categories. It enables justice to be done.

The administration of justice and constitutional appropriateness

It is sometimes suggested that the existence of some irreducibly non-justiciable areas of executive action is dictated by the separation of powers doctrine. According to such an argument any judicial 'intrusion' into such areas would represent a transgression beyond the limits of appropriate judicial action into the process of executive decision making. Judicial reluctance to transgress too far into such decision-making fields can be seen as a major element in a number of refusals to review.

Decisions relating to the appointment of judicial officers provide a prominent example of this reluctance to intervene. Despite this, a remedy is not always refused. In *Macrae v Attorney-General (NSW),*[72] the New South Wales Court of Appeal held that a decision not to reappoint certain magistrates to the newly restructured Local Court was reviewable on grounds of denial of procedural fairness, and held that such a denial had indeed occurred. Kirby P held that the appellants were entitled to have the decision of the Attorney-General 'made without the contamination of unfair procedures'.[73]

However, Kirby P went on to distinguish the position in relation to judicial appointment or appointment as a Queen's Counsel. He commented that:

> [I}t would … be difficult, if not impossible, to succeed in a case in which a senior barrister, however accomplished and well qualified, complained that he had been continually passed over and others preferred for judicial appointment or appointment as one of Her Majesty's counsel. What the Crown may give, it may also deny. The multitude

72 *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268 (*'Macrae'*).
73 Ibid 282 (Kirby P).

> of reasons which influence such decisions, their imprecision and insusceptibility to judicial review generally, render such issues non-justiciable in the courts.[74]

Little rationale for this non-justiciability was given, other than the somewhat mysterious reference to 'the multitude of reasons which influence such decisions' and their 'imprecision'. The statement that '[w]hat the Crown may give, it may also deny' is equally opaque, merely asserting a long tradition of non-justiciability without in any sense giving a rational justification for that immunity.

Kirby P's dictum in *Macrae* was applied by Olney J in a Federal Court decision, *Waters v Acting Adminstrator (NT)*.[75] Here the applicant for review was a disappointed seeker of appointment as Queen's Counsel. He had been the only applicant to fill a vacancy that had arisen in the Northern Territory, and had been recommended for appointment by both the Chief Justice and the Attorney-General. Despite this, the Acting Administrator of the Northern Territory, acting on the advice of Cabinet, rejected his application.[76] It appears from the judgment that there may well have been a strong case for denial of procedural fairness. The applicant may have been the victim of a 'whispering campaign' and clearly had no opportunity to address the substance of whatever allegations were indeed made against him.[77] However, Olney J did not address this issue, holding instead that the matter was non-justiciable. His Honour relied upon Kirby P's dicta in *Macrae*, as well as remarks made by the High Court in *Attorney-General (NSW) v Quin*[78] and dismissed the matter. There was thus ample authority to dismiss the matter as non-justiciable but disappointingly little in the way of reasoned argument to support this dismissal. Olney J referred to the comments of Mason CJ in *Quin*, that:

> Generally speaking, the judicial branch of government should be reluctant to intervene in the Executive process of appointing judicial officers … According to tradition, it is not a function over which the courts exercise supervisory control.[79]

Reliance was also placed on the view of Brennan J in the same case that:

> If it be said that unfettered executive discretion lays the way open to patronage or worse, the remedy must lie in the hands of the legislature which created, or which may prescribe the manner of exercise of, a power of appointment or which may call to account the minister who advises on the exercise of the power.[80]

In reliance upon this authority, Olney J concluded that:

> It has not been the practice in Australia to subject judicial appointments to the scrutiny of judicial review nor has it been so in respect of the appointment of Queen's Counsel … The weight of persuasive authority is against the proposition that the decision not to appoint the applicant is justiciable.[81]

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74 Ibid.
75 *Waters v Acting Administrator (NT)* (1993) 119 ALR 557.
76 Somewhat ironically, the Acting Administrator at the time was Asche CJ, the same Chief Justice who, in that capacity, had initially recommended the appointment of Mr Waters.
77 *Waters v Acting Administrator (NT)* (1993) 119 ALR 557, 564, 566.
78 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
79 Ibid 18 (Mason CJ).
80 Ibid 33 (Brennan J).
81 *Waters v Acting Administrator (NT)* (1993) 119 ALR 557, 573 (Olney J).

The decision in *Waters* may be usefully contrasted with the recent Federal Court decision in *Northern Australian Aboriginal Legal Aid Service v Bradley*.[82] Here, a decision to appoint a new Chief Magistrate of the Northern Territory, on a remuneration package that was fixed for two years only, was challenged, principally on improper purpose grounds. It was argued that the limited term of this remuneration package placed the Chief Magistrate in a position where he was beholden to the government for his future remuneration. This was in a context where the previous Chief Magistrate had resigned his appointment after ongoing controversy surrounding the government's introduction of mandatory sentencing legislation.

The allegations of improper purpose were ultimately held by Weinberg J not to have been made out. Importantly however, the matter was justiciable. Weinberg J rejected arguments to the contrary based on *Quin* and *Waters* amongst others. His Honour preferred to place reliance on *Toohey*, which was described as 'at least highly persuasive authority in support of NAALAS' [Northern Australian Aboriginal Legal Aid Service's] contention.' Weinberg J commented that

> NAALAS's allegations of improper or extraneous purpose are extremely serious. They would, if proved, tend to bring the administration of justice in the Northern Territory into disrepute. It would be surprising, given this consideration, if the Supreme Court of the Northern Territory could not examine these allegations.[83]

It is submitted that this was the appropriate way to deal with the matter. The substantive issues raised, though ultimately resolved against the plaintiff, were clearly capable of judicial determination. The ultimate inability of the plaintiffs to discharge their burden of proof[84] explains their failure to receive a remedy more satisfactorily than any purported immunity of the decision from review. Moreover, had they succeeded in making out the allegation of improper purpose, it would have been quite inappropriate for the Federal Court to have refused a remedy.

Contrary to the view expressed by Kirby P in *Macrae*, there appears no relevant point of distinction between the appointment of Magistrates and the appointment of Queen's Counsel. Why should a decision of either kind be beyond the purview of the courts? Clearly, it cannot be a question of judicial or institutional competence to address the issue. Where a denial of procedural fairness or an improper purpose is alleged, this is not a polycentric matter, nor is there any particular reason why the necessary information need be unavailable to a plaintiff and hence to the court.[85] Rather, the argument for non-justiciability of such appointment decisions must rest on constitutional sensitivities. Judicial review of such appointments may be 'uncomfortable' or 'embarrassing' for the court.

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82 *Northern Australian Aboriginal Legal Aid Service v Bradley* [2001] FCA 1728 (7 December 2001).

83 Ibid para 81. The reference to the Northern Territory Supreme Court arises dues to the procedural history of this matter. Olney J had rejected the claim by NAALAS in the NTSC at first instance. That decision was overturned on appeal to the Full Court, on the basis that it was 'fairly arguable' that the allegations of improper purpose were justiciable. Olney J subsequently transferred the matter to the Federal Court.

84 (1993) 119 ALR 557. See paras 310-26.

85 It is difficult to see that public interest immunity has any place in such situations. This immunity was sought unsuccessfully in this case. See *Northern Australian Aboriginal Legal Aid Service v Bradley* [2001] FCA 1080.

It is submitted, however, that a somewhat more robust judicial approach is appropriate. Feelings of constitutional sensitivity amount to a powerful argument that the 'merits' of such appointments are best left to the executive process. Once again, however, the conclusion of non-justiciability does not follow. Whilst it would indeed be inappropriate for the courts to delve into the merits of such appointments, judicial review, properly conceived and executed, ought to involve no such intrusion. To find, on the facts before the Federal Court, that Mr Waters was denied procedural fairness is to say absolutely nothing as to his ultimate suitability for appointment as a Queen's Counsel. The former issue is entirely within the province and competence of the court; the latter is, of course, entirely a matter for the executive. There is, once again, no need to invoke the spectre of non-justiciability.

As with 'national security' decisions, there are also negative consequences, which flow from a doctrine of continued immunity from review for appointment decisions. Put simply, a non-reviewable power is, by definition, unaccountable and open to abuse. Appointments may be refused for quite inappropriate reasons, such as party political affiliations or matters of personal dislike. Decisions may be made not in the 'public interest' however broadly conceived, but to reward friends and to punish enemies. They may be made to avoid political embarrassment or for a range of reasons which, were they ever revealed, could be seen objectively as amounting to an abuse of power. If appointment decisions remain firmly non-justiciable, then there is simply no legal remedy for such abuses of power. And it is surely somewhat fanciful to suggest that a political remedy is likely to be available for what is in essence a political wrongdoing.

Similar remarks may well be made as to the reviewability of decisions to proceed with an *ex officio* indictment, to enter a *nolle prosequi*, or to grant consent to a relator action. The latter power places an Attorney-General in a particularly sensitive and potentially invidious position. In each case, review by a court might superficially be seen as an inappropriate intrusion into the executive realm. It might be thought inappropriate for the court to rule on the validity of an action that may later appear before it, perhaps even to display an appearance of bias. But the counter argument will no doubt be clear to the reader. Judicial intervention in such decisions ought only to occur where a legal ground for judicial review can be made out, with appropriate respect for the distinction between such grounds and the substantive merits of the decision at issue. In no case should the court actually be involved in the latter. Hence, potential embarrassment is avoided. Further, it will be infrequent that the court that eventually hears a matter will have the same composition as that which determined the initial dispute. Even where this does occur, a proper perception of the legality merits distinction should suffice to allay any fears of prejudgment. Review by a court, on judicial review grounds alone, of decisions allowing an action to proceed should hardly be seen as betraying any view on the substantive merits. The issues in the two hearings are quite distinct. Once again, the rationale for continued non-justiciability appears flimsy upon close examination, whilst having the consequence that a potentially flawed exercise of power remains without remedy. In summary, the doctrine that such powers are non-justiciable renders their exercise unaccountable and potentially open to abuse. The possibility of judicial review, albeit tempered by a due sense of the legality merits distinction, provides a constitutionally appropriate level of control over such abuse.

Fiona Wheeler has argued strongly that further subject matter immunities should and will gradually be overturned by the courts.[86] Certainly, this has occurred in some areas. In relation to the prerogative of mercy, the English courts, on at least some occasions, would appear to have moved away from Lord Roskill's view that such decisions enjoyed a priori immunity from review.[87] 'National security' also appears not to provide automatic immunity on all occasions.[88] It would be desirable for a similar approach to be taken in regard to all other such powers.

A NEW APPROACH: LIMITS TO POWER AND THE GROUNDS OF REVIEW

It is notable that the decisions currently seen as immune from review on the basis of their subject matter are largely sourced in the prerogative power, albeit abrogated by statute in some instances. This has important practical implications for their reviewability, as observed by Mason J in *Toohey*:

> The statutory discretion is in so many instances readily susceptible to judicial review for a variety of reasons. Its exercise very often affects the rights of the citizen; there may be a duty to exercise the discretion one way or another, the discretion may be precisely limited in scope; it may be conferred for a specific or an ascertainable purpose; and it will be exercisable by reference criteria express or implied. The prerogative powers lack some or all of these characteristics.[89]

Although ultimately unpersuasive, this is the most coherent explanation for the apparent non-justiciability of some prerogative powers. It is the courts task upon judicial review to determine if the limits of an administrator's power, whether they be express limits or those implied by the common law, have been transgressed. This, of course, is no easy task. Even express statutory limits to power may be ambiguous in their construction. The further implicit limits upon the exercise of power developed by the courts in their elaboration of the common law grounds of review raise considerable difficulties, none more so than the notorious but infrequently invoked 'unreasonableness' ground. This is not, however, to accept that such prerogative powers ought to be seen as immune from review. It is simply to recognise the greater difficulty attendant upon the establishment of, in particular, some of the ultra vires grounds, where there is no statutory basis for the decision in question. However, these difficulties are not issues of non-justiciability. Rather they are to be seen as issues as to the appropriate delineation of the grounds of review, whilst respecting their separation of powers context. It can be seen that, rather than an exercise of prerogative power being truly non-justiciable, there will simply be considerable pragmatic difficulties in

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86 Wheeler, above n 5, especially 460-61.

87 *R v Secretary of State for the Home Department; ex parte Bentley* [1993] 4 All ER 442; *Lewis v Attorney General of Jamaica* [2000] 3 WLR 1785. For a discussion of the slow evolution of the Privy Council position on the justiciability of the prerogative of mercy see Justice EW Thomas 'A Critical Examination of the Doctrine of Precedent' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 141 especially 164-74.

88 See the fascinating decision of the Queen's Bench Division in *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 2 WLR 1219, where it was held that a power to make ordinances for the 'peace, order and good government' of a territory did not authorise, in the absence of exceptional circumstances, the making of an ordinance for the removal of the entire civil population.

89 *R v Toohey* (1981) 151 CLR 170, 219.

showing that the purpose for its exercise was truly improper, that a matter upon which weight was placed was 'irrelevant' or that one not taken into account was 'relevant' in the necessary legal sense. It is therefore little accident that the majority of attempted challenges to the exercise of prerogative powers have been made upon procedural fairness grounds.

How then should the issue of judicial review be approached? It is suggested that courts need only ask whether the plaintiff is able to make out a ground of review. In some cases, the plaintiff will fail to do so. This is particularly likely in the case of precisely those subject matters, notably in relation to some prerogative powers, which are now considered presumptively immune from review. In a majority of such cases, the substantive outcome of the case would not change. Both *CCSU* and *Peko-Wallsend* fall into this category. The rationale for this outcome, however, would be changed. It is not that the subject matter, nor the complexity of the particular decision, would mysteriously confer an automatic immunity upon the exercise of power. Rather, the width of the discretion, in all the circumstances of the particular case, would be such that no legal error on the part of the decision maker could be demonstrated.

Statutory powers will always be subject to ultra vires limits. However, some categories of these powers may involve very broad discretions to be exercised in the national interest. In most cases, a plaintiff will be unable to show that the broad limits of the particular power have been exceeded. Only the most obvious excesses of power will be reviewable, or perhaps the rare case where an inappropriately junior decision maker has purported to exercise a power.[90] Where arguments based on the considerations grounds are made, they should be assessed by the court with due respect for the breadth of the 'public interest' discretion at issue. This will allow intervention where clearly appropriate on the facts, whilst allowing a rational account of a decision not to intervene where the plaintiff fails to persuade the court that an abuse of discretion has taken place. The burden of the judicial decision will fall, as it should, upon the facts and the legality merits distinction, without allowing easy recourse to a smokescreen of non-justiciability.

Procedural fairness arguments in relation to broad 'public interest' discretions will only succeed in the rare cases where there is a sufficiently individualised effect, and the implication of a duty to act fairly is not negated by considerations of urgency or the need to act in secret. The latter may be described, in the alternative, as situations where the duty is applicable but urgency or secrecy reduce its content to nothingness. Where neither of these qualifications applies, there appears no reason why procedural fairness ought not to apply to decision making. Again, a court will be required to carefully articulate the rationale for its decision, whether to grant a remedy or not, in terms of the ground of review as argued.

Where a power is prerogative in nature the position is essentially the same. Here, as there are no written words of limitation, 'ultra vires' arguments will be even more difficult to make out.[91] But not impossible. It is not impossible to envisage

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90 The unlikelihood of such an eventuality is evident.

91 It is noted that 'ultra vires' doctrines are seen by some commentators as incapable of application to prerogative powers. This is not a view shared by the present writer. Whilst it is true that limits to statutory powers are directly referable to the intent of the legislature, it should be observed that prerogative powers are always susceptible to statutory abrogation. Where this does not occur, it is not unreasonable, and perhaps no more fictitious than other

circumstances where the entirely arbitrary or capricious exercise of a prerogative power might be called to account, whether on procedural fairness grounds or due to a failing in terms of ultra vires. Prerogative powers might conceivably be exercised in bad faith or for demonstrably improper purposes, on the basis of incontrovertibly irrelevant matters, or without taking account of clearly relevant ones. Though such cases will hopefully be rare indeed, where they do occur, a judicial response is clearly appropriate.

Some prerogative powers, notably those relating to the administration of justice such as judicial appointments, are of considerable sensitivity. But this ought not to render them non-justiciable. Rather, like all administrative decisions, those of this ilk should be reviewed with keen attention to the distinction between the legal issues and the merits of the matter.

CONCLUSION: WHY ABANDON THE DOCTRINE OF JUSTICIABILITY?

What is to be gained by abandoning the concept of justiciability, particularly when it is conceded that many substantive outcomes would be unchanged? First, it is submitted that conceptual clarity is always to be preferred. 'Non-justiciability' is a confused amalgam of rationales, none of which bear great weight when closely examined. It is better to ask simply whether, in all the legal and factual circumstances surrounding a particular exercise of power, any legal error can be demonstrated. To do so would contribute to a more appropriately targeted and rationally explicated judicial intervention.

Second, the continued existence of a priori immune subject matters amounts to a new formalism. This is precisely what was abandoned with the rejection of automatic immunity for the exercise of prerogative powers, for decisions of the Crown representative, or even for decisions taken by Cabinet. To assert that, for example, prerogative powers relating to the administration of justice retain such immunity contains all the dangers inherent in such formalism. In particular, it allows for the possibility of the abuse of those powers, their exercise in bad faith or for improper purposes with no possibility of legal remedy. This is contrary to the rule of law, and should not be countenanced without compelling reason. No such reason has been demonstrated. Thus, in a case such as *Waters*, or in a case where the Attorney-General's power to grant consent to a relator action were blatantly abused, it is right and proper that the court should undertake judicial review. Providing that the court limits itself to an investigation of the legal issues raised, there is no constitutional impropriety in such review. To the contrary, it is precisely the proper role of the court. In such cases, it is possible that the substantive outcome would indeed be altered by this different analytic approach to review, providing always that the plaintiff can in fact demonstrate a legal error.

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attributions of legislative intent, to suggest that the legislature is content with the existing, albeit broad, limits on the discretionary prerogative power recognised by the common law. These must at least include purposive limits, since it is hardly arguable that prerogative powers exist for no purpose. Equally, some matters would be clearly irrelevant to the exercise of a particular power, just as they would be to the exercise of a broadly expressed statutory power.

Finally, it might be objected that the position proposed places great weight upon the 'legality merits' distinction, a divide that is notoriously unclear and arguably often transgressed by courts. It is undoubtedly true that the legality merits distinction is a difficult one.[92] But it is submitted that it is the correct distinction. It is derived directly from the constitutional separation between the roles of the executive in making administrative decisions and the judiciary in supervising that administrative process. The distinction is not clear in all situations, but is nevertheless fundamental. A renewed focus on this distinction, no longer obscured by formalist and increasingly unjustifiable notions of non-justiciability may well lead to a gradually sharper delineation of the contours of this great constitutional divide. This can only serve to clarify the proper role of the courts in resolving the legal issues raised by the exercise of administrative powers, and in vindicating any legal rights and interests that may have been unlawfully affected. To the extent that doctrines of non-justiciability remain part of the law of judicial review, they serve only to blur the limits of appropriate judicial intervention with assertions of automatic immunity that are little more than the assertion of a long historical tradition of deference to the authority of the Crown. Such assertions have always sat uneasily with the counter tradition of the rule of law. Democratic government will be better served by a more appropriate account of the limits of judicial intervention in the process of government, an account structured around the grounds of review.

92 For one example of critique of the distinction see Peter Cane, 'Merits Review and Judicial Review: The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213. Whilst it is suggested that such critiques are ultimately not persuasive, there is undoubtedly a great deal of work to be done by administrative lawyers and theorists in developing a more perceptive analysis of 'legal error' and untangling it from mere disagreement as to the 'merits' in fact and law of a particular administrative action. That task is left for another day.