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# Deference

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*Standard definitions of “deference” include two alternative meanings. One meaning is respectful regard for the judgment or opinion of another. Another meaning is respectful acknowledgment of the authority of another. Australian constitutional adjudication has long recognised both forms of deference. In Australian administrative law adjudication, while the first form of deference has often been applied, the second has been seen to be more problematic. This article explores the second form of deference, drawing parallels between the Australian doctrine associated with *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, and the United States doctrine associated with *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).*

Australian constitutional law and Australian administrative law came to merge in the first decade of this century into an integrated system of Australian public law. As the bodies of principles came to be understood to form an integrated system, that system came to be understood to have a formal, unifying, justification. That formal justification came to be located in the traditionally understood duty and jurisdiction of a court, in the course and for the purpose of determining a genuine controversy between parties about immediate rights, duties or liabilities, to declare and enforce the law by which those rights, duties or liabilities are created or sustained. In particular, the justification came to be seen to lie in the duty and jurisdiction of a court, in the course and for the purpose of determining such a controversy about such rights, duties or liabilities, to declare and enforce the law which limits or conditions the exercise of power conferred by law on another repository. That formal justification was then seen to provide the foundation for the traditional method of analysing the legal efficacy of a purported exercise of power by another repository, which employs a number of overlapping distinctions commonly expressed in binary terms. The distinctions have varying degrees of generality, robustness and intensity. The most prominent have been and remain: between law and fact; between legality and merits; between jurisdiction and want or excess of jurisdiction; between vires and ultra vires.

That formal justification for the now conceptually unified system of Australian constitutional law and administrative law is known as the principle in *Marbury v Madison*. The principle is known by that name in Australia in acknowledgment of its emphatic articulation in the Supreme Court of the United States in the case of that name decided almost exactly a century before the establishment of the High Court of Australia.<sup>1</sup> The principle in *Marbury v Madison* has always been accepted within mainstream constitutional thinking in Australia as justifying the declaration and enforcement by a court of the constitutional limits of legislative power and the constitutional limits of non-statutory executive power.

What is more recent in Australia is the development of the understanding that the same principle provides the justification for the declaration and enforcement by a court of the legislated limits of an administrative power that is conferred by statute. That development occurred in stages. The principle was first accepted as explaining the express supervisory jurisdiction of the High Court over the exercise of statutorily conferred power by those who hold Commonwealth offices. The principle was next accepted as explaining what came to be recognised as the constitutionally entrenched supervisory jurisdiction of State Supreme Courts over the exercise of statutorily conferred power by those who hold State offices.

“[T]here are those, even today, who disapprove of the doctrine in *Marbury v Madison*”, wrote

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\* Justice of the High Court of Australia. This is an edited version of the paper presented to the New South Wales Bar Association as the inaugural Spigelman Public Law Oration, 17 November 2014. My thanks to Roshan Chaile, Heather Anderson and Sarah Zeleznikow for their assistance.

<sup>1</sup> *Marbury v Madison* 1 Cranch 137 (1803).



Fullagar J in 1951 in the *Communist Party Case*:

But in our system the principle of *Marbury v Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.<sup>2</sup>

The constitutionally conferred power of the national legislature to make laws about “lighthouses”, Fullagar J gave as an example, is a power to make a law about what a court finds to be a lighthouse and not what the legislature declares or the Executive decides to be a lighthouse. The concrete quality of being or not being a lighthouse, Fullagar J might well have said, is for the purpose of determining the legal efficacy of a purported exercise of the lighthouse power a “jurisdictional fact”. Yet in articulating the principle which provided the foundation for the view on which the High Court famously acted to strike down legislative action in that case, Fullagar J was careful to acknowledge the necessity for a court in some cases to accord respect to opinions of the legislature and the Executive.

What Fullagar J referred to as “respect”, others have referred to as “deference”. The standard dictionary definition of deference includes two alternative meanings. One meaning is respectful regard for the judgment or opinion of another. Another meaning is respectful acknowledgment of the authority of another. The two meanings point to two different forms of deference. Neither meaning equates deference to servility, much less to an abdication of duty. An example of a court exhibiting the first form of deference towards the legislature or the Executive would be for the court, having determined that it is the court’s own judgment or opinion on a particular subject-matter that is to have operative effect, to give weight to a legislative or executive judgment or opinion on that subject-matter in forming its own judgment or opinion. An example of a court exhibiting the second form of deference towards the legislature or the Executive would be for the court to determine that it is the judgment or opinion of the legislature or of the Executive on a particular subject-matter that is to have operative effect, either unconditionally or subject to a condition such as that the legislative or executive judgment or opinion must be made in good faith or must be reasonable.

Australian constitutional adjudication has long acknowledged both forms of deference. Not all subject matters of national legislative power are as concrete and readily identifiable as lighthouses. The power to bring about a resolution of interstate industrial disputes by conciliation or arbitration, for example, depends for its reach on the existence or non-existence of an interstate industrial dispute. That is a jurisdictional fact, in the past often referred to as a “constitutional fact”, on which reasonable minds in some cases may well differ.

The first form of deference can be seen in the long-standing practice of the High Court, in determining that jurisdictional fact for itself, to have respectful regard for the judgment or opinion of an expert conciliatory or arbitral body established by national legislation enacted in reliance on the power. The High Court captured the essence of that practice when it said in 1982 that, notwithstanding its frequent affirmations that it had to determine independently for itself whether the Australian Industrial Relations Commission had or lacked jurisdiction in a particular case, it would give weight on questions of fact and usage to the decision of the Commission.<sup>3</sup> A majority of the High Court had explained just the year before that the weight to be given to the Commission’s decision would vary with the circumstances: if the evidence remained the same, if the Commission had confirmed internally on appeal the decision which had been given at first instance, and if the issue was one of fact in the resolution of which the Commission’s specialised knowledge especially equipped it to provide an answer, greater weight would be accorded than if one or more of those factors was absent.<sup>4</sup> Were the national legislature ever to establish an expert body with jurisdiction over lighthouses, the same form of deference might well be expected to be extended to it.

<sup>2</sup> *Australian Communist Party Commonwealth* (1951) 83 CLR 1 at 262-263.

<sup>3</sup> *R v Williams; Ex parte Australian Building Construction Employees’ & Builders Labourers’ Federation* (1982) 153 CLR 402 at 411.

<sup>4</sup> *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees’ Union* (1981) 153 CLR 376 at 390.



The second form of deference – respectful acknowledgment of the authority of another – can be seen in Australian constitutional adjudication most relevantly for present purposes in the formulation of the limits of some national legislative powers (in the absence of an express or implied constitutional prohibition being engaged) in terms of what is reasonably capable of being seen to be appropriate and adapted to achieving a specified constitutionally permissible result. According to that formulation, the implicit or explicit judgment or opinion of the national legislature that the law it enacts is appropriate and adapted to achieving a constitutionally permissible result identified as the target of the law is accepted by a court as resulting in a legally effective exercise of legislative power, provided the court is satisfied that the legislative judgment or opinion can be seen to be reasonable.

If both forms of deference can be seen in some cases to apply in the determination by an Australian court of whether or not a law transgresses the constitutional limits of legislative power, what room exists for the same forms of deference to apply in the determination by an Australian court of whether or not administrative action transgresses the legislated limits of administrative power? Before answering that question, it is instructive to look to the room seen to exist for the same two forms of deference to apply in the adjudication of whether or not administrative action transgresses the legislated limits of administrative power in the birthplace of *Marbury v Madison*.<sup>5</sup>

In the United States, both forms of deference have an established place in administrative law adjudication. Each form of deference is there known by a label which derives from the Supreme Court decision with which it is most closely associated. The first is called *Skidmore* deference.<sup>6</sup> The second is called *Chevron* deference.<sup>7</sup>

*Skidmore* deference involves a court treating the rulings, interpretations and opinions of administrative agencies, on matters of fact and on matters of law, not as controlling on courts but as providing a body of expertise and informed judgment to which courts can properly look for guidance. The weight which a court will accord to an agency's judgment in a particular case will depend, it is said, on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control".<sup>8</sup>

*Chevron* deference involves a court construing ambiguous language within an agency's empowering statute as including within the scope of the authority so conferred by the statute a capacity or discretion for the agency to adopt and to act on such interpretation of that ambiguous language as the agency considers to be appropriate, subject to the condition that the agency interpretation is reasonable. *Chevron* deference was quite recently explained in the Supreme Court of the United States as follows:

*Chevron* is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Chevron* thus provides a stable background rule against which Congress can legislate. Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.<sup>9</sup>

Overall, *Skidmore* deference is about a court giving weight to an administrative agency's view on a particular question of interpretation which the court considers that a statute, on its proper construction, makes a question for the court. *Chevron* deference is about the zone of authority which

<sup>5</sup> As to deference in the UK see, eg, Hayne KM, "Deference: An Australian Perspective" [2011] *Public Law* 75; Poole T, "The Reformation of English Administrative Law" (2009) 68 *Cam LJ* 142; Young AL, "In Defence of Due Deference" (2009) 72 *Mod L Rev* 554; Allan TRS, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 *Cam LJ* 671.

<sup>6</sup> *Skidmore v Swift & Co* 323 US 134 (1944).

<sup>7</sup> *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).

<sup>8</sup> *Skidmore v Swift & Co* 323 US 134 at 140 (1944).

<sup>9</sup> *City of Arlington v Federal Communications Commission* 569 US \_\_\_\_; 133 S Ct 1863 at 1868 (2013).



a court considers a statute, on its proper construction, to confer on an administrative agency: it is about declaring and respecting the authority of an agency to form its own reasonable view on a particular question of interpretation which the court considers that the statute makes a question for the agency.

Returning to Australia, there appears never to have been seen to be any impediment to the first form of deference – *Skidmore*-type deference – applying in Australian administrative law adjudication. The approach taken to the adjudication of the constitutional limits of the jurisdiction of arbitral bodies in the federal industrial field has readily been translated to the adjudication of the legislated limits of the jurisdiction of other bodies having acknowledged expertise or experience in other fields. So, for example, it has been said that:

[W]hilst it is for [a court] to determine independently for itself whether in a particular case a specialist tribunal has or lacks jurisdiction, weight is to be given, on questions of fact and usage, to the tribunal's decision, the weight to vary with the circumstances. The circumstances will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions and the extent to which its decisions are supported by disclosed processes of reasoning.<sup>10</sup>

The extension of the same type of deference to questions of law has been less well articulated but can be seen in the practice of courts in proceedings for judicial review of decisions of administrative bodies whose members include individuals who are eminent in law. The Australian Competition Tribunal, the Australian Copyright Tribunal and the Administrative Appeals Tribunal, when constituted by a presidential member, furnish ready examples.

The second form of deference – *Chevron*-type deference – has been seen to be more problematic. It is, however, instructive to recognise that something akin to *Chevron*-type deference prevailed in Australian administrative law adjudication for much of the 20th century. It was known as the *Hickman* doctrine, by reference to the High Court decision in which it was first articulated by Sir Owen Dixon and with which it came to be most closely associated.<sup>11</sup> The *Hickman* doctrine was at root an approach to statutory construction concerned with how a court was to resolve what was seen to be a tension created by the concurrence of two provisions within the one statute. The first was a provision expressed to confer a limited jurisdiction on an administrative body (or an inferior court). The second was a provision – referred to as a privative clause – expressed to limit the supervisory jurisdiction of a court to provide a remedy in circumstances where the administrative body (or inferior court) made a decision or took action in excess of the limited jurisdiction conferred on it.

The *Hickman* doctrine was consistent with an acceptance of the principle in *Marbury v Madison* as providing the foundation both for the judicial review of legislative action on the basis of that action transgressing constitutional limits and the judicial review of administrative action on the basis of that action transgressing statutory limits. That was made clear in the original exposition of the doctrine by Sir Owen Dixon in *Hickman* itself. The exposition contained the pivotal observation that, just as it was “quite impossible” for the Commonwealth Parliament to give power to any judicial or other authority which goes beyond the subject-matter of legislative power conferred by the *Constitution*, so it was “equally impossible” for the legislature to impose limits on the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive the High Court in the exercise of its constitutionally-conferred express supervisory jurisdiction of power to restrain the invalid action of that body.<sup>12</sup> Indeed, it was the *Marbury v Madison* conception of judicial review of administrative action which gave rise to the tension which the *Hickman* doctrine was designed to resolve.

The *Hickman* reconciliation of the constitutional tension created by the presence of a privative clause in a statute conferring limited jurisdiction on an administrative body was to construe the

<sup>10</sup> *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 655. See also *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 154-155.

<sup>11</sup> *R v Hickman; Ex parte Fox* (1945) 70 CLR 598.

<sup>12</sup> *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 at 616.



privative clause not as effecting the constitutionally impermissible contraction of the supervisory jurisdiction of a court but as effecting a constitutionally permissible expansion of the jurisdiction conferred by the statute on the administrative body concerned. The expansion of jurisdiction was not to the point of the administrative body's jurisdiction being "set at large". The *Hickman* expansion was rather to the point of the statute being construed as providing statutory authority for the body to make a decision or to take action which would not be deprived of legal effect on the ground that the body had exceeded its statutory jurisdiction "provided always that its decision [was] a bona fide attempt to exercise its power, that it relate[d] to the subject matter of the legislation, and that it [was] reasonably capable of reference to the power given to the body".<sup>13</sup>

There was perhaps something of a gap between *Hickman* rhetoric and *Hickman* practice. Even in cases where the doctrine was treated as applicable, a decision or action of the body concerned would often in practice be found to be invalid as transgressing what was construed to be an "inviolable limitation" in the statute.<sup>14</sup> The doctrine nevertheless provided a well-understood basis on which an Australian court might treat the jurisdiction conferred by statute on an administrative body as extending, within the bounds of reasonableness, to that body forming and giving effect to its own opinion on a statutory question irrespective of whether that statutory question might, for other purposes, be characterised as one of fact or law, or as one of fact and law.

The hey-day of the *Hickman* doctrine was well and truly over by 2003 when the High Court decided *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The decision in that case built on the earlier adoption in *Craig v South Australia* (1995) 184 CLR 163 at 179, as applicable to the position in Australia, of the statement of Lord Diplock in *Re Racal Communications Ltd* [1981] AC 374, giving an explanation of the effect of the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. The explanation was that:

[The legislature] can ... if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy, but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, [the legislature] did not intend to do so.<sup>15</sup>

*Plaintiff S157/2002* highlighted the strength of that *Anisminic* presumption – the exact opposite of the *Chevron* presumption regarding matters of interpretation – even in the face of a privative clause. But *Hickman* was not overruled, and the *Hickman* doctrine was not suggested to be incapable of continuing application or adaptation to a particular statutory scheme in respect of which the *Anisminic* presumption might be displaced by the statutory language.

*Chevron*-type deference might be thought to have been treated less than enthusiastically by the High Court a few years earlier in *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135. Spigelman CJ, in *Pallas Newco*, the year after *Plaintiff S157/2002* and four years after *Enfield*, was inclined to go so far as to accept the view previously expressed by Stein JA that the High Court in *Enfield* "expressly rejected the proposition that Australian law contained any doctrine of deference".<sup>16</sup> But, as Professor Aronson and Associate Professor Groves have perceptively noted, the issue considered in *Enfield* was "not 'deference' to administrative determinations of the law, but 'deference' to administrative findings of fact which were jurisdictional".<sup>17</sup> *Chevron* deference on its own terms and in its own hemisphere would not extend that far.<sup>18</sup> A jurisdictional fact, paradigmatically, is (1) a fact and (2) to be found by a court.

<sup>13</sup> *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 at 615.

<sup>14</sup> For example, *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419.

<sup>15</sup> *Re Racal Communications Ltd* [1981] AC 374 at 382-383.

<sup>16</sup> *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at 712.

<sup>17</sup> Aronson M and Groves M, *Judicial Review of Administrative Action* (5th ed, Law Book Co, 2013) p 191.

<sup>18</sup> *Crowell v Benson* 285 US 22 at 56-57 (1932); cf *City of Arlington v Federal Communications Commission* 569 US \_\_\_\_; 133 S Ct 1863 at 1868-9, 1870-1 (2013).



What is potentially of general and enduring significance about *Enfield* was the High Court's adoption in that case, as applicable to Australian constitutional arrangements, of an important statement by Professor Monaghan in an article entitled "*Marbury and the Administrative State*" published in the *Columbia Law Review* in 1983. The statement is important because, as the title of Professor Monaghan's article suggests, it explains how what has since become known as *Chevron* deference fits with the principle in *Marbury v Madison*:

"[T]here is in our society," [said Professor Monaghan, himself quoting Professor Jaffe, whose work was to prove influential in the High Court's subsequent treatment of the nature of "jurisdictional error" in *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531] "a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures." But judicial review of administrative action stands on a different footing from constitutional adjudication, both historically and functionally. In part no doubt because alternative methods of control, both political and administrative in nature, are available to confine agencies within bounds, there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.<sup>19</sup>

The point of general and enduring significance is that *Marbury v Madison* has not been seen, in its country of birth or its country of adoption, to mandate a judicial duty to supply all relevant meaning to all statutory language. The point of *Chevron*, not unlike the point of *Hickman*, is that the provision of the content of statutory language can be committed by statute to the zone of discretion, or authority or jurisdiction, conferred on an administrative decision-maker without violation of the judicial duty to ensure that the administrative agency stays within that zone of discretion.

The implications of that point can, of course, be recognised and explored without using the language of deference. The language of deference would be quite misleading were it to be taken to suggest that a decision by a court as to the statutory allocation of power to an administrative decision-maker is a matter of courtesy rather than the result of the determination of a question of law which the court itself has exclusive jurisdiction to determine. Perhaps the better label here is still "respect".

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<sup>19</sup> Monaghan HP, "*Marbury and the Administrative State*" (1983) 83(1) Col L Rev 1 at 32-33.

