FROM THE MAGNA CARTA TO BENTHAM TO MODERN AUSTRALIAN JUDICIAL REVIEW

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On the 800th anniversary of the Magna Carta it is an opportune time to sit back and consider how history has shaped and still continues to shape Australian administrative law or, more specifically for the purpose of this paper, judicial review of government decision-making. It is perhaps an even more opportune time to undertake this task given that the war on terror has seen no less than the Prime Minister ask whether we as a society have the correct balance between governmental power and individual rights.[1]

It is somewhat trite to observe that one of the primary reasons our government makes laws and enforces them is to govern the behaviour of individuals with a view to the protection or mutual betterment of our society. To achieve this aim it is equally trite to observe that laws must be practical — practical in that they must address, either directly or indirectly, the behaviour in question and practical in the sense that our government must be able to implement and enforce the laws. Yet, as a civilised society, there is a recognition that, by giving our government the ability to make, implement and enforce laws, we are imbuing it with immense power — a power that must be overseen to ensure it is exercised in the right spirit so that, even in times of heightened conflict, individuals do not find themselves subjected to arbitrary or unfair administrative decision-making. This spirit, with symbolic roots winding back to the Magna Carta, forms the 'foundation block' of the powerful but nebulous rule of law.

The interplay or balance between a need to allow the government to govern — practicality — and the notion that law contains a substantive content to protect the individual from arbitrary government decision-making — its spirituality — forms the backdrop to this paper. To illustrate that this search for balance is not new and despite 800 years is not resolved, this paper starts with the Magna Carta but proceeds to consider influential historical figures chosen for the impact they have had, and continue to have, on the modern understanding of what limits can and should be imposed on government and how these limits may be legitimately applied by the judiciary. The historical figures chosen are Lord Coke, Blackstone, Dicey, Bentham and Austin. These figures in particular highlight what might be described as some of the original and core underlying values that shape the judicial response to Parliament's recent efforts to increase governmental power. In this regard, it will be contended that, while modern judicial review is essentially practical, there persists a touch of spirituality and without understanding this it is not possible to appreciate the balance that the High Court so often seeks to achieve between increased governmental power and protecting individuals from arbitrary government decision-making. This 'balance' will be explored by examining some examples of the modern form of the Magna Carta's 'law of the land' or 'due process' — natural justice. More specifically, it will touch upon three well-known

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modern developments:[2] the rebirth, defence, reformulation and rebadging of natural justice by the judiciary; the constitutionalisation of judicial review; and the adoption of a broader 'purposive' approach to statutory interpretation generally.

The common law: Magna Carta to Bentham

Magna Carta

Eight hundred years ago, rebelling English barons coerced King John I into signing the Magna Carta, bringing into existence the document that has been proclaimed as the oldest of 'liberty documents'[3] and 'the first principle of western freedom under law'.[4] This was a time when there was no Parliament but the common law had started to evolve.

The common law had been a feature of the English governing system since the 12th century, when the King had appointed judges to act as 'his surrogates' to dispense his justice. The judges were known collectively as 'the King's court'.[5] While the common law originated in a time when the King of England ruled with almost absolute power, it was not an arbitrary or capricious system designed only and always to benefit the King. Rather, the common law 'was founded in notions of justice and fairness of the judges, consolidated by their shared culture, their professional collegiality, and a growing tradition'.[6]

With the rise of the common law, a perception had developed that the King's power was not absolute but was instead subject to certain limits: '[t]he problem in 1215 was that the king had flouted pre-existing limits, not that such limits did not exist.'[7] As such, the Magna Carta was a document created to limit the brutal and despotic power of King John and it did so by clothing itself in the legitimacy of custom and of precedent. It was a practical rather than an aspirational document. Many of its original 63 clauses were quite specific in nature. However, two clauses in particular have had a lasting and influential impact on common law countries. The two clauses were cl 39, with its requirement that 'no free man' may have what can be termed their basic rights taken away other than 'by the law of the land';[8] and cl 40, with its claim that justice would be denied to 'no one'.[9]

With the signing of the Magna Carta, for the first time in English history the sovereign was forced to acknowledge in writing that he was subject to a higher law. To ensure his compliance, the Magna Carta provided for 25 barons to act as a committee of overseers. While this committee could be described as an ongoing rebellion, it can also be seen as the precursor to the creation of Parliament. Despotic power had been challenged and the seeds of what was ultimately to replace it (Parliament and the common law) had been planted.

Yet, despite the esteemed position that the Magna Carta holds today, it did not have legal force in its own right, nor did those in power blithely accept it. To be recognised as law it needed to be assented to by the King and reaffirmed by future Kings. Even with King John's assent, it would seem he never intended to honour it,[10] Pope Innocent III issued a papal bull denouncing it[11] and 'after the turmoil and suffering of the War of the Roses, the stability of the strong rule of the Tudors' was welcome, with the result that the Magna Carta did not feature prominently in the 16th century.[12] Further, it must be remembered that, despite the universal portrayal of the principles underlying the Magna Carta today, at the time of its creation the use of 'free-men' excluded the lower born, outlaws and slaves. It is estimated that, when the Magna Carta was entered into, it only applied to 10 per cent of the population.[13] While the reach of the Magna Carta was slowly to expand over time, it was not until the 17th century that it was to play its most important role. This time, rather than being a sword used to impose obligations on a King, it was to be used by Lord Coke[14] in tandem with the common law as both a shield and a sword. It was to be used as a shield to protect the

substantial power that Parliament had slowly taken from the King over time[15] and then as a sword to obtain further power.

Lord Coke the judge

To understand Lord Coke's championing of the Magna Carta as a parliamentarian, it is necessary to start with his time as a judge and in particular with two decisions: *Rooke's Case*[16] and *Dr Bonham's Case*.[17] These decisions illustrate Dr Coke's deep-seated faith in the common law and the fundamental role he saw for it in supervising government decision-making.

In *Rooke's Case* the Commission of Sewers had undertaken repairs to the riverbank of the Thames. The relevant statute allowed the Commission to recover from landowners the costs of such repairs 'according to their discretions'. The Commission sought costs from only those landowners adjoining the Thames. Lord Coke ruled that the Commission had to spread the cost of repairs more broadly. He did so by finding that, regardless of the broad parliamentary grant of 'discretion' to the Commission, there was nevertheless a right and a wrong way to exercise it, as the discretion was 'limited and bound with the rule of reason and law'. Lord Coke made it clear that it was the judiciary's right to intervene 'not withstanding the words' of the statute. On this formulation it is difficult to see when a court would not be justified in substituting its own decision for that of the government decision maker, either in law or on the merits of the individual case.[18]

Dr Bonham's Case was, on one view, an early but fairly straightforward application of the natural justice bias rule; however, in its time it was even more controversial than *Rooke's Case*. Indeed, *Dr Bonham's Case* attracted the ire of King James I, with the King suggesting, to no avail, that Lord Coke correct it.[19] For present purposes, it is the following phrase that has proven most controversial, as, on one reading, it gave the common law precedence over legislation and hence gave the judiciary power over Parliament and King:

> it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void … [20]

Lord Coke's rhetoric held out the hope of individual salvation when a law of a general and broad nature, as most legislation is, would otherwise apply arbitrarily and unfairly.

Given the backward-looking nature of the common law, *Dr Bonham's Case* raises the hope, or spectre, that an ancient principle could be invoked to protect common law principles such as natural justice from repudiation by Parliament.[21] This interpretation is attractive to those who aspire to an implied Australian 'Bill of Rights'. Some have queried and others rejected such an interpretation, arguing instead that Lord Coke was simply, if not powerfully, stating a rule of statutory interpretation[22] — that rule being that there is a presumption that Parliament does not intend to abrogate common law principles. This latter interpretation sits more comfortably with Coke's defence of Parliament, Dicey's later theory of parliamentary supremacy and the judiciary's current approach to statutory interpretation. Either way, *Dr Bonham's Case* illustrates a tradition of judicial review that, at the very least, can be described as intrusively supervisory.

Lord Coke's questioning of Parliament's (and, through it, the King's) legal supremacy when an individual needed protection from arbitrary decision-making continues to resonate today. Yet, from a practical perspective, it had a more timely and significant impact on the yet to be formed American colonies, as it raised for consideration the constitutional possibility that an

Act of Parliament could be declared invalid.[23] It was ultimately a possibility that came to fruition in America with the creation of a written constitution setting out the 'fundamental law' that Parliament could not contravene, including a Bill of Rights that was to contain, in the Fifth Amendment, what could be described as a Magna Carta law of the land or due process clause. The 'axiomatic'[24] decision of *Marbury v Maddison*[25] then confirmed that it was the duty of the judiciary to ensure Congressional compliance. Of course, this development was in turn to have particular significance for Australia, with our founding fathers also adopting a written constitution, albeit without a Bill of Rights.

Lord Coke the parliamentarian

Having, in his time on the bench, rejected the notion of unconstrained governmental power, it should have been of little surprise that, on becoming Speaker of the English House of Commons in 1621, Lord Coke would join with others to oppose attempts by King James I to increase his power. In doing so, Lord Coke drew heavily upon the spirit of the Magna Carta and famously stated:

> If my sovereign will not allow me my inheritance, I must fly to Magna Carta and entreat explanation of his Majesty. Magna Carta is called Charta libertatis quia liberos facit ... The Charter of Liberty because it maketh freemen.[26]

Incensed by the opposition he was facing, King James I dissolved Parliament and, for a time, imprisoned Lord Coke and other parliamentarians. However, in the face of continued opposition, King James I relented and freed the dissidents. It was in the late 1620s, when Charles I ascended to the throne asserting an absolute right to rule, that the struggle between the King and Parliament really came to a head. This time Parliament prevailed, with the King ultimately being compelled to accept a Petition of Rights inspired by the Magna Carta. In accepting the petition the King was forced to acknowledge 'Parliament's (and Coke's) interpretation of the [Magna Carta] as a constitutional limitation' on his power.[27] The seeds of freedom planted with the signing of the Magna Carta had germinated and, while the publishing of Lord Coke's Second Institute, civil war, revolution and the passing by Parliament of other foundational Acts such as the *Habeas Corpus Act* (1679), the *Bill of Rights* (1689) and the *Final Act of Settlement* (1701) were still required, the spirit of the Magna Carta evolved from a claim of inalienable feudal rights to a claim that there was an inalienable and universal right to be protected from arbitrary government action.[28] It is in this sense that it can be most confidently asserted that the spirit of the Magna Carta had blossomed and become one of the most important ideals underlying modern democracy.

Blackstone

It was William Blackstone who in 1759 produced what is often referred to as the first scholarly edition of the Magna Carta[29] and then in 1766 produced his *Commentaries on the Laws of England*. These writings were available to American colonists and have been described as preparing 'the mind for the American revolution of the 1770s'[30] and influencing 'the Declaration of Independence and the Constitution of the United States'.[31]

Blackstone's commentaries 'were the first comprehensive statement of the common law'.[32] The commentaries were filled with reference to rights, principally civil and property, and extolled the importance of the Magna Carta.

Yet in Blackstone's commentaries there can be seen a very significant shift in emphasis from Lord Coke's 'spiritual' rhetoric evoking the Magna Carta as a natural source of inalienable human rights to a more 'practical' view of the law. For Blackstone, natural rights offered guidance to but did not supplant the laws set down by Parliament. As no less than H L A

Hart observed, for Blackstone the law of nature, or unalienable rights, 'consists almost wholly of gaps: it is a net through which virtually everything must fall'.[33]

Consequently, while Blackstone believed natural rights existed and were promoted by the common law,[34] they did not inhibit and limit Parliament's ability to legislate — rather, Parliament 'by its own acts recognised' such rights and could be expected to protect them.[35] Rights such as those that had become synonymous with the Magna Carta were morally compelling but not legally enforceable;[36] the spiritual had begun to be riven from legal reality. As such, it could be argued, erroneously, that Blackstone placed all of his faith in Parliament.

While Blackstone championed the power of Parliament, at the time he wrote most law was still made by the judges — that is, the common law still reigned supreme in practice if not in his theory.[37] Indeed, Blackstone identified the 'law of the land' or 'due process' in the Magna Carta with the established procedures and rules of the common law.[38] Consequently, while his writings clearly placed Parliament as the supreme law maker when it legislated, he still championed the broader and vital role of the common law. Importantly, influenced by Locke and Montesquieu,[39] Blackstone's *Commentaries on the Laws of England* explain how the English legal system had matured from a mixed constitution, where judges were beholden to the King in Parliament, to one with a constitutional separation of power in which both Parliament and the judiciary sought independently to protect public and private liberty.[40]

For Blackstone, Parliament was supreme when it intervened, but the common law played a vital role where it did not. Where Parliament did intervene, its laws still needed to be interpreted. While his views on parliamentary supremacy meant that in theory he supported a textualist approach to the interpretation of legislation[41] and he rejected any suggestion in *Dr Bonham's Case* that the common law could override legislation, he recognised that in practice the 'intention' or 'will of the legislature' was often unclear. When it was unclear, it was necessary to have recourse to 'the context, the subject matter, the effects and consequences, or the spirit and reason' of the legislation.[42] This allowed and, indeed, required judges to presume that Parliament did not intend to pass unreasonable or unjust laws. This presumption in turn allowed legislation to be interpreted so that it conformed with the common law as the source of 'ancient practice and hence to reason and justice'.[43] This approach has remarkable similarities to the approach of the Australian High Court today. In any event, it can be said that for Blackstone legal reality meant the acceptance of parliamentary sovereignty but a belief that such power would be exercised, and implemented, for a higher purpose.

Bentham and Austin

Perhaps the most strident critic of inalienable or fundamental human rights was Jeremy Bentham. Bentham was the ultimate utilitarian, with the practical always prevailing over the spiritual. He was a prolific writer and, as such, it is not surprising to find in his writings a direct connection to Australia. What is perhaps surprising is that in those writings he used the Magna Carta to argue that the conveyance of convicts to, and the treatment of British subjects in, the new penal colony of New South Wales was illegal.[44] Yet Bentham's reliance on the Magna Carta illustrates how distinctively different his approach was from those of Lord Coke and Blackstone. This is because his real complaint was not that British subjects had some higher natural rights but, rather, that existing legislation, represented by the Magna Carta, gave them such rights and those rights could in turn only be taken away by Parliament.

At the age of 16, Jeremy Bentham attended Blackstone's lectures at Oxford — lectures that later became the basis for Blackstone's *Commentaries on the Laws of England*.[45] Bentham's disdain for Blackstone's ideas materialised very quickly.[46] Bentham believed that

Blackstone's commentaries were designed to perpetuate what he saw as a system that benefited the ruling class and, in particular, the legally trained. He saw Blackstone's common law, with its outdated reference to rights, as a yoke around society's neck — one that needed to be swept away.[47]

While Bentham wanted to overthrow the prevailing legal system, he did not seek to justify doing so by claiming that every person held natural or inalienable rights; in fact, he famously stated that such claims were 'rhetorical nonsense, — nonsense upon stilts'.[48] The answer for Bentham was the replacement of the existing common law with a codified system — a system designed and passed into law by a sovereign Parliament. This belief in codification was founded in his underlying theory of utility (subsistence, abundance, security and equality, with security being the most important) or, more simply, that Parliament was in the best position to balance the needs of society and pass laws to provide for 'the greatest happiness of the greatest number'.[49] As his views, mentioned above, on the settlement of New South Wales illustrate, Parliament was the only legitimate source of law. As will be touched upon below, it was similar Benthamic beliefs that resulted in the codification of Australia's migration laws.

Bentham's mission to codify the common law was spectacularly unsuccessful. Nevertheless, he was extremely influential[50] and his combination of utilitarianism and command theory, assisted by the writings of his protégé John Austin,[51] was dramatically to influence the development of the common law.

Austin's most significant contribution to the study of law was the analytical approach he brought to it — an approach often referred to as 'analytical jurisprudence'. He was more interested in law as it was than law as it should be. His focus was the logic, not the morality or spirituality, of the law. He sought to clarify and classify rather than to reform.[52] A law was a law because Parliament, and to a lesser extent the judiciary, said it was a law, not because of some underlying right. In a nutshell, Austin was, like Bentham, a legal positivist.

Like Bentham, Austin saw parliamentary codification as the answer to the faults of the common law. However he 'approached the subject of codification in a much more cautious and realistic manner', rejecting 'the idea of an ideal code as too utopian'.[53] For Austin, Parliament reigned supreme, but judges were needed to implement its decrees and, when Parliament had not yet legislated, to maintain and develop the common law.[54]

Dicey

Without doubt, the most influential conception of legal parliamentary sovereignty has been that of A V Dicey.[55] His writings 'heavily influenced' the drafting of the *Australian Constitution*.[56]

The attraction of Bentham's legal positivism, ameliorated by Austin's acceptance of the judiciary,[57] can be seen in the manner in which Dicey formulated his approach to the law and constitutionalism. This approach was to portray law, and particularly the legal principles that dealt with the separation and interaction of Parliament, the judiciary and administrators, as a 'political, scientific and technical' exercise.[58] In his iconic text, *An Introduction to the Study of the Law of the Constitution,* Dicey stated that:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[59]

Stated in this manner, Dicey's conception of parliamentary power is largely consistent with that of Bentham. However, there are two stark differences for the purposes of this paper. The first difference is that Dicey accepted the practical reality that, in a federation formed under a written constitution, Parliament was 'subordinate to and controlled by the Constitution'.[60] This has meant that, from the commencement of federation,[61] Australian legislatures have never had the form of absolute power envisaged by Dicey's pure vision, albeit that the Australian judiciary has acknowledged that parliamentary supremacy is grounded in 'political facts' and it is inappropriate for it to question 'such basic political realities'.[62]

The second difference, and more important for immediate purposes, is that Dicey espoused and made popular the rule of law as a limitation on governmental power. For Dicey, the rule of law was a practical concept that included equality before the law, a lack of arbitrariness in the law's application and an obligation on the government to obey the law — obedience that the judiciary must enforce.[63]

From a modern administrative law perspective, this formulation of the rule of law had two practical deficiencies. The first deficiency in Dicey's conception of the rule of law was that, unlike Bentham, with his highly prescriptive codes, Dicey did not develop a means of accounting for discretion in administrative decision-making. He did not see what 'law' there was for the judiciary to enforce when the administrative decision maker was to use their discretion to reach a decision. As he could not account for administrative discretion, the rule of law could not be applied to it. A similar attitude will be seen in the approach taken by the English courts to natural justice from the 1930s to 1960s.

The second deficiency in Dicey's conception of the rule of law arose because of the possibility of an inherent conflict between parliamentary supremacy and his conception of the rule of law. This conflict can occur if Parliament stipulates what the law is but then seeks to prevent the judiciary from enforcing it.[64] This potential quandary was recognised by the Australian High Court as early as 1910[65] and then confronted directly in more modern times.[66] Consequently, it is an opportune point for this paper to shift its focus to Australia and to the application of natural justice.

The rejection and then re-emergence of natural justice in Australia

The origins of natural justice

The Magna Carta, with its requirement that rights not be taken away other than in accordance with the 'law of the land', later to become 'due process', can be seen as the precursor to the modern principle of natural justice, or procedural fairness.[67] The Magna Carta was a clear statement that government (then the King, now Parliament and the executive) does not have an absolute power over its people and, in particular, it cannot make a decision that directly affects one or more of them without taking into account their legal rights. In a modern context, what these rights entail and what is sufficient to show they have been taken into account can vary greatly depending upon whether the 'law of the land' is viewed through a looking glass held by one or more of Lord Coke, Blackstone, Bentham, Austin or Dicey.

In Australia the law of the land starts with the *Constitution*. However, the *Constitution* does not include a Bill of Rights, nor does it provide a constitutional right to procedural 'due process' like the *United States Constitution*, whose drafters had been so influenced by the writings of Blackstone (and, consequently, the Magna Carta).[68] Neither has Parliament seen the need to guarantee due process through an ordinary legislative Act such as a Charter of Rights. Consequently, to obtain 'due process' or natural justice, it has been necessary to

have recourse to the highly malleable common law so admired by Blackstone and so abhorred by Bentham.

Common law natural justice boils down to two grand principles:

- the rule that the decision maker must not be, or must not be perceived to be, biased (*nemo debet esse judex in propria sua causa*);
- the rule requiring a procedurally fair hearing (*audi alteram partem*).

Of the two, the bias rule is the more straightforward and readily defined.[69] The content of the hearing rule is far more uncertain and may not even include a hearing.[70]

Natural justice is described as a 'duty to act fairly'[71] and it has been stressed that it 'does not require the application of fixed or technical rules; it requires fairness in all the circumstances'[72] and what is required may even 'fluctuate during the course of particular decision making'.[73] These formulations conjure up an image of Lord Coke's appeal to the spirit of the common law, yet the Australian judiciary has repeatedly emphasised, in true Austinian style, that it is a duty focused on the procedures followed by the decision maker, not the actual substance of the decision itself.[74]

Natural justice and administrative decisions

The requirement to provide natural justice was seen as a judicial obligation until in 1863[75] it was extended to government or, more correctly, executive or administrative decision-making. In any event, and contrary to popular belief,[76] shortly after the High Court's establishment in 1903, natural justice had been applied in a number of administrative contexts.[77] It was only in 1927 that the English Privy Council, channelling Dicey's insecurities, held that natural justice was only owed in judicial or quasi-judicial style enquiries,[78] not when the decision was the culmination of 'a merely administrative function'.[79] In an administrative context, it was to be Parliament, not the judiciary, that was to hold the decision maker accountable. The immediate and then ongoing effect of English decisions was to retard the growth of natural justice for the next 37 years.

After 1964 and, in particular, the House of Lords' decision in *Ridge v Baldwin*,[80] the Australian judiciary was able again to consider the appropriateness of extending natural justice to more typical administrative decisions. By 1970 Windeyer J was willing to find that natural justice applied where the administrative decision maker 'looks to facts and determines whether they answer a particular statutory description'.[81] In 1976, Mason J went further when he held that the obligations of natural justice applied 'whether the authority is acting judicially or ministerially'[82] — a position also adopted shortly afterwards by Gibbs J[83] and Jacobs J.[84] However, it was not until 1985, in *Kioa v West*,[85] that the possibility of natural justice applying more generally to administrative decisions really became a reality. While there was a difference in opinion as to whether the renewed reach of natural justice was due to the common law or statutory imputation (with overtures of the approach of Lord Coke or Blackstone respectively), it is a debate that is now largely seen as irrelevant.[86] It is largely irrelevant because a point was reached where the High Court no longer had to extend the reach of natural justice, as, in a statutory context, it was accepted that there will almost always be an initial assumption that natural justice applies to administrative decision-making.[87] It is this position that is now important and was evident in *M61/2010 v Commonwealth*,[88] where natural justice was held to apply to boat people held in a legislatively defined 'excised offshore' location, and in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,[89] where the visa applicant was in Pakistan. Further, during this period the High Court's increased emphasis on 'jurisdictional error' generally[90] — and, in particular, that a breach of natural justice was a jurisdictional error — allowed it to assert that

it was simply monitoring the boundaries within which administrative decision makers were authorised to act by Parliament and consequently it was abiding by Dicey's separation of powers as supplemented by the adoption in Australia of a written constitution. This in turn allowed the judiciary to shift its attention to what rules should be applied in deciding whether a decision was made in accordance with natural justice. As these rules developed and were applied more often, it became apparent that the judiciary was becoming more and more comfortable intervening in administrative decision-making. It could also be argued, as I have done elsewhere,[91] that this increased 'bulking up' of natural justice formed part of an ongoing evolution in which the High Court was imposing a thicker, more justificatory account of the rule of law.[92]

What was also apparent from natural justice's expansion was that, where Dicey had not known what 'law' there was to enforce when an administrative decision maker exercised a discretion, the judiciary did. The law they were enforcing was the law that they had applied and expanded in true common law fashion — natural justice. Lord Coke would have appreciated this development, yet, unlike in Lord Coke's time, it is a development that is unlikely to have unfolded, and certainly would not have unfolded as quickly as it did, if Parliament had not sought to limit the judiciary's role.

Australia's Benthamic codification

Theoretically, it is accepted that Parliament can exclude the operation of natural justice. To a degree this must be correct, as any Australian formulation of natural justice places great importance upon the wording of the statute. However, theory does not always reflect reality. In Australia, this truism has been particularly evident in the politically charged arena that is the *Migration Act 1958* (Cth). It is in this arena where Benthamic attempts by Parliament to introduce a code to promote practicality of decision-making over, and to the exclusion of, natural justice have failed.

After 1985 and, in particular, in *Kioa v West*,[93] natural justice took centre stage in many migration decisions. Decisions were set aside where, for example, an applicant was not given the opportunity to provide further evidence on a crucial issue;[94] respond to adverse inferences;[95] respond to allegations that they were not a bona fide visitor;[96] and respond to assertions that they had relied upon fraudulent documents or claims.[97]

Parliament was concerned about the increasing number of migration decisions being set aside and in 1989 sought to check the judiciary's influence in the migration arena through the introduction of a highly prescriptive code.[98] However, it was not until 1992 that Parliament, through the *Migration Reform Act 1992* (Cth) (Reform Act), sought expressly to limit the scope of judicial review. It did so by introducing a unique regime for the review of migration decisions by the Federal Court.[99] This was a regime that no longer allowed applicants to use the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). Strict time limits and far more limited grounds of review were to be provided in the Migration Act itself. These limited grounds included review where the procedures set out in the Migration Act had not been followed but specifically excluded natural justice (and unreasonableness, which will be touched upon later). The Reform Act also sought to codify the procedures that were to be undertaken in reaching a decision by introducing new subdivisions under the heading 'Code of procedure for dealing quickly and efficiently with visa applications'.[100] It was believed that these reforms would 'codify decision-making processes', thereby addressing concerns with both the fairness and potential abuse of such processes.[101] It was also envisaged that these codified procedures would provide greater guidance and direction for decision makers, as they would 'replace the current common law rules of natural justice'.[102] Parliament had spoken: the practicality of a Benthamic code was to supplant the more flexible common law, and the spirit of the common law was no longer to

direct decision-making processes. This was consistent with a belief that Parliament could direct the judiciary to leave the common law behind and focus on whether the legislative code and visa criteria had been correctly followed by the executive decision makers.[103]

The constitutional validity of the new scheme was tested in *Abebe v Commonwealth*[104] (*Abebe*). In *Abebe* the central issue was whether the *Constitution*[105] allowed Parliament to limit the jurisdiction of the Federal Court by giving it power to review only part of a 'matter' — that is, for example, giving it the power to review an administrative decision for failure to comply with statutory procedures but not natural justice. The majority of the High Court[106] deferred to 'parliamentary supremacy' and found the scheme was valid insofar as it applied to the Federal Court.[107] However, Parliament's victory was somewhat hollow. The High Court emphasised that there was a substantial difference between its own original jurisdiction guaranteed under s 75(v) of the *Constitution* and the Federal Court's jurisdiction, which was given to it, and could therefore be taken away, by Parliament. As such, the new scheme did not prevent an applicant from seeking judicial review in the High Court for a breach of natural justice.[108] Indeed, if anything, the High Court encouraged applicants to use its original jurisdiction by predicting a serious increase in its workload.[109] This was a prediction that over time was proved correct and became the 'Achilles heel of the scheme'.[110]

Any doubt that a breach of natural justice was something that attracted the jurisdiction of the High Court under s 75(v) was dispelled the following year in *Re Refugee Review Tribunal; Ex parte Aala*[111] (*Aala*). Mr Aala argued that he had been denied natural justice. Before the High Court, the government's most interesting argument was premised on the originalist assumption that the jurisdiction given to the High Court by s 75 of the *Constitution* was to be determined by reference to the state of the common law in 1901, when the *Constitution* came into existence. In Diceyian fashion, it was argued that in 1901 there was a distinction drawn between 'jurisdictional error' — a breach of an express parliamentary direction — and 'natural justice'.[112] Jurisdictional error was said to activate the High Court's original jurisdiction under s 75(v), but natural justice did not.[113]

The High Court rejected the government's arguments. Regardless of whether there was a breach of natural justice or a procedural requirement in the Act, it was 'a breach of a condition governing the exercise of a power'[114] and was 'today'[115] to be considered a jurisdictional error activating s 75(v) of the *Constitution*. To adopt terminology used by Gummow and Gaudron JJ, the effect of *Aala* was 'to outflank and collaterally impeach' Parliament's attempt to exclude natural justice.[116] The High Court had sent a clear message that it would adjust judicial review under s 75(v) of the *Constitution* to accommodate modern circumstances. The government's constitutional argument was rejected. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[117] (*Miah*) it argued that Parliament had enacted a code and as a result it had, in a Benthamic fashion, replaced or at least modified any common law natural justice obligations.[118]

Illustrating how rapidly the law was developing in this area and the jurisdictional uncertainty that consequently existed, in *Miah* the High Court split three to two on whether the wording used in the Migration Act was enough to exclude natural justice. The minority of Gleeson CJ and Hayne J adopted a literal or textual approach, focusing intently on the wording of the statute, to find that it was a code and hence natural justice had been replaced.[119] On the other hand, the majority, and particularly McHugh and Kirby JJ, evoked what this paper has referred to as the 'spirituality' of the law in that they found the requirement that an administrative decision maker accord natural justice was so 'deeply entrenched'[120] that the rules of statutory interpretation assumed it would not be excluded unless there was explicit wording to the effect that the decision maker did not have to comply with it.[121] This was because Parliament was not to be taken to 'intend to work serious procedural injustice', as it ordinarily acts 'justly'.[122] This judicial presumption held so much weight with the majority that

they found little to no significance in the fact that the word 'code' was used in the heading of the relevant subdivision setting out the procedures to be followed.[123]

The majority's findings in *Miah* represented a real and tangible advance by the judiciary in its efforts to ensure that administrative decision makers remained subject to natural justice. Nevertheless, the result was achieved 'traditionally' in that judicially created principles of statutory construction were still being applied and the underlying rationale that the judiciary was implementing a legislative directive had not changed. What was different was that the judicial starting point for its interpretive analysis had been modified to assume that Parliament placed as great an importance upon natural justice as the judiciary, thereby reflecting the judiciary's current values onto Parliament. While it can be argued that the majority placed too great an emphasis on its judicially created presumptions, such criticism should not be confused with a belief that the judiciary can and should cast aside its judicial norms and apply the written word as an automaton in accordance with a Benthamic understanding of the judiciary's role relative to a 'supreme' Parliament. The belief that the judiciary can act as an automaton is in its simplicity alluring but, as even Austin recognised, unrealistic.

Together *Abebe*, *Aala* and *Miah* heralded the downfall of the Reform Act.

Further, and somewhat ironically, Parliament's attempt to limit judicial review actually turned attention to and invigorated judicial interest in s 75 of the *Constitution*. This was to lead to what was insightfully described as 'the "new common law" of constitutional judicial review'.[124] It was an avenue of judicial review that had largely lain dormant due to a lack of real need while the broad review rights under the ADJR Act had been available. For present purposes this meant, in somewhat simplified terms, that the underlying justification for the role played by the judiciary and the reach and limits of judicial review were moving from the traditional English reliance on the ordinary common law to an amalgam of the common law and the interpretation of the written *Constitution*.[125] As the creators of the common law and the interpreters of the *Constitution*, the judiciary had intimated that parliamentary sovereignty in Australia might be more limited than previously believed.

A privative clause

Parliament strikes back

Parliament's initial attempt to limit judicial review being an abject failure, it responded with the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) (Judicial Review Act).

The Judicial Review Act represented a new extreme in parliamentary attempts to vest in the executive exclusive control over immigration. This emphasis on executive control was described rather aptly by two commentators as:

> a metaphor for a changing conception [by the government and opposition] of the relation of the three arms of government, and a reconceptualisation of the separation of powers in which executive power is paramount in relation to the other arms of government. This metaphor rests on a crude majoritarian view of democracy.[126]

The key to the new scheme was a privative clause — s 474 — that was designed to restrict judicial review. Due to its broad definition the privative clause sought to make almost all decisions under the Migration Act, including decisions of the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT), 'final and conclusive'.[127]

As is now well known, the privative clause was spectacularly unsuccessful, being eviscerated by the High Court in *Plaintiff S157 v Commonwealth*[128] (*Plaintiff S157*).

Plaintiff S157

In *Plaintiff S157,* the judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ emphasised two statutory presumptions: first, if there is an 'opposition' between the *Constitution* and a privative clause it should, if 'fairly open', be resolved by adopting an interpretation of the clause that is consistent with the *Constitution*;[129] and, second, 'Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies'.[130] As is well known, these two rules allowed the majority to conclude that the privative clause only applied to decisions that the judiciary found to be valid in the first place. A decision would not be valid if there had been a jurisdictional error[131] and, as *Aala* demonstrated, a breach of natural justice was a jurisdictional error.

Such an interpretation was clearly at odds with Parliament's 'intention' if this was understood to be as stated in the Explanatory Memorandum and parliamentary debates.[132] It was also at odds with the literal meaning of the section, which would have fallen foul of s 75(v) of the *Constitution*. For this reason it was unsurprising that the majority judgment sought shelter amongst, and to an extent was consumed by, an appeal to higher constitutional values. In this regard it most famously stated that:

> [Section 75], and specifically s 75(v), introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review.[133]

The proposition that the judiciary had an 'entrenched role' was said to be unavoidable when it was understood that one of the underlying assumptions of the *Constitution* was the 'rule of law'.[134] Of course, the rule of law is a concept far more protean and subject to contrary notions of its content than even natural justice. Understandably, although unfortunately, the majority did not give any guidance as to what the 'minimum provision of judicial review' may entail.[135] It is suggested that such guidance that is available must be obtained from the judgment of Gleeson CJ.

Gleeson CJ, while agreeing with the joint judgment, emphasised the manner in which a decision maker is to reach their decision — that is, in a fair way. What is fair is still a relatively abstract and controversial question, but Gleeson CJ's use of it nevertheless points to the 'rule of law' having an underlying substantive effect. That is, the rule of law is more than simply the rule by law — or, to put it another way, there is an underlying spirit within the law that will not be expelled.

For Gleeson CJ, natural justice was not a unique independent rule; it was instead part of the decision-making matrix created by the Migration Act to ensure that decision makers acted fairly and with detachment. This matrix meant there was no one 'central and controlling provision'[136] such as the privative clause. Rather, the impact of the privative clause was to be ascertained through established principles of statutory construction (a conclusion consistent with the joint judgment[137]). This approach to statutory construction brought Gleeson CJ closer to the approach of McHugh and Kirby JJ in *Miah*. More importantly, Gleeson CJ was presenting fairness as a higher-level organising principle that, having been derived from a value assumed by the *Constitution*, set a minimum standard against which to judge the conduct of administrative decision makers.

Gleeson CJ's formulation of fairness in this way is particularly resilient. It rejects the notion that in undertaking judicial review the undesirable administrative conduct must be

categorised under one and only one organising label, such as natural justice.[138] This means that, in circumstances affecting 'fundamental rights'[139] and where there is a legislative right to a hearing,[140] short of saying that a decision can be made 'unfairly', it is difficult to see what wording would exclude all of the underlying obligations inherent in natural justice. If this reconstruction of what *Plaintiff S157* can stand for is correct (and, as discussed later in this paper, the rejection of labels is evident in the 2013 decision of *Li v Minister for Immigration and Citizenship*[141] (*Li*)) then, from a statutory construction standpoint, Parliament will rarely prevent the judiciary from imposing some natural justice like obligations on decision makers if, after considering the particular circumstances faced by the administrator, it is inclined to do so. Rather, the issue will mostly be how high a standard the judiciary sets.[142]

In *Plaintiff S157* the High Court had once again demolished Parliament's attempt to limit judicial review and, in particular, exclude review for natural justice. However, the skirmishing between Parliament and the judiciary was not yet over. As the interpretation of the privative clause wound through the courts, Parliament inserted new sections into the Migration Act with the aim of once again trying to codify the procedural requirements that decision makers were to follow.

The end of a Benthamic vision of a code uncorrupted by the spirit of the common law

A renewed attempt to codify

In *Miah*[143] the High Court rejected the executive's argument that amendments to the Migration Act meant it had codified the decision-making process.[144] The *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (Procedural Act) was designed to overcome *Miah* through what will be called the 'codifying clause' — an express statement that the procedures contained in the relevant divisions of the Migration Act exhaustively stated the requirements of the natural justice hearing rule in relation to the matters the relevant division dealt with.[145] In true Benthamic style, the Procedural Act was seen as necessary to restore the Parliament's original intention that the Migration Act should contain codes of procedure that allow fair, efficient and legally certain decision-making processes that replace the common law requirement of the natural justice hearing rule.[146]

A distinct fissure quickly opened within the Federal Court over the interpretation of the codifying clause. It was a split that can be seen to have its genesis in whether, or to what degree, individual judges felt compelled to look for the actual legislative intent or, alternatively, utilised common law statutory presumptions to limit the operation of what could be termed an 'ambiguous perhaps also obscure'[147] clause. Illustrating the complexity of the interpretive task faced by individual judges, Belperio usefully categorised the different interpretations that had arisen under three distinct headings: the whole division approach[148] (where common law natural justice is extinguished and the only natural justice like obligations that do exist are those reproduced in the Migration Act itself); the exact text approach (where each section in the relevant procedural division is looked at individually, with the result that few common law natural justice obligations are excluded);[149] and the individual sections approach (which sits somewhere between the previous two approaches).[150]

The interpretation of the codifying clause by French J (as he then was) was particularly influential. He adopted the exact section approach. However, despite his interpretation being at odds with what was said to be the aim of the codifying clause, French J's concerns went beyond arbitrary decision-making. Rather, like Gleeson CJ, his concern was the fairness of the entire decision-making process combined with an uncompromising but not unique view that it was the judiciary's role to be the final check against arbitrary executive decision-making. In his own way, he was balancing justice to the applicant, efficiency and

certainty, and in doing so he began to develop a richer theoretical foundation for the position he was adopting. This foundation justified the limitation he placed on the codifying clause by again adopting the approach that is now known as the principle of legality[151] — a principle that featured prominently and widely in the High Court after French J's rise to Chief Justice[152] and channels Blackstone's faith in the common law.

Despite French J's efforts, in *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat*[153] (*Lay Lat*), overtures of parliamentary supremacy overrode fidelity to common law presumptions and the Full Court adopted the whole division approach.[154] Despite initial resistance,[155] this approach quickly came to be the accepted view,[156] even though it was seen as operating harshly[157] and 'a matter of shame for every Australian citizen'.[158] A Benthamic view of the world had prevailed. However, like the experience with the privative clause, it was a success that was not to last. Four years later the High Court, in *Saeed v Minister for Immigration and Citizenship*[159] (*Saeed*), with French as Chief Justice, rejected the reasoning in *Lay Lat* and instead endorsed the individual section approach or perhaps even the exact section approach.[160]

Saeed was a significant reversal of legal principle and reintroduced many of the common law natural justice obligations previously exiled. However, by the time it was decided, its significance was muted by both an expansive interpretation of the sections in the Migration Act that could be said to impose natural justice like obligations[161] and an extremely strict application of the procedural codes when they were breached by the decision maker.[162] These two developments (which, due to constraints of space, will not be discussed further) and a significant change in approach to statutory construction by the High Court under French CJ in 2009 put to rest any remaining hope that the procedural codes in the Migration Act could ever extinguish the spirit of the common law completely. Indeed, these developments were so significant that they overshadowed and in most instances made it unnecessary for the judiciary to explore the impact in 2007 of an amendment to the Migration Act directing the tribunals to be fair and just (and, as such, this paper will not explore it either).[163]

A broader approach to statutory construction

By early February 2009, Gleeson CJ, McHugh J and Kirby J had all retired and been replaced by French CJ, Crennan J and Bell J respectively. Up until this point in time the outcome in many of the key High Court cases interpreting the procedural codes in the Migration Act would have been different if one judge in the majority had changed their mind.

With the change in personnel came a unanimous change in approach to a less restrictive interpretation of the procedural requirements in the Migration Act. This change can be discerned almost immediately in *Minister for Immigration and Citizenship v Kumar*[164] (*Kumar*). Instead of focusing on the fact that the codifying clause in the Migration Act sought to replace natural justice and endorsing the trend in the Federal Court to view and read the procedural requirements in the Migration Act with an emphasis on protecting the individual, the Court took a broader purposive approach. This broader approach started from the premise that the Migration Act as a whole is designed not only to ensure that a person who is entitled to a visa receives it but also to ensure that a person who is not entitled to a visa does not get it.[165] This allowed the Court to decide the procedural issue that arose by balancing competing policy objectives exactly as had been done four years earlier when determining what natural justice required at common law.[166] *Kumar* denoted a determination by the High Court now to consider a larger range of underlying values, some which favoured the administrative decision maker and some which did not.

The High Court's new approach was applied again in *Minister for Immigration and Citizenship v SZKTI*[167] (*SZKTI*), where it rejected the position adopted by two Federal Court benches that when making enquiries the RRT had to use one of the procedures stipulated in its procedural code.[168] The High Court once again considered the aim of the decision-making process as a whole rather than simply following the Federal Court's approach and focusing on the purpose of the procedural code alone.[169] Starting from this broader premise meant that, while the High Court acknowledged that the procedural code had an important role to play in providing the applicant with natural justice, it had to be balanced against a need to ensure the RRT could operate efficiently and effectively.[170] The High Court was now showing a willingness to consider the needs of the RRT without losing sight of the individual's needs for protection from arbitrary decision-making.

While the broader approach by the High Court flagged a more pro-administrative stance to the procedural requirements in the Migration Act, it also foreshadowed the end of any hope that they really were a code. This is because the RRT was able to avoid the restraints of the legislatively proscribed procedures by relying on a power outside the code. As Alderton, Granziera and Smith observed, 'one might ask whether the role of [the relevant division] as a "code" has any significance at all'.[171]

Alderton, Granziera and Smith were critical of the High Court's reasoning, as they were concerned that parliamentary safeguards could now be ignored. However, this sole concern with protection did not fully account for the fact that the declinature in the codes' effectiveness would also allow, as will be seen with *Li*, the judicial introduction of more natural justice like obligations.

Shortly after *SZKTI*, the decline in the codes' significance continued in *Minister for Immigration and Citizenship* v *SZIZO*[172] (*SZIZO*), where the High Court found that, despite Parliament prescribing the procedure to be followed in detail and using language indicating the procedure was mandatory, it did not necessarily mean that a decision was invalid if the procedure was not followed. Rather, the court had to consider 'whether in the events that occurred the applicant was denied natural justice'.[173] It is interesting to observe that the Court used the more traditional words 'natural justice' rather than the modern ones of 'procedural fairness'. It is suggested that subconsciously this is a significant change in semantics, as the use of natural justice has its origins in the common law and, as has been argued, the spirituality of the Magna Carta. It is this spirituality that can then be seen to influence the outcome in *Li*.

Li and the unpacking of natural justice; the end of labels

Li can be seen as the culmination of a judicial trend, evident in Gleeson CJ's reliance on fairness, to unpack the obligations traditionally underpinning natural justice so that in the face of legislative resistance it has the flexibility still to offer some protection against arbitrary decision-making.

The facts in *Li* were fairly straightforward. Ms Li was denied a skills visa. A mandatory criterion for the issuing of the visa was a favourable skills assessment (made by a third party), which Ms Li did not have. Ms Li's review application before the MRT had a substantial history and it is fair to say that the MRT had taken numerous steps to afford her natural justice, including the provision of further time in which to obtain a second skills assessment. When the second skills assessment was unfavourable, the MRT made its decision despite Ms Li seeking a further adjournment. In rejecting the adjournment, the MRT did not address the reasons provided by Ms Li, simply observing that Ms Li 'has been provided with enough opportunities to present her case and [it] is not prepared to delay any further'.[174]

A decade before *Li*, in *Dranichnikov v Minister for Immigration and Multicultural Affairs* the High Court had observed that:

> To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice.[175]

It is a passage previously acknowledged by all of the High Court justices that heard *Li* except Gageler J, who was not at the time on the bench.[176] It is also a passage that appears directly relevant to the facts in *Li* — that is, the MRT failed to respond to Ms Li's reasoned request for an adjournment other than blandly to state that she had had enough opportunities. Further, as the joint judgment of Hayne, Kiefel and Bell JJ observed, a failure 'to accede to a reasonable request for an adjournment can constitute procedural unfairness'.[177] Yet only French CJ treated the case as one involving a denial of procedural fairness.[178] Hayne, Kiefel, Bell and Gageler JJ circumvented the need once again to engage with Parliament's attempts to exclude natural justice by opening up what could be termed a 'new front'. On this 'front', rather than treating the claim as one that falls under the more traditional natural justice label, they instead focused on the reasonableness of the decision maker's actual decision. Illustrating his unwillingness to be constrained by traditional labels, French CJ also joined in this reasoning.

In determining what was reasonable, all of the judgments looked beyond the specific power to adjourn a hearing, which on its own appeared to be unlimited, and read it in the context of the statute as a whole. This was a 'functional and pragmatic approach'[179] perfectly consistent with what had occurred in *Kumar, SZKTI* and *SZIZO*, although with very different consequences. By taking this approach the Court was able to balance what seemed in Diceyian terms an unfettered discretion to grant or refuse an adjournment against the statutory obligation to invite the applicant to a hearing.[180] While neither of these obligations on a plain literal reading created a right to an adjournment, they allowed the Court to read into the adjournment power an obligation to consider the circumstances of the applicant. In finding that the MRT had committed a jurisdictional error by acting unreasonably in not granting the adjournment, all judgments were clearly swayed by the fact that the MRT had not provided any substantive justification for its decision.

As a ground of judicial review, up until *Li* unreasonableness had been a very 'rare bird'.[181] This was because, as a ground of judicial review, it had been governed by the particularly stringent *Wednesbury* test.[182] This test in effect was that a decision would only be set aside if it was so unreasonable that no reasonable decision maker could have made it. Despite Gageler J's protestations,[183] what is now clear is that the stringency of the unreasonableness test will depend upon the particular statutory context in consideration.[184] As this context cannot be unaffected by the subject matter of the legislation, where the administrative decision affects rights symbolised by the Magna Carta (for example, life, liberty, deportation, property) the stringency of the test is likely to be less. Further, in applying the unreasonableness test, the fact that the Court has rejected a strict reading of the particular statutory power in issue for a more global approach will allow a balancing of other administrative obligations elsewhere in the relevant Act. Given the many competing aims that modern statutes seek to address, this raises the possibility of a more substantive approach being taken to judicial review, albeit that it must still be tied to obligations within the legislation itself.

Given the early history that this paper has traversed, it would be remiss not to observe that a case referenced by each judgment, the 1891 case of *Sharp v Wakefield*[185] (*Sharp*), was not necessarily supportive. Lord Halsbury's judgment in *Sharp* was used as authority for the proposition that when a decision maker exercises a statutory discretion they must do so 'according to the rules of reason and justice'.[186] Yet, while Hayne, Kiefel and Bell JJ were

correct in observing that this statement appealed to higher principles (particularly Lord Coke's comments in *Rooke's Case* that discretion is 'to be limited and bound with the rule of reason and law'),[187] the reasoning in *Sharp* as a whole suggests that this aspirational statement was of a far more limited reach and in fact that an administrative decision should not be disturbed unless the decision maker misinterpreted an explicit obligation imposed by the authorising legislation.[188] Indeed, if Lord Bramwell's judgment in *Sharp* had been followed, the MRT's decision in *Li* would not have been set aside because he observed that the administrative decision maker has 'a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned'.[189] Consequently, despite the fine words of Lord Halsbury, *Sharp* was a continuation of a trend in its time to limit judicial review. It was a trend identified by Professor Jaffe as commencing in the early 19th century[190] and one this paper suggests reflects the values promoted by Bentham, Austin and Dicey. However, this does not mean that in *Li* the High Court was wrong to take the steps it did; rather, it means that it is participating in a trend moving in the opposite direction from that being experienced in 1891. The current trend, starting in 1964, is one in which there has been a strengthening of judicial review. Seen in this light, *Li* is not a return to the approach prevailing at the time of *Sharp* but the even earlier and far more liberal approach to judicial review of Lord Coke in *Rooke's Case* and *Dr Bonham's Case.* However, unlike the interpretations of *Dr Bonham's Case* which suggest a direct challenge to parliamentary supremacy, the High Court has striven for a more Blackstonian constitutional balance, as reflected in the words of French CJ:

> The [administrative decision maker] is not excused from compliance with the criteria of lawfulness, fairness and rationality that lie at the heart of administrative justice albeit their content is found in the provisions of the Act and the corresponding regulations and, subject to the Act and those regulations, the common law.[191]

Concluding observations

It has been said that, as a bastion against the abuse of basic rights and freedoms, the Magna Carta is 'overrated'.[192] Indeed, as an effective practical protection of such rights, it is quite true to say that it has 'died a death of a thousand cuts'[193] as the law, and modern judicial review in particular, has moved on. Yet the Magna Carta can be seen to stand for what I have loosely termed 'spirituality' — a general belief that within the law there is some higher purpose. The difficulty is that, like any search for a higher purpose, precise definitions are few and far between and differing beliefs proliferate. Nevertheless, it is hoped that it has been demonstrated that one signpost that reappears on the journey to enlightenment is the prevalence and enduring strength of the notion that the law should seek to protect individuals from arbitrary and capricious government decisions.

Of course, as the English barons recognised by forcing the agreement of the King, there is always a need to be practical and in this regard the most important and powerful way of protecting rights is to obtain the acquiescence of Parliament. On the other hand, when Parliament will not acquiesce or even seeks to limit rights, the judiciary can and does play a vital role. It is a role that Parliaments have been unable to extinguish and attempts by them to do so appear to have proceeded under a misplaced Benthamic view of the world. This proposition is evidenced by the fact that Australia now has a 'minimum entrenched level of judicial review', that the obligations underlying natural justice permeate multiple grounds of review and the adoption of a broad purposive approach to statutory interpretation has allowed the judiciary to balance a greater number of underlying values (with the weight of those values also being determined by the judiciary).

Yet, while it can be confidently stated that the judiciary's power to influence the rebalancing of government power and individual rights has increased, its power to do so is not, and never has been, absolute. The judiciary must still act within the general (although somewhat

modified) constraints articulated by Dicey. As Emeritus Professor Aronson has observed, to say that the judicial 'mission statement' has changed 'might be putting it too high'. The professed mission statement remains 'all about enforcing the law' and ensuring the decision maker exercises any discretion within the boundaries set out in the parliamentary Act under which the decision is made.[194] Yet it is hoped that this paper shows that there has been an understated but stark change in how this mission statement is achieved. The 'how' now includes situating (or re-situating) parliamentary legislation firmly within a body of pre-existing and judge-made presumptions, the origins of which go back more than 800 years. Consequently, it is fair to say that, despite their differences, the voices of Blackstone, Lord Coke and the barons who drafted the Magna Carta continue to resonate to this day.

Endnotes

1 The actual statement made by the then Prime Minister was that '[w]e need to ask ourselves whether we have got the balance right between the safety of our community and the rights of the individual': The Hon Tony Abbott MP, Prime Minister of Australia, 'Martin Place Siege Review Released' (Media Release, 22 February 2015).
2 These developments have largely occurred in the 'migration arena' and as such it is recognised, although not conceded completely, that they can be viewed as peculiar to high-risk administrative decisions.
3 Faith Thompson, *Magna Carta* (The University of Minnesota Press, 1948) v.
4 William Swindler, *Magna Carta Legend and Legacy* (The Bobbs-Merrill Company Inc, 1965) ix.
5 James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004) 6–7.
6 Ibid 6.
7 Caroline Eele, *Perceptions of Magna Carta: Why Has it Been Seen as Significant?* (Dissertation Code DISS02860, University of Durham, March 2013) 10.
8 Clause 39 initially provided that 'No free man shall be taken or imprisoned or disseized or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land'. The Magna Carta underwent many amendments — in particular, s 39 was re-scribed in 1354 as cl 28 and 'law of the land' was replaced with the modern reference to 'due process of law': Robert Aitken and Marilyn Aitken, 'Magna Carta' (2009) 35 *Litigation* 57, 61.
9 Clause 40 provided that 'To no one will we sell, to no one will we deny or delay right or justice'.
10 Aitken and Aitken, above n 8, 60.
11 Ibid.
12 William Allan Neilson and Charles Jarvis Hill (eds), *The Complete Plays and Poems of William Shakespeare* (1942) as cited in ibid 61.
13 Swindler, above n 4, 97.
14 He was possibly the most famous but not the first to do so. An earlier example is Sir John Fortescue, Chief Justice of the King's Bench under Henry VI.
15 It seems likely that the term 'Parliament' itself was first used in the 13th century: Crawford and Opeskin, above n 5, 8; see also Colin F Padfield, *British Constitution Made Simple* (WH Allen, 4th ed, 1977) 17–18.
16 *Rooke's Case* (1598) 5 Co Rep 99b.
17 *Dr Bonham's Case* 8 Co Rep 114, 77 Eng Rep 646 (CP 1610).
18 See Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Journal* 953, 954.
19 Swindler, above n 4, 172.
20 *Dr Bonham's Case* 8 Co Rep 114, 77 Eng Rep 646 (CP 1610), 652.
21 See, for example, Allen Dillard Boyer, '"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review' (1979) 39 *Boston College Law Review* 43, 85.
22 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 19; Nathan S Chapman and Michael W McConnell, 'Due Process as Separation of Powers' (2012) 121 *Yale Law Journal* 1672, 1690–1.
23 Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Hart Publishing, 2014).
24 *Australian Communist Party v Commonwealth* (1958) 83 CLR 1, 263; see also *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1, 35; and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570.
25 *Marbury v Madison* 1 Cranch 137 (1803).
26 Aitken and Aitken, above n 8, 61.
27 Swindler, above n 4, 186.
28 Ibid 233–4.
29 William Blackstone, *The Great Charter and Charter of the Forest, with Other Authentic Instruments* (1759).
30 Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press, 2008) 8.
31 Arlidge and Judge, above n 23.

32 James J Spigelman, 'Blackstone, Burke, Bentham and the Human Rights Act 2004 (ACT)' (2005) 26 *Australian Bar Review* 1.
33 H L A Hart, 'Blackstone's Use of the Law of Nature' (1956) 3 *Butterworths South African Law Review* 169, 174.
34 Rights which he identified as 'security from personal injury, physical freedom and the complete freedom to use, enjoy and dispose of his property': Swindler, above n 4, 232.
35 See ibid 232.
36 See, for example, Howard Lubert, 'Sovereignty and Liberty in William Blackstone's *Commentaries on the Laws of England*' (2010) 72(2) *The Review of Politics* 271.
37 William Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Duke University Press, 1999) 53.
38 Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (Penn State University Press, 1996) 58.
39 Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (The University of Chicago Press, 2003) 126.
40 Ibid 149–51.
41 Popkin, above n 37, 20–1; J W Ehrlich, *Ehrlich's Blackstone* (Nourse Publishing Company, 1959) 20.
42 Ehrlich, above n 41, 20.
43 Lubert, above n 36, 285.
44 Jeremy Bentham, 'A Plea for The Constitution' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol IV, 249–85.
45 Dean Alfange, 'Jeremy Bentham and the Codification of Law' (1969) 55 *Cornell Law Review* 58, 59.
46 See, for example, Jeremy Bentham, Preface to 'A Fragment on Government' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol I, 1–32, as cited in ibid 59.
47 See, for example, letter by Jeremy Bentham 'To the President of the United States' dated October 1811 in Philip Schofield and Jonathan Harris (eds), *The Collected Works of Jeremy Bentham: 'Legislator of the World': Writings on Codification, Law, and Education* (Clarendon Press, 1998) 5.
48 Ibid 53.
49 This focus underlies all of his writing. For example, it is specifically stated in his Constitutional Code, ch II, art 1, in James Henderson Burns and Frederick Rosen (eds), *Constitutional Code: Volume 1*, *The Collected Works of Jeremy Bentham* (Clarendon Press, 1984) 18.
50 See, for example, Alfange, above n 45, 76–7.
51 John Austin met Bentham in 1819 and soon became one of his inner circle and heir apparent: Richard A Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996) 90.
52 Peter J King, *Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century* (Garland Publishing, 1986) 339.
53 Ibid 367; Robert Campbell (ed), *John Austin: Lectures on Jurisprudence or the Philosophy of Positive Law* (Glashütten im Taunus, D Auvermann, 5th ed, 1972) 1021, 1099–100.
54 Wilfrid E Rumble (ed), *John Austin: The Province of Jurisprudence Determined* (Cambridge University Press, 1995) 163.
55 It can be suggested that Bentham's conception (as well as that of others such as Bodin and Hobbes) differed in that they were political and did not seek to justify the existing legal order in the same way Dicey did. See Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, 2005) ch 4; and Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 80–5.
56 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 232.
57 For Dicey the judiciary was vitally important — see, for example, Sir Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1885) 201.
58 Carol Harlow, 'Disposing of Dicey: from Legal Autonomy to Constitutional Discourse?' (2000) 48 *Political Studies* 356, 357.
59 Dicey, above n 57, 39–40.
60 Ibid 144.
61 Nor did the colonies have it prior to federation: *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130, 155–6 (Higgins J).
62 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 427 (Kirby J).
63 Dicey, above n 57, 203.
64 Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 35, 37. Murray Hunt referred to this as the 'competing supremacies': Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamford and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart Publishing, 2003) (EBSCO Publishing, eBook Collection (EBSCOhost), 2003) 337. However, if it comes to a direct choice between parliamentary supremacy and the rule of law, Dicey would choose parliamentary supremacy: Dicey, above n 57, xxvi.
65 *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 131 (Griffith J).

66 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
67 Although the High Court has indicated a preference for the term 'procedural fairness', the terms are often used as synonyms.
68 Linebaugh, above n 30, 8; Arlidge and Judge, above n 23.
69 Although exactly what will be enough to give rise to a perception of bias can still be controversial: *Isbester v Knox City Council* [2015] HCA 20.
70 *Daguio v Minister for Immigration and Ethnic Affairs* (1986) 71 ALR 173 (Ryan J); *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641 (French J).
71 *Kioa v West* (1985) 159 CLR 550, 584.
72 *O'Rourke v Miller* (1985) 156 CLR 342, 353 (Gibbs CJ); see also *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 660, 672; *Kioa v West* (1985) 159 CLR 550, 614; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504.
73 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 110.
74 Although it is possible to point to examples that blur this distinction — for example, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177, 192; Greg Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100.
75 *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.
76 See, for example, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 64 (Brennan J); and *Abebe v Commonwealth* (1999) 197 CLR 510, 553 (Gaudron J).
77 *Stockwell v Ryder* (1906) 4 CLR 469; *Evans v Donaldson* (1909) 9 CLR 140; *Municipal Council of Sydney v Matthew Harris* (1912) 14 CLR 1; and *Dickason v Edwards* (1910) 10 CLR 243 (*Dickason*). *Dickason* was a decision involving the decision-making of a friendly society, but the approach taken and principles adopted were the same as those applied to governmental decision-making.
78 *Laffer v Gillen* (1927) 40 CLR 86, 95. A requirement for a judicial or quasi-judicial inquiry was emphasised by Lord Hewart in *R v Legislative Committee of the Church Assembly* [1928] 1 KB 411, 415.
79 *Laffer v Gillen* (1927) 40 CLR 86, 95.
80 *Ridge v Baldwin* [1964] AC 40.
81 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398.
82 *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 112–13.
83 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 419.
84 Ibid 452.
85 *Kioa v West* (1985) 159 CLR 550.
86 *Abebe v Commonwealth* (1999) 197 CLR 510, 572 (Gummow and Hayne JJ); *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 491 (Kirby J); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616, 640 (Gummow, Hayne, Crennan and Bell JJ).
87 See discussion by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 16.
88 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, particularly the discussion at 352–3.
89 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616.
90 See Stephen Gageler, 'The Constitutional Dimension' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 165; Grant Hooper, 'The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?' (2015) 41 *Monash University Law Review* 102.
91 Hooper, above n 90.
92 David Dyzenhaus and Evan Fox-Decent, 'Rethinking the Process/Substance Distinction: Baker v Canada' (2001) 51 *University of Toronto Law Journal* 193, 204.
93 *Kioa v West* (1985) 159 CLR 550.
94 *Renevier v Tuong Quang Luu and Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 614 (Spender J).
95 *Waniewska v Minister for Immigration and Ethnic Affairs* (1986) 70 ALR 284 (Keely J); *Woudneh v Inder* (Unreported, Federal Court of Australia, Gray J, 16 September 1988, BC8802988).
96 *Waniewska v Minister for Immigration and Ethnic Affairs* (1986) 70 ALR 284, 296 (Keely J); *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 172, 173 (Keely J).
97 *Yaa Akyaa v Minister for Immigration and Ethnic Affairs* (Unreported, Federal Court of Australia, Gummow J, 5 May 1987, BC8702012).
98 *Migration Legislation Amendment Act 1989* (Cth).
99 *Migration Reform Act 1992* (Cth) s 33.
100 *Migration Reform Act 1992* (Cth) s 33.
101 Explanatory Memorandum, Migration Reform Bill 1992 (Cth), Migration (Delayed Visa Applications) Tax Bill 1992 (Cth) 5.
102 Ibid 6, 9; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 November 1992, 2620 (Gerry Hand, Minister for Immigration).
103 John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335,

348.
104 *Abebe v Commonwealth* (1999) 162 ALR 1.
105 In particular, s 77.
106 It was a 4:3 majority, indicating how finely balanced the decision was.
107 *Abebe v Commonwealth* (1999) 197 CLR 510, 26 (Gleeson CJ and McHugh J).
108 For example, see ibid 553 (Gaudron J) and 583 (Kirby J).
109 For example, see ibid 534 (Gleeson CJ and McHugh J) and 593 (Kirby J).
110 Andrew Metcalfe, 'Jason's Legacy — Impact of Immigration on Administrative Law' (Paper presented at Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 3.
111 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
112 See argument of counsel T Reilly that 'The grounds for relief, not being specified in the Constitution, are derived from the common law': ibid 85.
113 Ibid 86.
114 Ibid 92, 101, 109 (Gaudron and Gummow JJ) and 135 (Kirby J); see also Stephen Gageler SC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 285.
115 The Court did not concede that there had ever been a distinction but, rather, felt that it did not matter, as it was now clear that a breach of natural justice by an administrative decision maker was a jurisdictional error.
116 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90.
117 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
118 Hayne J, while not addressing it directly, appeared to allude to this possibility: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 142.
119 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 75.
120 Ibid 112 (Kirby J).
121 There is even one reading of Kirby J's judgment that holds out the possibility of there being some 'truly fundamental obligations of natural justice' that cannot be excluded: ibid 113. See Simon Evans, 'Protection Visas and Privative Clause Decisions: *Hickman* and the *Migration Act 1958* (Cth)' (2002) 9 *Australian Journal of Administrative Law* 49, 50, 56, 60.
122 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 113 (Kirby J).
123 Ibid 84 (Gaudron J), 94 (McHugh J), 113 and 114 (Kirby J).
124 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 131. See also David F Jackson, 'Development of Judicial Review in Australia over the Last 10 Years: The Growth of the Constitutional Writs' (2004) 12 *Australian Journal of Administrative Law* 22.
125 An interest that, since *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, has been responsible for the development of Australia's unique form of constitutional judicial review and, in particular, its reliance upon jurisdictional error. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, Gaudron J (87), McHugh (102) and Kirby J (123–4) referred back to Gaudron and Gummow JJ's reliance upon s 75(v) of the *Constitution* in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101. However, it was in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 that its real potential was realised. For a concise assessment of this development, see John Basten, 'Constitutional Elements of Judicial Review' (2004) 15 *Public Law Review* 187.
126 Helen Pringle and Elaine Thompson, 'Tampa as Metaphor: Majoritarianism and the Separation of Powers' (2003) 10 *Australian Journal of Administrative Law* 107, 117–18.
127 Section 474(1)(a).
128 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
129 Ibid 504.
130 Ibid 505.
131 Ibid 506; the proposition that a decision affected by jurisdictional error was not a decision under the *Migration Act 1958* (Cth) had been the reason for the earlier decision of *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
132 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31314 (Philip Ruddock); Commonwealth, *Parliamentary Debates*, Senate, 26 February 2001, 21910 (Eric Abetz).
133 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
134 Ibid 514. Gaudron and Kirby JJ's approach in *Re Minister for Immigration and Multicultural and Indigenous Affairs: Ex parte Applicants S134/2002* (2003) 211 CLR 441, 471, underscored their presumption that Parliament similarly believed that the rule of law necessitated judicial enforcement of the legislative command. These observations were later described by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [51], as 'compelling'.
135 Callinan J in a separate judgment was quite unapologetic about the lack of guidance: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 535.
136 Ibid 493 (Gleeson CJ).
137 Ibid 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
138 That is, labels are not mutually exclusive; they overlap.
139 Which will almost always be the case in a migration decision and undoubtedly in a refugee decision.
140 That is, before the Refugee Review Tribunal or the Merits Review Tribunal in this instance.
141 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

142 This is not to suggest that the judiciary will always require a high standard; it will not. While rare, there will also be occasions where no natural justice obligations are imposed by the judiciary. An example of the later case is *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616, although that decision must be viewed in light of the fact that the plaintiff had previously received a full merits review as well as judicial review of his claim for a visa, both of which had confirmed he was not entitled to the visa.
143 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
144 That is, the decision from which applicants had a right of appeal to the Refugee Review Tribunal or the Merits Review Tribunal.
145 *Migration Act 1958* (Cth) ss 51A, 97A, 118A, 127A, 357A, 422B.
146 Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2790–1 (Ian Campbell, Parliamentary Secretary to the Treasurer).
147 *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562, 567; *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214, [64].
148 Enzo Belperio, 'What Procedural Fairness Duties Do the Migration Review Tribunal and Refugee Review Tribunal Owe to Visa Applicants' (2007) 54 *AIAL Forum* 81, 85; *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562 (Heerey J); *SZEGT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1514 (Edmonds J); *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214 (Heerey, Conti and Jacobson JJ).
149 Belperio, above n 148, 84; *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 (French J); *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170 (Gray J).
150 Belperio, above n 148, 84; *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 (Lindgren J); *Wu v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 23 (Hely J).
151 *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624, [59], where he set out the test in *Annetts v McCann* (1990) 170 CLR 596, 598. This approach was also adopted by Gray J in *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170, [36]. In between *WAJR* and *Moradian* the term 'principle of legality' was used by a member of the High Court for the first time as an overarching rule of statutory interpretation: *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ).
152 For example, in 2013 alone see *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289; *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082; *Monis v The Queen* (2013) 87 ALJR 340.
153 *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214.
154 Ibid (Heerey, Conti, Jacobson JJ); the same bench simultaneously handed down *SZCIJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 62. *SZCIJ* dealt with s 422B, while *Lay Lat* dealt with s 51A.
155 *Antipova v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 151 FCR 480 (Gray J).
156 *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419, [85] (Young J); *MZXFN v Minister for Immigration and Citizenship* [2007] FCA 362, [17] (Bennett J); *MZXGB v Minister for Immigration and Citizenship* [2007] FCA 392, [51] (Lander J); *SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1, [93]–[96], [113] (Graham J), [189] (Rares J); *SZEQH v Minister for Immigration and Citizenship* (2008) 172 FCR 127, [27] (Dowsett J). Although see the observation in the joint judgment of Emmett, Kenny and Jacobson JJ in *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427, [10]–[12], which proposes an individual section approach, although, due to the broad way in which they define the nature of each section, it in turn gives the codifying clause a very broad reach.
157 *SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1, [189] (Rares J).
158 *SZHMM v Minister for Immigration and Multicultural Affairs* [2006] FCA 1541, [7] (Madgwick J).
159 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.
160 It was not necessary on the facts to choose between the tests.
161 See, for example, the application of the invitation to appear clause (ss 425 and 430) in *SCAR v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 198 ALR 293 and *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152.
162 For examples of the strict application of the codes, see in particular *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214, although the trend to apply this strict approach universally — that is, to every section of the code — was eventually rebuffed, as discussed immediately below.
163 *Migration Amendment (Review Provisions) Act 2007* (Cth).
164 *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448 (French CJ; Gummow, Hayne, Kiefel and Bell JJ).
165 Ibid 455.
166 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.
167 *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489.

168 *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256, [45] (Tamberlin, Goldberg and Rares JJ); and *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236, [6] (Stone and Tracey JJ), [63] (Buchanan J).
169 See, for example, the consequences listed by the Full Federal Court of not following the specified procedure: *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256, 268 [46].
170 *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489, 503–4.
171 Matthew Alderton, Michael Granziera and Martin Smith, 'Judicial Review and Jurisdictional Errors: The Recent Migration Jurisprudence of the High Court of Australia' (2011) 18 *Australian Journal of Administrative Law* 138, 143.
172 *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (French CJ; Gummow, Hayne, Crennan and Bell JJ).
173 Ibid 640 [36].
174 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 339.
175 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389, 394 (Gummow and Callinan JJ).
176 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 177.
177 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 357. French CJ was less reticent and made a specific finding that there had been a breach of procedural fairness: ibid 347.
178 Ibid 347.
179 John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35, 35.
180 *Migration Act 1958* (Cth).
181 Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117, 117.
182 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury*). As pointed out in Matthew Groves and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 133, 140, prior to *Wednesbury* the High Court in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 had also taken a very 'conservative' approach to the reasonableness ground of review.
183 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377–8.
184 Ibid 364 (Hayne, Kiefel and Bell JJ).
185 *Sharp v Wakefield* [1891] AC 173.
186 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 349 [24] (French CJ), 363 [65] (Hayne, Kiefel and Bell JJ), 371 [90] (Gageler J), although strictly speaking Gageler J did not use 'justice' but instead said the exercise must be 'according to law and to reason within limits set by the subject matter, scope and purpose of the statute' — this formulation can be seen as more restrictive than a general appeal to 'reason and justice'.
187 *Rooke's Case* (1598) 5 Co Rep 99b.
188 The specific examples given by Lord Halsbury which warranted intervention included 'where justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle', where the statute specified what matters had to be considered and a completely irrelevant matter was taken into consideration, and the statutory discretion was implemented incorrectly in that a general resolution was made rather than considering affected persons individually: *Sharp v Wakefield* [1891] AC 173, 179–81.
189 Ibid 183.
190 Jaffe, above n 18, 960.
191 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 344.
192 Michael Sexton SC, 'Bills of Rights are Overrated, Like the Magna Carta', *The Australian*, 9 June 2015 <http://www.theaustralian.com.au/opinion/bills-of-rights-are-overrated-like-the-magna-carta/news-story/ba572a278b67196b7ef51c90a3083ecb>.
193 Matthew Zagor, *England and the Rediscovery of Constitutional Faith* (30 July 2009, The Australian National University) <http://ssrn.com/abstract=1445138 or http://dx.doi.org/10.2139/ssrn.1445138>, 25 and fn 134.
194 Mark Aronson, 'The Growth of Substantive Review: The Changes, Their Causes and Their Consequences' (Paper presented at the Cambridge Public Law Conference, Cambridge, 16 September 2014) 21.