

GOVERNMENT SOLICITORS CONFERENCE

**The Hon. Justice Nye Perram
of the Federal Court of Australia**

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1. On thing that government lawyers might be thought to have in common is the practice of governmental law. However, that expression “governmental law” is not one which we hear often in general legal discourse. No single expression captures it and instead we have a range of other expressions describing various aspects of the same concept. Thus we have:

Criminal Law – which describes the interaction of the State with those accused of crimes;

Administrative law – which describes the review, generally in a civil context, of governmental decisions; and

Constitutional law – which describes the review of legislative, executive and judicial action at a structural level.

2. Some people call these three areas together “public law”. We all know that these topics are studied at law school as separate subjects and this is apt to lead to the assumption that they are entirely disparate topics. Other matters may point in the same direction. Thus, for example, not every litigant involved in these areas of governmental law is a government. Indeed, almost half of them are not. The accused is usually not a government in a criminal case and in judicial review proceedings the moving party will not generally be found to be the State. Further, not every transaction or case involving a government appears to involve governmental law in that sense.

3. To take another example, where a government commits a tort or has a tort committed upon it one would not normally expect notions derived from governmental law – in the sense I have used that expression – to be in play. The same remark might easily enough be made about a case involving a government contract.
4. This aspect of our legal system warrants comparison with civilian legal systems. In French administrative law there is an approach which is quite surprising for a common lawyer. The ordinary courts of law are prohibited from being involved in the administrative functions of the State. This is the result of a law of Napoleon, No 16-24 of August 1790, which remains in force and which provides by Article 13 as follows:

“Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.”

5. The consequence of this far reaching provision is that the general courts of law in France have been kept entirely out of suits involving the State in its administrative capacity. Instead, there is in place a system of judges who are part of the administration and who resolve all cases involving the administrative functions of the State. The courts ordinarily doing this are the Administrative Tribunals and above them sits the Conseil D’Etat. The Conseil D’Etat is also the highest body of the executive government.
6. Before one gets too worried about that from the perspective of the separation of powers one should bear in mind the former executive and judicial roles of the English Privy Council. Complex questions have arisen in French law as to whether a State entity comes to be involved in litigation in its capacity as a State actor or whether instead the case involves only the State entity’s private law rights. Because the characterisation affects directly the correct selection of forum it is a matter which has generated some anxiety in French administrative law. The incorrect selection of the relevant court is a serious matter. Perhaps unsurprisingly there exists a tribunal known as the Tribunal of Conflicts whose sole role is to determine which court system a particular case involving the State is to be consigned to.

7. We might scoff at such an arrangement although the existence of separate court systems has a continuing resonance with our own system's former division between courts of law and courts of equity.
8. If we look we will see that notions of public law in our system are more pervasive in private law than might first appear to be the case. One example – which I owe to Professor Paul Craig – concerns the law of negligence and our notion of ultra vires. These two topics appear to be chalk and cheese or, at least, snails and ginger beer. That perception may however be apt to obscure some really quite interesting issues.
9. Consider, if you will, the example of a local council who is considering installing a children's playground in a park. Three options are presented to it for its selection:
 - (a) a seesaw; or
 - (b) a roundabout; or
 - (c) a sandpit.
10. The council decides to go with the seesaw. Predictably, and in the usual way, a child is injured whilst being catapulted from the seesaw into a tree. Proceedings in negligence are inevitably commenced.
11. The inquiry in those proceedings will be the ordinary inquiry under the laws of negligence and we know that that will require the court in question to ask whether in making its decision the council took reasonable care. In the course of the case experts, no doubt, will be called and they will each sing of the merits or demerits of the seesaw, the roundabout and the sandpit. Eventually the judge will decide that the council's decision was or was not a reasonable one in the circumstances. In some places, a jury may be let loose on the question.
12. There are other ways of looking at this problem, however, particularly from a public lawyer's perspective. Imagine instead that the local parent's association, even before any child is catapulted into the tree by the seesaw, decides to initiate judicial review proceedings to overturn the council's shocking decision to go with the seesaw. In those proceedings, we now know that the question will be whether the decision was a lawful one, or to put it another way, whether the decision was in any way afflicted by

jurisdictional error. That inquiry is, as we all know, a difficult one but the one thing we do know for sure is that under no circumstances are we to engage in the pernicious practice of merits review. The merits of the choice between the seesaw, the roundabout and the sandpit are, so a public lawyer will say, uniquely reposed in the council.

13. Thus, we have the rather unusual result that merits review of a public decision is permitted in a common law court but forbidden, on pain of punishment for heresy, in administrative law. For an administrative lawyer it seems odd that the very inquiry said to be forbidden is undertaken on a daily basis in the District Court. No doubt the tort lawyer looks at the public lawyer's fascination with jurisdictional authority with a curious puzzlement. There are no easy answers to this conundrum and it depends rather on why you think merits review should be forbidden. Notions of the separation of powers linger just beneath the surface. Now is not the time to explore those questions but the issue is ventilated in the leading English cases of *X v Bedfordshire County Council* [1995] 2 AC 633 and *Stovin v Wise* [1996] AC 923. The High Court has touched upon the same intriguing issue in *Graham Barclay Oysters Ltd v Ryan* (2002) 211 CLR 540.
14. That example suggests that for government agencies, even in what appear to be private law situations, questions of public law can frequently be resting not far out of sight. Once can see the same phenomenon in contract cases. What does one say, for example, of cases where a government agency binds its future exercise of statutory discretion? Ponder if you will:
 - a contractual promise to close roads to assist a toll road operator;
 - a contract to grant development approval in return for a substantial development of Crown land;
 - a promise to grant a visa in return for a compromise of litigation.
15. Each of these raises its own issues about the extent to which private contractual power can be used to fetter the future exercise of a State function. Again, there is present need to explore the principles involved. The point is that there is a unique plane of activity which is governmental in nature, even where the particular topic at hand is something which looks like tort or contract.

16. Now what I wanted to say today was to draw attention to what I think are some developments in the present High Court's view about public law and to comments on its implications for the practice of government law generally and government lawyers in particular.
17. If one thing emerges with clarity from the last 10 or so year of the High Court's private law learning it is the centrality of jurisdictional error. Commencing with *Craig v South Australia* (1995) 184 CLR 163 and finishing most recently with *Kirk v The Industrial Relations Court of New South Wales* (2009) 239 CLR 531 the High Court, in a mountain range of cases, has cemented very solidly into place the role of jurisdictional excess as the organising principle underpinning public law. This is a distinctly Antipodean development and its origins lie in the law of refugees. As many of you will know, throughout the 90s the Commonwealth became dissatisfied with the Federal Court's interference by way of judicial review with government decisions on protection, or refugee, visas. This dissatisfaction resulted in a series of amendments to the *Migration Act 1958* designed to increase governmental control in, and decrease in judicial interference with, these kinds of administrative decisions.
18. Initially, the traditional merits review function was removed from the Administrative Appeal Tribunal and given to a specialist merits review body, the famous Refugee Review Tribunal. Then the Federal Court's jurisdiction under the Administrative Decisions Judicial Review Act 1977 was restricted in its application to protection visas. Amendments provided that procedural fairness, Wednesbury unreasonableness and apprehended bias would not be grounds of review under the ADJR. Review under s 39B of the *Judiciary Act 1903* was also cut out in the Federal Court. In practice, this made the High Court the sole Court with original jurisdiction to deal with refugee matters. Subsequently, a privative clause was inserted into the Act purporting to prevent any review of protection visa decisions at all.
19. The striking down of that final step by the High Court revealed that the project had failed. However the failure has forever changed the nature of public law in this country. The High Court's power of review under s 75(v) had long been understood to be involved with notions of jurisdictional excess (leaving aside its reference to injunction). Confronted with the Parliament's apparent desire to remove from any judicial scrutiny protection visa decisions the Court held that grounds of administrative

law were all jurisdictional and that a privative clause which sought to avoid jurisdictional error – that is administrative review – was ineffective for constitutional reasons.

20. The result is that our administrative law is now firmly a creature of constitutional legality. Whereas prior to the refugee amendments few doubted the Parliament's capacity to regulate judicial review of administrative decisions the consequence now is that most of the administrative law has been permanently crystallised in s 75(v) of the *Constitution* in a way which is now permanently beyond Parliamentary interference. It is difficult to imagine a legislative project which has more wholly failed to achieve its stated aims. After 15 years of legislative amendments and restrictions the Federal Magistrates Court (and the Federal Court on appeal) now hear what are basically pre-1985 judicial review cases albeit clothed in the language of jurisdictional error.
21. Now migration cases are a fairly narrow topic but the shockwaves from the showdown between the Parliament and the High Court continues to reverberate throughout the entire system of public law. Let me give you some examples.
22. For a long time in the Federal Court most of its judicial review jurisdiction was exercised unexceptionally under the provisions of the *Administrative Decisions Judicial Review Act*. The Court's jurisdiction under s 39B of the *Judiciary Act* – which reproduced the High Court's original jurisdiction under s 75(v) of the *Constitution* to grant writs of prohibition mandamus and injunction – were usually added as a ground for relief only as if something of an afterthought and, usually, only by those who regarded themselves as specialists. Since it was mired in jurisdictional error and the arcanities of the prerogative (or constitutional) writs most practitioners tended to avoid s 39B and this was unsurprising giving that equivalent relief was readily available under the ADJR. Now, however, with the High Court making plain that jurisdictional error is the ultimate jurisprudential basis for judicial review, the ADJR seems to be of receding relevance and, indeed, practical experience tends to confirm this. Much focus is now placed on s 39B.
23. Another example of just the extent of the shift is visible in the debate about what review for error of law patent on the face of the record is all about. That kind of error never had to be jurisdictional. But in a world in which most grounds of review are now

jurisdictional errors and in which most errors of law are jurisdictional in nature the utility of this ground of review is less than obvious. The High Court in *Kirk* was clear that this remedy now existed for non-jurisdictional error of law patent on the face of the record and that this was an important function; however, one may be forgiven for asking rhetorically whether this is so in view of the rare nature of the non-jurisdictional error of law.

24. *Kirk* itself affords an example of the unexpected consequences of federal refugee policy on the authority of the New South Wales Parliament. In its most recent pronouncement the High Court has held that the State's Supreme Court now have the inviolable function of locating and extirpating jurisdictional error within their own Court and Tribunal structures. The same constitutionalisation of federal administrative law which has occurred is now to be seen at the State level. All of these matters are now flowing through the system.
25. Many of you, no doubt, will have encountered jurisdictional error in your dealings. For those who have not, I am sure you soon will. However, I think there will be even broader effects than merely an increasing fascination with jurisdictional error. Underlying the High Court's decisions is a consistent vision of the exercise of judicial power as being about the limits of authority rather than the control of discretion. It is informed, I venture to suggest, by aspects of the doctrine of the separation of powers. We are accustomed in this country to hearing about that topic in the context of attempts to usurp the judicial function. But there is a flip side to the doctrine as well and that is a prohibition on the judiciary usurping executive functions where they are reposed in the executive by legislation or directly by the *Constitution* itself.
26. On this view of things when Parliament or the *Constitution* grants powers to a decision maker to make a decision there is an infringement of the doctrine of the separation of powers if a court, in any way, seeks to interfere in the merits of that decision. The decision maker is the one chosen by the Parliament (or the *Constitution*) as the decision maker and that carries with it the necessary implication that the Court is prohibited from being the decision maker. Consequently, judicial review is to be seen as a structure which merely ensures that there is no excess of authority. The difference with Napoleon's law is not so great.

27. From the judiciary's perspective this is both an increase and a decrease in its authority. It is a decrease because the ability to interfere in actual decisions has been circumscribed – perhaps clarified is a better word. On the other hand, the powers exercised by the judiciary (or at least the High Court under s 75(v)) are now constitutionally inviolable.
28. From the practitioner's perspective the questions which arise across the legal system are more likely now to be seen as encompassing analysis based on want of authority rather than control of discretion. If you go back to the example I gave at the outset of the seesaw you may perceive the difference in approach. If the principle to be applied involves control only of discretion then the imposition of a common law duty of care may not be troubling. On the other hand, if the real principle in play is an absolute constitutional prohibition upon the judiciary being involved in making choices about the merits of matters then that may well lead to a different result.
29. None of these questions have ready answers. However, in the times ahead I am sure that governmental lawyers such as yourselves are likely to encounter these questions and questions like them more and more. I am honoured to open this conference.