Article

Australian National University

Federal Law Review
2024, Vol. 52(2) 182–207

DOI: 10.1177/0067205X241253295
journals.sagepub.com/home/flr

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Justiciability as a Constitutional Limitation on Federal Jurisdiction

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Abstract

Justiciability, or non-justiciability, has been regarded as a difficult and indeterminate concept in Australia. This article provides a definition of justiciability in order to clarify the interaction of justiciability with the grant of federal jurisdiction in Chapter III of the *Constitution*, as well as with related doctrines, such as the act of state doctrine and the American political question doctrine. It argues that justiciability is a constitutional limitation on federal jurisdiction to matters that are capable of being resolved by the exercise of federal judicial power. Accordingly, broad statements that certain subject matters are always non-justiciable should be rejected. Instead, it is necessary to demonstrate exactly what grounds a matter is said to be non-justiciable, arising from the text and structure of the *Constitution*.

Accepted 27 December 2023

I Introduction

Sir Anthony Mason described justiciability as 'controversial and difficult' because 'so far it has not been susceptible to definition'.[1] Similarly, Professor Lindell thought 'much remains to be done … if the concept of justiciability is to be much more than a discretionary and subjective tool'.[2] The leading texts on judicial power and jurisdiction,[3] and constitutional law[4] do not deal directly with justiciability or discuss its interaction with related doctrines relating to jurisdiction or standing.

1. Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784, 787. See also *Thomas v Mowbray* (2007) 233 CLR 307, 354 [105] (Gummow and Crennan JJ) ('*Thomas*').
2. Geoffrey Lindell, 'Justiciability' in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (OUP, 2001) 391, 392.
3. James Stellios, *The Federal Judicature* (LexisNexis, 2nd ed, 2020) discusses justiciability as an element of the 'matter' requirement: 116–17 and 158. Mark Leeming, *Authority to Decide* (Federation Press, 2nd ed, 2020) expressly excludes justiciability: 14.
4. For example, Will Bateman, Dan Meagher, Amelia Simpson and James Stellios, *Hanks Australian Constitutional Law* (LexisNexis, 11th ed, 2021) [2.9.22], [2.10.23], [2.10.27] (internal Parliamentary proceedings), [7.3.17] (Cabinet decisions). Limited discussion is in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) at [13.93]–[13.105].

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The purpose of this article is to define justiciability in the Australian constitutional context in order to remedy this gap. I will argue that whether an issue is justiciable simply means whether it involves a lack of constitutional competence caused by the absence of judicial power to determine a particular issue before a court. For a court to decline to exercise federal jurisdiction on the ground of non-justiciability, it must be shown that the issue falls outside the role of a court as described in the text and structure of the *Constitution*. This should be an entirely uncontroversial conclusion, because it boils down to the principle that federal courts must only exercise federal judicial power.

This article is primarily concerned with justiciability in the context of federal courts rather than state courts, as the doctrine of separation of powers is not as strict at the State level. State courts may be conferred jurisdiction to decide matters that would ordinarily be beyond the exercise of federal judicial power, subject to institutional integrity limitations from *Kable v Director of Public Prosecutions*[5] and associated cases. This means there may be divergence between the jurisdictions of State courts and federal courts. However, this does not necessarily mean there is a divergence between the nature of State and federal judicial power. Accordingly, State and federal versions of justiciability would generally have a close affinity.

The article proceeds as follows. Part II discusses justiciability in the Australian constitutional context and argues that any limitations on jurisdiction must only be found in the text and structure of the *Constitution*. Parts III, IV and V clarify concepts introduced in Part II and identify and analyse particular aspects of justiciability that arise from those concepts. It is not intended to be a shopping list but rather an illustration of how the principles of justiciability would apply to several problems regarding the characterisation of a particular dispute as justiciable or non-justiciable. Part III examines and rejects the proposition that respect for or embarrassment caused to the political branches is a valid ground of non-justiciability. Part IV discusses the limitations on jurisdiction flowing from a lack of legal rights or standards. Part V considers issues arising from determining whether there is an express or implied constitutional commitment of the resolution of certain disputes to the political branches.

II Justiciability in the Australian Constitutional Context

A Jurisdiction, Justiciability and the Matter Requirement

The relationship between jurisdiction, justiciability and judicial power is sometimes confused. There is a long-standing distinction between jurisdiction and judicial power.[6] Judicial power, as conferred by s 71 of the *Constitution*, is the power 'which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property' and involves the 'power to give a binding and authoritative decision'.[7] On the other hand, jurisdiction is the '*authority to exercise* judicial power … within limits prescribed'.[8]

Sections 75 and 76 of the *Constitution* confer on the High Court original jurisdiction (and additional original jurisdiction) in respect of specified 'matters'. Section 77(i) of the *Constitution*

5. (1996) 189 CLR 51.
6. *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, 593–594 [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Leeming (n 3) 14.
7. *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) ('*Huddart Parker*').
8. *Ah Yick v Lehmert* (1905) 2 CLR 593, 603 (Griffith CJ) (emphasis added); *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J), applied in *Rizeq v Western Australia* (2017) 262 CLR 1, 12 [8] (Kiefel CJ) and *Burns v Corbett* (2018) 265 CLR 304, 330–331 [21]–[26] (Kiefel CJ, Bell and Keane JJ). See also *Burns v Corbett* at 346–7 [70]–[71] (Gageler J), 365 [124] (Nettle J), 378 [159]–[160] (Gordon J).

https://doi.org/10.1177/0067205X241253295 Published online by Cambridge University Press

and s 39B of the *Judiciary Act 1903* invest federal jurisdiction in the Federal Court for a narrower range of 'matters'. 'Matter' is therefore a jurisdictional term. There must be a 'matter' in order for the High Court or Federal Court to take jurisdiction.[9]

In *In re Judiciary and Navigation Acts*, the High Court held 'there can be no matter within the meaning of [s 76] unless there is some immediate right, duty or liability to be established by the determination of the Court'.[10] Parliament purportedly legislated to confer a power on the Court to give advisory opinions. The Court held the legislation was unconstitutional, separating the concept of a matter from judicial power by drawing a distinction between judicial power generally and Commonwealth judicial power. Accordingly, the majority held the giving of advisory opinions is 'clearly a judicial function' but 'such a function is not competent to this Court unless it is an exercise of part of the judicial power of the Commonwealth'.[11] The exercise of federal judicial power required there to be some 'matter', so the federal judicial power could not extend to making advisory opinions. The matter requirement was what differentiated federal judicial power from judicial power generally.

However, in *Boilermakers*, the High Court appeared to recharacterise the *Re Judiciary* decision.[12] The majority said, 'The learned judges treated it as an attempt to confer judicial power but judicial power which fell outside Chap III of the Constitution'.[13] Their Honours continued that the better characterisation was that the power to give advisory opinions was either non-judicial in nature or simply outside the power of the legislature to confer.[14] The effect was to reconnect 'matter' with 'judicial power', such that the resolution of a matter requires the exercise of judicial power *and* judicial power could only be exercised where a matter exists.

This means there could only be a matter if the dispute involved an exercise of judicial power. The question of justiciability, then, is to ensure there is a matter involving an exercise of judicial power. These restrictions include a real dispute between the parties[15]; and that the determination of that dispute must affect the legal rights of the parties.[16] 'Matter' was later refined to include two elements: 'the subject matter itself as defined by reference to the heads of jurisdiction set out in Chapter III, and the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy'.[17]

It may seem odd to define 'matter', a jurisdictional term, with respect to justiciability, which relates to the limits of judicial power. It does not make much sense to talk of an authority to exercise

9. *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 350–353 [25]–[31] (French CJ, Kiefel, Bell and Keane JJ) ('*CGU Insurance*').
10. (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
11. Ibid 264–5.
12. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 272–3 ('*Boilermakers*').
13. Ibid.
14. Ibid 274–5.
15. *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442, 451 (Isaacs J).
16. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 612 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).
17. *CGU Insurance* (n 9) 351 [27] (French CJ, Kiefel, Bell and Keane JJ), quoting Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 232, and applied in *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5, [26] (Kiefel CJ, Keane and Gordon JJ) ('*Hobart International Airport*').

https://doi.org/10.1177/0067205X241253295 Published online by Cambridge University Press

judicial power if the issue at hand does not involve the exercise of judicial power.[18] 'Matter' was explained by Josiah Symons during the 1898 Convention to mean 'the very widest word … in order to embrace everything which can possibly arise within the ambit'[19] of the federal jurisdiction that is 'capable of being vested in a court under Ch III of the *Constitution*'.[20]

But in response to a concern by John Quick that such a wide expression may allow courts to determine quasi-political matters, Symons clarified that 'matter' 'merely indicates the scope within which the judicial power is to be exercised'.[21] Edmund Barton added 'matter' 'means such matters as can arise for judicial determination'.[22] Accordingly, as O'Connor J held in *South Australia v Victoria* ('*State Boundaries Case*'), the 'generality of the word "matters" in this context is restricted by sec. 71'.[23] The word 'matter' should be read down to only include matters that are 'justiciable' or 'capable of judicial determination'.[24] Justiciability is therefore a constitutional implication limiting the scope of a 'matter' to matters *capable* of being resolved by the exercise of judicial power. The consequence of non-justiciability is a lack of jurisdiction.[25]

The relationship between a matter, justiciability and standing was explored in *Hobart International Airport Pty Ltd v Clarence City Council*.[26] There, the plurality held that standing is 'subsumed within the constitutional requirement of a "matter"'.[27] Further, Kiefel CJ, Keane and Gordon JJ wrote, in obiter, '[i]t may be that standing to seek relief ordinarily provides the "justiciable" aspect of the controversy'.[28]

Justices Gageler and Gleeson explained that a 'controversy is justiciable if it is capable of being resolved in the exercise of judicial power by an order of a court which, if made, would operate to put an end to the question in controversy'.[29] This, in turn, depends on whether there exists an immediate right, duty or liability that is legally enforceable. Their Honours thought that a 'legally enforceable remedy is as essential to the existence of a matter as the right, duty or liability which gives rise to the remedy'.[30] As standing determines whether a person has a right to seek a remedy from a court, their Honours considered that justiciability depends on:

> (1) the power of a court to make an order that would operate to resolve the controversy between those persons; and (2) the right of one or more of those persons to seek that order from that court. Standing … is in that way inseparable from justiciability and, therefore, is intrinsic to the existence of the matter without which the federal jurisdiction of the court to make the order cannot exist.[31]

18. *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767, 779, where Kirby J thought that regardless of the order of the issues, 'the court's duty is plain. It should stop the proceedings forthwith'.
19. *Official Record of the Debates of the Australasian Federal Convention* Melbourne, 31 January 1898, 319.
20. *Hobart International Airport* (n 17) [46] (Gageler and Gleeson JJ).
21. *Official Record of the Debates of the Australasian Federal Convention* Melbourne, 31 January 1898, 319.
22. Ibid 320.
23. (1911) 12 CLR 667, 708 (O'Connor J) ('*State Boundaries Case*').
24. Ibid.
25. Mason (n 1) 788, 792.
26. *Hobart International Airport* (n 17).
27. Ibid [31] (Kiefel CJ, Keane and Gordon JJ), [49] (Gageler and Gleeson JJ), citing *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 68 [152].
28. Ibid [31].
29. Ibid [47].
30. Ibid [48], citing *Abebe v Commonwealth* (1999) 197 CLR 510, 527 [31].
31. Ibid [49].

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The proposition is that if justiciability is defined as whether a controversy is capable of being resolved in the exercise of judicial power, standing is an essential precondition to authorise a court to be able to exercise judicial power. It may be accepted that standing is an essential requirement of a matter and is in that sense inseparable from justiciability. However, if standing is said to provide the justiciable aspect of a controversy, this would be to elide the distinction between judicial power and jurisdiction. The concept of justiciability should be restricted to issues relating to the exercise of judicial power. Standing, which goes to whether a person has a right to seek a remedy, is irrelevant if the court simply does not have the power to decide a case.[32]

More recently, the majority in *Unions NSW v New South Wales* ('*Unions NSW*') explained:

> [t]he extent of this Court's authority to exercise that power (and the authority of other courts invested with federal jurisdiction) is limited by the *Constitution*, reflecting notions of the separation of powers, and of responsible and representative government, found in the text and structure of the *Constitution*.[33]

Their Honours held that 'the function of the Court is not the giving of legal answers or the declaration of legal principle—it is the resolution of a controversy about a legal right, duty or liability', which is reflected in the requirement that a dispute involves a 'matter'.[34] This makes it clear that the Court's jurisdiction is dependent on the constitutional requirements of a 'matter' and limitations arising from the constitutional allocation of powers.

In *Unions NSW*, the issue was whether a provision of a NSW Act, which created an offence related to election expenditure caps for third-party campaigners, impermissibly infringed on the implied freedom of political communication. Two weeks before the hearing, NSW repealed the impugned offence. The plaintiffs amended their statement of claim to seek a declaration that the provision was invalid between the time it was first enacted and the time it was repealed. The Court held that as the provision had been repealed, there was no continuing matter, and therefore, the Court did not have any jurisdiction to determine the claim.[35] The majority held:

> [a]s the standing of a party to seek declaratory relief depends on the sufficiency of the interest of that party in obtaining that relief, a sufficient interest must continue to subsist up until the time at which relief is granted or refused. If, after the commencement of a proceeding, a party ceases to have a sufficient interest in obtaining the relief sought, that party no longer has standing to obtain that relief, the 'matter' ceases to exist and, in consequence, the jurisdiction of the Court comes to an end.[36]

That the Court reached their decision primarily on the basis of standing, rather than on the basis of justiciability, illuminates a key difference between standing and justiciability. Standing is a property of a dispute that relates to the nature of the parties involved — do the parties have a sufficient interest in the dispute. Justiciability is broader and generally applies regardless of whether the particular parties have a sufficient interest. Non-justiciability applies, for example, where there are no ascertainable legal standards or where the subject matter of the dispute is exclusively

32. *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26, [75]-[76] (Edelman J) ('*AZC20*').
33. [2023] HCA 4, [13] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ) ('*Unions NSW*').
34. Ibid [14].
35. Ibid [28].
36. Ibid [18].

https://doi.org/10.1177/0067205X241253295 Published online by Cambridge University Press

allocated to a different branch of government. Those disputes are non-justiciable regardless of the identity of the parties.

Both are essential requirements of a matter. But standing is about the parties, whereas justiciability is about the subject of the dispute. Justiciability is analytically prior to standing — if the resolution of the dispute does not involve the exercise of judicial power, it would be odd to say that the parties had a sufficient legal interest in the outcome of the dispute.

In *Unions NSW*, the plaintiffs failed to demonstrate standing once the provision had been repealed because they had not engaged in conduct that would have contravened the provision.[37] The situation was therefore different to *Croome v Tasmania*, where the plaintiffs had engaged in conduct that contravened the impugned offence, but the Director of Public Prosecutions had given evidence that it would not enforce the provisions against the plaintiffs.[38] Accordingly, if persons other than the plaintiffs in *Unions NSW* had engaged in contravening conduct before it had been repealed, they might have had standing to challenge the provision. That dispute would almost certainly be justiciable. If, on the other hand, the provision was repealed with retrospective effect, such that there was effectively no point in time it was a law of NSW, a challenge would likely be non-justiciable. It would be a purely hypothetical dispute, with no impact on anyone's legal rights.

The Court also rejected[39] an argument that the plaintiffs had standing because the NSW Parliament might in the future enact a similar provision, because the wrong was subject to a risk of repetition.[40] Such a claim is non-justiciable because it based on a mere hypothetical and would interfere with the parliamentary process of law-making.[41]

B Defining Justiciability in Australia and the United States

It is next necessary to consider the content of the principle of justiciability. Australian courts have so far used 'justiciability' without defining the exact boundaries of the term, save that it refers to an issue that is 'capable of judicial determination' or can be 'determined on some recognised principle of law'.[42] It is typically contrasted with a 'political controversy'.[43] Non-justiciability has also been used to describe 'the absence of the constitutional competence of [the High Court] to restrain or otherwise intervene in some of the activities entrusted to Parliament by Ch I and the Executive by Ch II'.[44] Justiciability therefore gives expression to the principle of the separation of powers inherent in the structure of the *Constitution*.

37. Ibid [25]–[26].
38. *Croome v Tasmania* (1997) 191 CLR 119, 126 (Brennan CJ, Dawson and Toohey JJ) 133, 136 (Gaudron, McHugh and Gummow JJ).
39. *Unions NSW* (n 33) [27].
40. *Wragg v New South Wales* (1953) 88 CLR 353, 370–1; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 66 [23] (French CJ, Kiefel and Nettle JJ), 76 [64] (Bell J), 123 [235] (Keane J) ('*Plaintiff M68*'). This is an exception to the US doctrine of mootness: *Southern Pacific Terminal Co v Interstate Commerce Commission* 219 US 498, 515 (Justice McKenna for the Court) (1911); *Roe v Wade* 410 US 113, 125 (Justice Blackmun for the Court) (1973).
41. *Cormack v Cope* (1974) 131 CLR 432, 453–5 (Barwick CJ), 464–5 (Menzies J) ('*Cormack v Cope*'); *Osborne v Commonwealth* (1911) 12 CLR 321, 351–2 (Barton J), 356 (O'Connor J); *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203, 205 (Dixon CJ).
42. *State Boundaries Case* (n 23) 708 (O'Connor J); *Kahn v Board of Examiners (Vic)* (1939) 62 CLR 422, 437 (Starke J). See also PH Lane, *The Australian Federal System* (Law Book, 2nd ed, 1979) 588.
43. *State Boundaries Case* (n 23) 674–5 (Griffith CJ); *South Australia v Commonwealth* (1942) 65 CLR 373, 409 (Latham CJ) ('*South Australia v Commonwealth*'); *Victoria v Commonwealth* (1971) 122 CLR 353, 363 (Barwick CJ).
44. *Thomas* (n 1) 354 [105] (Gummow and Crennan JJ).

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In the *State Boundaries Case*, a boundary dispute between South Australia and Victoria was held to be justiciable because it involved the application of ordinary principles of law, namely the interpretation of Imperial statute and letters patent, and the common law of possession and trespass.[45] This was contrasted to the United States, where O'Connor J explained that boundary disputes between US states were ordinarily non-justiciable because each state 'had full rights of sovereignty over its own territory [and] no common code of laws could be applied'.[46]

Justice Dixon recognised that 'the text of [Ch III] is the outcome of much knowledge of the judicial exegesis by which the judicial power of the United States has been defined'.[47] In the United States, justiciability is derived from Art III of the *United States Constitution*, which provides that the judicial power shall extend to the determination of 'cases' and 'controversies'.[48] The Supreme Court has interpreted this requirement in a similar way to the matter requirement in Australia — the phrase gives rise to limitations on federal jurisdiction. Chief Justice Warren explained that 'cases and controversies' requirement 'define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government'.[49] There are a number of doctrines of justiciability, which include advisory opinions, ripeness, mootness and the political question doctrine.[50]

Significantly, the cases and controversies requirement is treated in Art III as a limitation on judicial power. This differs from the *Australian Constitution*, where the matter requirement is found in the provisions defining the jurisdiction of the federal courts in ss 75 to 77, rather than in the definition of judicial power in s 71. In the American context, justiciability is a direct limitation on judicial power, which consequently limits the jurisdiction of the courts.[51]

Perhaps the most well-known doctrine of justiciability is the political question doctrine. The leading US case is *Baker v Carr* ('*Baker*').[52] Justice Brennan outlined six characteristics that may lead a court to conclude that an issue is non-justiciable:

- A textually demonstrable constitutional commitment to a coordinate political department;
- A lack of judicially discoverable and manageable standards for resolving it;
- The impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
- The impossibility of a court's undertaking independent resolution without expressing a lack of respect due coordinate branches of government;
- An unusual need for unquestioning adherence to a political decision already made; or
- The potentiality of embarrassment from multifarious pronouncements by various departments on one question.[53]

In *Zivotofsky v Clinton*, Sotomayor J classified these factors into three categories: cases requiring a court to decide 'an issue whose resolution is textually committed to a coordinate political

45. *State Boundaries Case* (n 23) 675 (Giffith CJ), 709 (O'Connor J).
46. Ibid 708–9 (O'Connor J).
47. *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 366 (Dixon J).
48. Erwin Chemerinsky, *Constitutional Law* (Wolters Kluwer, 6th ed, 2020) 39.
49. *Flast v Cohen*, 392 US 83, 95 (1968).
50. Richard Fallon Jr et al, *Hart and Weschler's The Federal Courts and the Federal System* (Thomson Reuters, 6th ed, 2009) 49–50.
51. See *Cohens v Virginia*, 19 US 264, 378 (Marshall CJ) (1821).
52. 369 US 186 (1962).
53. Ibid 217.

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department'; cases that 'call for decision making beyond courts' competence'; and cases in which 'prudence may counsel against a court's resolution of an issue presented'.[54] According to Sotomayor J, the legal basis for the first category is that 'the Constitution itself requires that another branch resolve the question presented', whereas the basis for the second category is that Art III of the *United States Constitution* only confers *judicial* power on the Supreme Court.[55]

However, the legal basis for the third category is less clear. Justice Sotomayor wrote, 'abstention accommodates considerations inherent in the separation of powers and the limitations envisioned by Article III, which conferred authority to federal courts against a common-law backdrop that recognized the propriety of abstention in exceptional cases'.[56] One example of that common law backdrop is *Marshall Field & Co. v Clark*, where the Supreme Court held that to consider whether a Bill signed by the Speaker of the House of Representatives and the President of the Senate had in fact complied with the internal procedures 'is forbidden by the respect due to a coordinate branch of government' because it would require the Court to contemplate a 'deliberate conspiracy' between the presiding officers.[57]

C Justiciability Must Be Derived from the Text and Structure of the Constitution

Turning back to Australia, it is convenient to first define justiciability in a negative sense. The content of any principle of justiciability must not derive from any other source other than the text and structure of the *Constitution*. This is illustrated by the Full Federal Court decision *Habib v Commonwealth* ('*Habib*').[58] Habib, an Australian citizen, alleged he was tortured by foreign officials in various countries. He sued the Commonwealth for the torts of misfeasance in public office and intentional infliction of harm. The Commonwealth submitted that Habib's claim was non-justiciable pursuant to the act of state doctrine because the resolution of the claims would require the Court to determine whether Habib's treatment by agents of foreign states within the territories of foreign states was unlawful. The Court unanimously held that the act of state doctrine could not exclude judicial determination of Habib's claim.[59]

The act of state doctrine is a common law doctrine. The traditional formulation of the doctrine is that 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory'.[60] Justice Perram described it as a 'super choice of law rule'.[61]

The basis for the Court's decision is that the doctrine of judicial review, as expressed in *Marbury v Madison*[62] and accepted as 'axiomatic' in Australia,[63] means that the courts are given the power to assess the validity of legislative and executive acts against the *Constitution*. A common law doctrine

54. 566 US 189, 203–4 (2012).
55. Ibid.
56. Ibid 206.
57. 143 US 649, 672–3 (Harlan J for the Court) (1892); *United States v Munoz Flores*, 495 US 385, 409–10 (Scalia J concurring) (1990).
58. (2010) 183 FCR 62 (Black CJ, Perram and Jagot JJ) ('*Habib*').
59. The matter was settled before High Court consideration, when the Commonwealth paid compensation to Habib without admitting liability.
60. *Underhill v Hernandez*, 168 US 250, 252 (Fuller CJ) (1897).
61. *Habib* (n 58) 77 [38].
62. 5 US 137, 177 (Marshall J) (1803).
63. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J); *Habib* (n 58) 72 [25].

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could not apply to 'cut across *Marbury v Madison*' nor operate to 'cripple' the *Constitution*.[64] Thus, Perram J held:

> just as a law of the Parliament may not remove from judicial scrutiny issues about the limits of the Commonwealth's lawful authority, so too it must follow that common law doctrines imported from unitary systems such as England's must yield to the ineluctable imperatives of s 75(iii) and (v).[65]

Similarly, Jagot J held:

> A judge-made doctrine cannot exclude that jurisdiction … The act of state doctrine, being a rule of the common law but no more, could not exclude the High Court's original jurisdiction guaranteed by s 75(v) of the Constitution to restrain the Commonwealth officer by injunction from acting in excess of s 61 of the Constitution and in breach of s 6 of the *Crimes (Torture) Act*.[66]

In Perram J's words, 'whenever a question as to the limits of Commonwealth power arises it is justiciable'.[67] *Habib* therefore stands for the proposition that the act of state doctrine, or indeed any common law doctrine, cannot prevent the judiciary from exercising its constitutional role to confine the other branches of government to the limits of their constitutional power.

Of course, the common law can be useful in informing what those constitutional limits are. For example, the use of history can inform by analogy the constitutional concept of judicial power, as held by the High Court in *R v Davison* ('*Davison*').[68] Dixon CJ and McTiernan J held that the historical practice of courts exercising bankruptcy jurisdiction was sufficient to bring determination of sequestration orders within the definition of judicial power, despite the absence of any determination of rights between parties.[69] However, the proper scope of a historical analogy was doubted by a majority in *Palmer v Ayres*, where their Honours cautioned, '[h]istory alone does not provide a sufficient basis for defining the exercise of a power as judicial power'.[70] I return to this issue in Part V.

Justice Perram, in a footnote, described the political question doctrine in *Baker* as a principle that is 'part of constitutional law' and suggested there is no 'matter' where a political question is involved.[71] Nevertheless, Perram J doubted whether the political question doctrine would apply 'where there is an allegation of excess by the Commonwealth of its constitutional authority'.[72] I turn to this question next.

D Justiciability and Judicial Review in Australia

Justiciability in the United States is closely tied to that of judicial review. As is well known, Art III of the US Constitution does not provide the Supreme Court with an express power of judicial review. Though Marshall CJ in *Marbury v Madison* famously proclaimed that 'it is emphatically the

64. *Habib* (n 58) 74 [29] (Perram J).
65. Ibid 73 [27].
66. Ibid 100 [129].
67. Ibid 73 [28].
68. (1954) 90 CLR 353 (Dixon CJ, McTiernan, Webb, Fullager, Kitto and Taylor JJ).
69. Ibid 371. See also at 385 (Kitto J).
70. *Palmer v Ayres* (2017) 259 CLR 478, 494 [37] (Kiefel, Keane, Nettle and Gordon JJ.
71. *Habib* (n 58) 74–5 [31].
72. Ibid.

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province and duty of the Judicial Department to say what the law is',[73] his Honour also held discretionary executive powers are not examinable by any court:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use in his own discretion, and is accountable only to his country in his political character and to his own conscience … Where heads of the departments of the Government are the political or confidential officers of the Executive … nothing can be more perfectly clear that their acts are only politically examinable.[74]

The constitutional context in Australia differs from the United States. That the High Court has the power of judicial review 'engendered little debate' and was 'never really in dispute' in Australia.[75] This was what Fullagar J meant when he described *Marbury v Madison* as 'axiomatic' in Australia.[76] However, Fullagar J qualified that statement, saying the principle is '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'.[77]

The High Court has regularly adverted to a constitutional duty to exercise jurisdiction.[78] For example, the Court has approved the proposition that the *Constitution* provides for 'the duty of the Courts of the Commonwealth … to consider whether any act done in pursuance of the powers given by the Constitution, whether by the legislature or the executive, is beyond the power which the *Constitution* assigns to that body'.[79]

The Australian approach is exemplified by *Re Ditfort; Ex parte Deputy Commissioner of Taxation* ('*Re Ditfort*'),[80] approved numerous times by the High Court and appellate courts, including the Federal Court in *Habib*. The applicant sought to challenge his extradition to Australia from Germany on the basis that the Commonwealth exceeded its constitutional powers or broke assurances given to Germany. The respondent submitted that these allegations were non-justiciable because they involved Australia's international relations. The respondent's submission followed *Baker* and UK authority, which held that prerogative powers were non-justiciable.[81] Justice Gummow rejected that submission, holding held:

> In Australia, with questions arising in federal jurisdiction, one looks not to the content of the prerogative in Britain, but rather to s 61 of the Constitution, by which the executive power of the Commonwealth was vested in the Crown.[82]

73. *Marbury v Madison* (n 62) 177.
74. Ibid 165–6.
75. Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 174.
76. *Australian Communist Party v Commonwealth* (n 63) 262.
77. Ibid 262–3.
78. *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
79. *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 165 (Dixon CJ) ('*R v Richards; Ex parte Fitzpatrick and Browne*').
80. (1988) 19 FCR 347 (Gummow J) ('*Re Ditfort*').
81. *Attorney-General v Nissan* [1970] AC 179, 237 (Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce, Lord Pearson and Lord Reid); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418; Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14(4) *Sydney Law Review* 432.
82. *Re Ditfort* (n 80) 369; *Thorpe* (n 18) 777; *Habib* (n 58) [31], *Attorney-General (Cth) v Ogawa* (2020) 281 FCR 1, [67] (Allsop CJ, Flick and Griffiths JJ).

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Justice Gummow emphasised that because the executive power in Australia is limited by the *Constitution*, in determining whether the executive has exceeded their constitutional limits, 'no question of "non-justiciability" ordinarily will arise'.[83] Any limitation on federal jurisdiction must derive from the text and structure of the *Constitution* itself; non-justiciability 'reflects another element in the constitutional concept of a "matter"'.[84] Non-justiciability means 'the absence of the constitutional competence of [the Court] to restrain or otherwise intervene in some of the activities entrusted to the Parliament by Ch I and the Executive by Ch II'.[85]

Accordingly, it is doubtful the political question doctrine in its entirety applies in Australia. The High Court has not needed to decide this question, though several members of the Court have contemplated it. For example, Kirby J referred to *Baker* when discussing *Re Ditfort* in a subsequent case but expressly excluded considering it.[86]

In *Victoria v Commonwealth* ('*PMA Case*'), McTiernan J (dissenting) referred to *Baker* and held that the question of whether the Senate had failed to pass a Bill within the meaning of s 57 of the *Constitution* was a political question.[87] His Honour considered that the Court would be 'going beyond its function' because 'the Parliament is master in its own household'.[88] And in *Alley v Gillespie*, Nettle and Gordon JJ approved the proposition that s 47 of the *Constitution* is an example of a 'textually demonstrable constitutional commitment' of a question 'to a coordinate political department'.[89]

Accordingly, only certain aspects of the political question doctrine are relevant in Australia. Notably, there was no discussion about the factors regarding respect for the other branches, a need for unquestioning adherence or the potentiality for embarrassment. This observation is consistent with my central argument that non-justiciability is defined as the absence of judicial power to decide a particular controversy, arising either from an inherent limitation on judicial power or from a constitutional commitment to another branch of government.

Brandon Smith has argued for the need to reconceptualise justiciability in light of Australia's constitutional context.[90] Smith's argument is that the UK doctrine of justiciability is inapt in the Australian constitutional context and cannot be safely relied on. As is evident from my discussion of UK case law, I agree with Smith that the reliance on UK law is problematic. However, we differ in how justiciability ought to be reconceptualised.

Smith proposes grouping claims of justiciability into three categories: (1) constitutional competence, (2) institutional capacity and (3) institutional legitimacy.[91] Constitutional competence refers to whether the courts have been assigned an adjudicative role under the *Constitution*. Institutional capacity refers to the lack of judicially ascertainable standards.[92] Institutional legitimacy refers to the 'normative political legitimacy of the judiciary as an institution for resolving the

83. *Re Ditfort* (n 80) 369.
84. Ibid 370.
85. *Thomas* (n 1) 354 [105] (Gummow and Crennan JJ).
86. *Thorpe* (n 18) 778–9.
87. *Victoria v Commonwealth* (1975) 134 CLR 81, 135.
88. Ibid 135, 138.
89. (2018) 264 CLR 328, [72], citing Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in Hoon Phun Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 180, 184.
90. Brandon Smith, 'Reconceptualising "Justiciability": Crafting a Coherent Framework for Australia's Unique Constitutional Context' (2022) 50(3) *Federal Law Review* 371.
91. Ibid 387–8.
92. Ibid 389.

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question'.[93] Since I think that justiciability is all about judicial power (Category (1)), I think that dividing justiciability into these categories confuses rather than helps.

As I have argued, justiciability is a lack of constitutional competence caused by the absence of judicial power to determine a particular issue before a court. The difference in our approaches is most evident in the description of Category (2) as 'cases where despite establishing a "matter" within the court's constitutional competence, the court cannot exercise judicial power as it has no judicially ascertainable standards by which to adjudicate'.[94] Respectfully, I disagree. The fact that a court cannot exercise judicial power means that there is no matter or constitutional competence. A 'matter' 'merely indicates the scope within which the judicial power is to be exercised'.[95] The matter requirement is essentially linked to the exercise of judicial power.[96]

With respect to Category (3), I agree with Smith that 'a court should never refuse to adjudicate a dispute solely on the judiciary's comparative institutional legitimacy in a given case'.[97] This is because these considerations cannot undermine the judiciary's constitutional duty to scrutinise the actions of the legislature and executive for compliance with the *Constitution*. The question then turns to exactly what the relevant factors are in determining whether the Australian doctrine of non-justiciability operates in a particular situation. Accordingly, the subsequent Parts examine those particular aspects or factors of justiciability to demonstrate a practical application of the issues involved in characterising a dispute as justiciable, as discussed in this Part.

III Embarrassment to the Political Branches

The latter three factors listed by Brennan J in *Baker* are concerned with the political consequences that might follow a court decision, rather than whether the question itself involves political rather than legal rights or involves the application of political rather than legal standards. This distinction is often overlooked, particularly if one focusses solely on the subject matter of the issue (eg, foreign affairs) rather than the grounds on which the issue is said to be non-justiciable.

Every constitutional determination will invariably have large economic, social and political consequences.[98] In the *State Boundaries Case*, O'Connor J held the possibility that the determination of the boundary between South Australia and Victoria would result in political consequences was irrelevant.[99] Similarly, in *Melbourne Corporation v Commonwealth*, Dixon J rejected the argument that the Court should show restraint where political considerations exist, because 'the Constitution is a political instrument' and 'nearly every consideration arising from the Constitution can be so described'.[100] The principle that courts are not concerned with the political consequences of their decisions should be uncontroversial. In this Part, I consider and reject arguments that political consequences are a valid reason for refusing jurisdiction.

93. Ibid 388.
94. Ibid 397.
95. *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 31 January 1898, 319.
96. *Boilermakers* (n 12) 272–3 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
97. Smith (n 90) 399.
98. *Kartinyeri v Commonwealth* (1998) 195 CLR 336 [158] (Kirby J).
99. *State Boundaries Case* (n 23) 707.
100. *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 ('*Melbourne Corporation*').

https://doi.org/10.1177/0067205X241253295 Published online by Cambridge University Press

A Foreign Affairs and the Act of State Doctrine Revisited

The argument that political consequences or embarrassment are valid reasons for refusing jurisdiction is often used for issues relating to foreign affairs. The issue is made more complex because there are typically multiple reasons cited as to why foreign affairs are non-justiciable. In *Baker*, Brennan J explained that foreign affairs are generally political questions because such issues 'frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature' but also because they often 'uniquely demand single voiced statement of the Government's views'.[101]

Justice Brennan expressly cautioned that 'it is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance'.[102] Instead, it depends on the circumstances of each case. Australian courts have often ruled in matters that touch on international relations in politically sensitive topics. Thus, in *Re Canavan*, the High Court made findings about foreign law for the purposes of determining whether a person is a citizen of a foreign power under s 44 of the *Constitution*, finding that Senator Canavan was likely not an Italian citizen on a 'reasonable view of Italian law'.[103]

Similarly, the High Court in *Plaintiff M70 v Minister for Immigration* ('*Plaintiff M70*') held that an arrangement with Malaysia under which Australia would transfer refugees to Malaysia was unlawful.[104] The matter was brought under ss 75(iii) and (v) of the *Constitution*. The majority held it was not open for the Minister to declare that Malaysia was a safe place for refugees (pursuant to s 198A(3)(a) of the *Migration Act 1958*), because Malaysia did not recognise refugees in its domestic laws and was not a party to the Refugee Convention or Protocol.[105]

Justice Heydon, the sole dissentient, considered that the Minister's declaration was 'a decision which pertains to the conduct of Australia's external affairs' and '[i]ntrusion by the courts into those dealings may be very damaging to international comity and good relations'.[106] Consequently, Heydon J considered that the Minister 'is not accountable to courts of law' for the declaration, though he conceded that there are circumstances in which Australian courts are 'obliged to make pronouncements about the acts of a foreign sovereign'.[107]

Chief Justice French rejected the argument that the practical consequences of a judicial decision are relevant to deciding whether to exercise federal jurisdiction. His Honour held:

> Some [federal Court] decisions, including decisions of this Court, have had practical consequences for the implementation of government policy. It is the function of a court when asked to decide a matter which is within its jurisdiction to decide that matter according to law. The jurisdiction to determine the two applications presently before this Court authorises no more and requires no less.[108]

Instead, federal jurisdiction *requires* a court to decide a matter according to law, despite any practical consequences. The dispute in *Plaintiff M70* could be resolved using the ordinary principles

101. *Baker v Carr* (n 52) 211–12.
102. Ibid 211; *Hicks v Ruddock* (2007) 156 FCR 574, 582–6 (Tamberlin J).
103. *Re Canavan* (2017) 263 CLR 284, 304 [37], 317 [86] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Bell, Gordon and Edelman JJ).
104. (2011) 244 CLR 144 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ) ('*Plaintiff M70*').
105. Ibid 201 [135–36] (Gummow, Hayne, Crennan and Bell JJ).
106. Ibid 209 [163].
107. Ibid.
108. Ibid 157–8 [2] (citations omitted).

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of statutory interpretation and administrative law. The mere fact that it could be damaging to international comity and relations between States was not sufficient to deprive the Court of jurisdiction.

Justice Heydon's opinion references the act of state doctrine, also sometimes justified by international comity.[109] *Habib* was a departure from the pre-existing approach to the act of state doctrine in Australia, and so we should now examine its correctness.

The leading UK case on the act of state doctrine is *Buttes Gas and Oil Co v Hammer [No 3]* ('*Buttes Gas*').[110] The plaintiff, who had been granted a concession by a foreign government, sued the respondent in defamation for statements that the plaintiff conspired with that government to deprive the respondent of its own concessions. The House of Lords held that the matter was non-justiciable because it would require the Court to adjudicate on transactions of foreign sovereign states. Lord Wilberforce described it as a principle 'inherent in the very nature of the judicial process'.[111] The reason for this was '[l]eaving aside all possibility of embarrassment in our foreign relations … [there are] no judicial or manageable standards by which to judge these issues'.[112] Significantly, non-justiciability was established not because of the embarrassment to foreign relations but because there were no applicable judicial standards. Further, Lord Wilberforce maintained a distinction between the act of state doctrine and justiciability, writing that the principle ought to be characterised 'not as a variety of "act of state" but one for judicial restraint or abstention'.[113]

Prior to *Habib*, the leading case on the doctrine in Australia was *Petrotimor Companhia de Petroleos SARL v Commonwealth* ('*Petrotimor*').[114] *Petrotimor* concerned a dispute between Australia, Portugal and Timor-Leste about maritime boundaries in the Timor Sea. The appellant was granted a concession by Portugal over certain lands in the disputed territory. The appellant sued on the basis that Australia's claims over those lands through the *Seas and Submerged Lands Act 1973* and the Timor Gap Treaty expropriated its property other than on just terms, contrary to s 51(xxxi) of the *Constitution*.

The Full Federal Court unanimously held it lacked jurisdiction to determine the claim.[115] However, it is difficult to identify the *ratio* because the Court seemed to fuse considerations from three different doctrines. The *ratio* of the decision (that the issue is non-justiciable) could be any of:

- The acquisition of territory by a sovereign State is a prerogative power of the Crown[116];
- It would require a court to adjudicate upon the validity of acts of a foreign State within its own territory (the act of state doctrine proper)[117]; or
- It involves the determination of title to foreign immovable property (called the *Moçambique* rule after *British South Africa Co v Companhia de Moçambique*).[118]

109. Ibid 209 [163]; *Habib* (n 58) 68 [14] (Perram J), 101 [134] (Jagot J).
110. [1982] AC 888 ('*Buttes Gas*'). See also *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 1080–1 (Lord Nicholls).
111. *Buttes Gas* (n 110) 932.
112. Ibid 938.
113. Ibid 931.
114. (2003) 126 FCR 354 ('*Petrotimor*').
115. Ibid 369 [44] (Black CJ and Hill J, Beaumont J agreeing at 415 [155]).
116. Ibid [9]–[31].
117. See ibid [33]–[36].
118. [1893] AC 602; see, eg, *Petrotimor* (n 114) [37]–[41].

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The first ground is a standard application of non-justiciability: the lack of any legal standards to determine the validity of the claim or because it is reserved to the executive.[119] The third ground is outside of the scope of this paper, as it pertains to the fusion of the act of state doctrine with the *Moçambique* rule in *Potter v The Broken Hill Proprietary Company Ltd* ('*Potter*').[120] It is sufficient to note that the correctness of both *Mocambique*[121] and *Potter*[122] has been doubted.

Regarding the second ground, the Court was concerned that 'the outcomes of a court adjudication might well create embarrassment for the government'.[123] The Court relied on *Buttes Gas*, as applied in Australia by *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* ('*Spycatcher*').[124] In that case, the UK Attorney-General sued an Australian publisher for breach of confidence. The High Court held that any obligation of confidence between the UK Government and its employees was unenforceable in an Australian court, on the ground that the Court will not enforce foreign penal or public laws (referred to as the 'associated rule').[125] Significantly, the High Court maintained the distinction between justiciability and that rule:

> The associated rule … has traditionally been expressed as a bar to jurisdiction, although the rule might now be more correctly described as one rendering a claim unenforceable.[126]

Whereas justiciability goes to jurisdiction, the *Spycatcher* rule concerns unenforceability. Analogously, the act of state doctrine pertains to the validity of foreign state actions rather than jurisdiction.

The reasoning of the Court in *Petrotimor* obscures the distinction between justiciability and other doctrines that was clearly delineated in *Buttes Gas* and *Spycatcher*, confusing a rule of jurisdiction with a rule of validity or enforceability.[127] The act of state doctrine only requires that a court not 'sit in judgment' of foreign governmental acts. The validity of the Portuguese concession under Portuguese law was never in doubt.[128] The more correct application of the act of state doctrine would have been to recognise the validity of the Portuguese concession; refusing jurisdiction actually demonstrates a lack of recognition for the validity of acts of Portugal within its own territory.[129]

A more nuanced view was taken by the Federal Court in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* ('*Kyodo*').[130] The appellant sued for declaratory and injunctive relief, alleging that the respondent breached the *Environment Protection and Biodiversity Conservation Act 1989* by whaling within Australia's Antarctic Exclusive Economic Zone. Allsop J at first

119. *New South Wales v Commonwealth* (1975) 135 CLR 337, 388 (Gibbs J) ('*Seas and Submerged Lands Case*'); *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 31–32 (Brennan J) ('*Mabo*'); *Baker v Carr* (n 52) 212.
120. (1906) 3 CLR 479.
121. *Lucasfilm Limited v Ainsworth* [2012] 1 AC 208, 241 [106] (Lord Phillips PSC, Lord Walker, Baroness Hale and Lord Collins JJSC).
122. *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520 [76] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Moti v The Queen* (2011) 245 CLR 456, 474 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Moti*').
123. *Petrotimor* (n 114) 369 [48] (Black CJ and Hill J).
124. (1988) 165 CLR 30.
125. Ibid 40 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).
126. Ibid 41.
127. Cf *Habib* (n 58) 79 [40] (Perram J).
128. Ibid 78 [40].
129. Cf Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704, 719.
130. (2006) 154 FCR 425 ('*Kyodo*').

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instance refused an application to serve the claim out of jurisdiction, on the basis that the case involved 'political judgments' and 'lack[ed] legal criteria permitting judicial assessment'.[131]

On appeal, the Full Court overturned Allsop J's decision.[132] Somewhat ironically, Black CJ and Finkelstein J held that considering the potential political consequences was itself barred by the doctrine of non-justiciability, as this would apply political standards to what would otherwise be a straightforward case of whether a statute was contravened.[133] Moore J put it clearly:

> Courts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise, is to compromise the role of the courts as the forum in which rights can be vindicated whatever the subject matter of the proceedings.[134]

In *Moti v The Queen* ('*Moti*'),[135] the accused had been deported from the Solomon Islands to Australia, the deportation was unlawful under Solomon Islands law and Australian officials had knowingly facilitated the unlawful deportation. The accused applied for a permanent stay on the basis of abuse of process. The respondents sought to rely on the act of state doctrine to argue that Australian courts should not adjudicate on the lawfulness of the actions of the Solomon Island officials. However, the High Court held that the *Spycatcher* case should not understood as

> establishing as a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law.[136]

Instead, Australian courts will sometimes be required to determine the legality of the conduct of a foreign government.[137] In *Moti*, the question of the unlawfulness of the deportation according to Solomon Islands law was a necessary preliminary question to the primary question, under Australian law, of whether a permanent stay should be granted.

Accordingly, the reasoning of *Habib* is preferable to *Petrotimor*. The Court in *Habib* recognised that neither the act of state doctrine nor international comity could undermine federal jurisdiction to hear matters involving the limits of legislative or executive power. Nevertheless, the outcome of *Petrotimor* was probably correct. The appellant sought to impugn the validity of an acquisition of territory by Australia. That issue is non-justiciable because there are simply no standards by which an assertion of sovereignty by a sovereign state over new territory is to be judged under the municipal laws of that state.[138] *Kyodo* and *Petrotimor* demonstrate that blanket statements that certain subject matters are non-justiciable are unhelpful and lead to confusion with other doctrines.

The act of state doctrine instead acts as a presumption of the validity of foreign state acts, rather than as a bar to jurisdiction. In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* ('*Plaintiff M68*'),[139] the relevant issue was the interpretation of s 198AHA(2) of the *Migration Act 1958* (Cth), which authorised the Commonwealth to take any action to implement 'any law' of

131. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, [24].
132. *Kyodo* (n 130) 430 [10] (Black CJ and Finkelstein J).
133. Ibid 430 [12]–[13].
134. Ibid 435 [38].
135. *Moti* (n 122).
136. Ibid 475 [50] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
137. Ibid 475–6 [51]–[52].
138. *Mabo (No 2)* (n 119) 31–2 (Brennan J).
139. *Plaintiff M68* (n 40) 73.

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Nauru in relation to refugee processing matters. The plaintiff argued that 'any law' should be interpreted to mean a valid law of Nauru, such that Australian courts would be required to determine validity of Nauruan law under the Nauruan Constitution. The Court rejected this argument, though it was unnecessary to decide.[140]

Keane J, the only Justice to discuss the issue, held that s 198AHA did not contain any textual indications that its operation depended on the constitutional validity of Nauruan law. Indeed, the text indicated the contrary.[141] His Honour referred to the *Spycatcher* rule, international comity and judicial restraint as additional reasons to reject the argument. Keane J appeared to be using the act of state doctrine to negative an asserted presumption of statutory interpretation that a reference to a law of a foreign State is a reference to a *valid* law.[142] This is a similar exercise which is undertaken, for example, in relation to determining whether a person is a citizen under foreign law for the purposes of s 44 of the *Constitution* (discussed above in relation to *Re Canavan*).

Hypothetically, then, if the text of s 198AHA made it clear that its operation depended on the validity of Nauruan law, then an Australian court would be required to make that determination. Accordingly, Keane J speculated that where the foreign law was 'indisputably contrary to the law of the foreign sovereign State', an Australian court might be willing to determine the validity of the foreign law.[143]

B Recent Developments

Recent developments in the UK law of justiciability may signify a convergence between UK and Australian law.[144] In *Shergill v Khaira* ('*Shergill*'),[145] the UK Supreme Court held that a dispute over who had the power to appoint and remove trustees of a religious charity was justiciable, despite the Court being required to adjudicate on competing interpretations of religious doctrine, because it was necessary to determine the legal status of a trust held for religious purposes.

In the court below, the Court of Appeal held, relying on *Buttes Gas*, that the dispute was non-justiciable because the adjudication of religious beliefs involved a lack of judicially manageable standards.[146] On appeal, the Supreme Court held that the actual *ratio* in *Buttes Gas* was that it involved a 'political' dispute about the boundaries of sovereign states, which was the proper function of the executive.[147] The Court explained that there were two types of non-justiciability: the first where the issue is always beyond the constitutional competence of the courts (eg, *Buttes Gas*) and the second where the issue involves subject matters that are only prima facie non-justiciable, but a court has a discretion to venture into these areas if necessary to resolve a justiciable issue (as was the case in *Shergill*).[148]

In *Belhaj v Straw* ('*Belhaj*'),[149] the claimants sought damages against the UK Government alleging their involvement in the claimants' torture by foreign officials. The Supreme Court held the act of state doctrine did not provide a blanket rule to preclude determination of the claim; this would

140. Ibid 73 [52] (French CJ, Kiefel and Nettle JJ), 88 [102] (Bell J), 110 [181] (Gageler J), 129 [258] (Keane J).
141. Ibid 126 [248]–[249].
142. Ibid 128 [252].
143. Ibid 129 [257].
144. Rayner Thwaites, 'The Changing Landscape of Non-Justiciability' [2016] (1) *New Zealand Law Review* 31, 55.
145. [2015] AC 359.
146. Ibid 376 [39] (Lord Neuberger PSC, Lords Sumption and Hodge JJSC, Lords Nance and Clarke agreeing).
147. Ibid [40].
148. Ibid 377–8 [42]–[43].
149. *Belhaj v Straw* [2017] AC 964.

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be determined on a case-by-case basis.[150] Specifically, there was a public policy exception where the dispute involved a breach of *jus cogens* norms or extreme human rights violations.[151] This is an important qualification to the doctrine.

Interestingly, Lord Sumption disapproved of the Australian High Court's decision in *Moti*.[152] His Lordship said adopting the *Moti* principle would be 'tantamount to the abolition of the foreign act of state doctrine'.[153] Lord Sumption is correct to say *Moti* has essentially abolished the act of state doctrine in Australia. As this consequence arises from the *Australian Constitution*, it makes sense that Lord Sumption was reluctant to abandon the act of state doctrine.

IV A Lack of Judicially Manageable Standards

This factor is perhaps best described as a negative stipulation. It can be divided into two categories: where the issue does not involve legally enforceable rights and where the resolution of the issue would involve the application of non-legal standards and principles. An example of the former is if the plaintiff 'seeks an extension of the court's true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions'.[154] An example of the latter is if the validity of a sovereign state's claim of sovereignty over a territory is challenged in its municipal courts, because '[i]ts sanction is not that of law, but that of sovereign power'.[155]

This Part considers two separate issues in determining whether a controversy involves judicially manageable standards. These issues are both characterisation questions — how to determine whether a dispute involves legal standards. The first issue clarifies that although political *consequences* should be irrelevant to the determination of jurisdiction, there are certainly controversies that only involve political disputes rather than legal disputes. But a dispute will not be rendered political simply because it involves an element of discretion or consideration of policy. The second issue is the significance of when judges disagree over whether there are judicially manageable standards. Disagreement among judges here raises the prospect that judges may be arbitrarily making up standards rather than determining whether legal standard exists.

A Political Considerations, Not Policy Considerations

In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* ('*Tasmanian Breweries*'),[156] the issue was whether the power conferred by legislation on the Trade Practice to examine and make determinations on certain agreements or practices was judicial, given that the Tribunal was not a Ch III court. The High Court held that legislation was valid because the proceedings before the Tribunal did not involve 'vindication of any right or obligation' nor 'any ascertainable criterion'.[157] The Act instead used a 'public interest' criterion, which Kitto J described as 'essentially non-justiciable' because it requires application of a standard 'the content of which has no

150. Ibid 1014–16 [89]–[90] (Lord Mance JSC).
151. Ibid 1122 [168] (Lord Neuberger PSC, Lord Wilson JSC agreeing), 1167 [268], 1170 [278] (Lord Sumption JSC, Lord Hughes JSC agreeing).
152. Ibid 1156–7 [246]–[247] (Lord Sumption JSC, Lord Hughes JSC agreeing).
153. Ibid 1157 [247].
154. *Re Ditfort* (n 80) 370 (Gummow J).
155. *Salaman v Secretary of State in Council of India* [1906] 1 KB 613, 639 (Fletcher Moulton LJ) ('*Salaman*').
156. (1970) 123 CLR 361 ('*Tasmanian Breweries*').
157. Ibid 375–6 (Kitto J).

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fixity—a description which refers the Tribunal ultimately to its own idiosyncratic conceptions and modes of thought'.[158] Windeyer J described it as 'a concept which attracts indefinite considerations of policy that are more appropriate to law-making than to adjudication according to existing law'.[159]

Similarly, in *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd*, the Federal Court held that a decision by Cabinet to nominate certain lands for inclusion in the World Heritage List was non-justiciable.[160] The *ratio* is often said to be because the decision involved polycentric policy considerations.[161] The reliance on polycentricity should be criticised.[162] Just because an issue raises multiple interests does not mean it is non-justiciable, courts are regularly called upon to balance competing interests. Instead, as Wilcox J held, the Cabinet decision was non-justiciable because there are no legal standards to apply in balancing the policy factors and because the decision did not in fact affect the respondents' legal rights and interests.[163]

An issue will not be non-justiciable merely because it raises policy considerations or involves some degree of discretion: 'matters of policy may enter permissibly (and necessarily) into the exercise of judicial power in many ways'.[164] In *Thomas v Mowbray*, Gummow and Crennan JJ rejected an argument that determining whether the restrictions placed by an interim control order are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act' was non-justiciable.[165] This was because courts have, over time, developed legal principles to guide the assessment of that test involving policy considerations.[166]

Thus, non-justiciability is concerned with whether the issue is *capable* of being resolved through the application of legal principles, not whether legal principles currently exist or could be developed in the future. For example, as recognised in *Mabo (No 2)*, the acquisition of territory is governed by well-recognised rules of international law: there are *international* legal principles capable of application.[167] However, this does not mean that questions regarding acquisition of territory are justiciable in *municipal* courts.[168] Disputes over territory between sovereign states must be resolved on a state-to-state level. Domestic law is dependent on the existence of a sovereign. Judicial power is defined as the power of *sovereign* to resolve disputes according to law.[169] Thus, in an extreme case, if a court were to consider the validity of the Crown's acquisition of sovereignty over Australia, the court would have to apply legal standards to the question of whether the legal system exists. But no legal criteria can exist as such considerations are essentially extra-legal.

Of course, the consequences of any acquisition involve legal considerations, such as in *Mabo (No 2)* as to whether the acquisition extinguished native title rights.[170] Similarly, if Parliament were to

158. Ibid 376.
159. Ibid 400. See also *R v Spicer*; *Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312, 317 (Dixon CJ, Williams, Kitto and Taylor JJ).
160. (1987) 15 FCR 274 ('*Peko-Wallsend*').
161. Ibid 278–9 (Bowen CJ, agreeing with Wilcox J).
162. See, eg, Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30(2) *Federal Law Review* 239.
163. *Peko-Wallsend* (n 160) 305–6. See also at 280 (Black CJ).
164. *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542, 553 (Gummow J).
165. *Thomas* (n 1) 354–5 [107]–[109].
166. Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 253, approved in *Thomas* (n 1) 351 [91].
167. *Mabo* (n 119) 32 (Brennan J).
168. *Salaman* (n 155) 639 (Fletcher Moulton LJ); *Seas and Submerged Lands Case* (n 119) 388 (Gibbs J).
169. *Huddart Parker* (n 7) 357 (Griffith CJ).
170. See also *Salaman* (n 155) 639–41 (Fletcher Moulton LJ).

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legislate to place limitations on the prerogative power to extend sovereignty, those limitations would also be justiciable.[171]

B Disagreement About Judicially Manageable Standards

One puzzle is what it means when judges disagree whether there is a judicially manageable standard. If judges disagree, it might seem like judges are making up legal standards. I think this occurs primarily in two scenarios. The first is where the court is asked to rule on international law (eg, *Petrotimor*) or on the municipal law of a foreign State (eg, *Plaintiff M68*), in circumstances where Australian law does not require such determination. The important thing here is not the absence of legal criteria but rather the lack of criteria applicable by an Australian court.

The second is where the court is asked to rule on matters where there are no legal criteria at all. In the public law context, in *Gerhardy v Brown*, the Court declined to make further inquiries into what special measures were necessary for the purposes of the *Race Discrimination Act*.[172] In *Tasmanian Breweries*, the public interest criterion did not contain any ascertainable legal criteria as the Tribunal had been given a wide discretion.[173]

However, that is not to say that there is an absence of legal criteria in every case: in *Gerhardy v Brown*, Brennan J thought it was possible to apply the ordinary legal standards of reasonableness.[174] And it would be difficult to imagine even a very wide discretion being unreviewable in cases of bad faith or fraud.

Given these two categories, it becomes clearer what judges are doing when they disagree about the existence of judicially ascertainable standards. In the first category, the disagreement is about the extent to which Australian law incorporates the international/foreign law, such as whether it is necessary to determine a question of international/foreign law, as was the case in *Moti* but not in *Plaintiff M68*.

In the second category, the disagreement is about ascertaining the legal limits of the exercise of a power. An example of this kind is *Thomas v Mowbray*. The relevant issue was whether the power conferred on federal courts to make interim control orders was conferring a non-judicial power on a Ch III court. The plaintiff argued that the legislation required the judge to apply standards that were incapable of judicial application because they were too vague or uncertain. The High Court split 5: 2 on this issue, deciding that the criteria were judicially ascertainable.

Chief Justice Gleeson noted that 'reasonable necessity' or 'reasonably appropriate and adapted' were legal tests often used in other areas of law: '[a]gainst this background of judicial and legislative usage, it cannot be plausibly suggested that the standard of reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public is inherently too vague for use in judicial decision-making'.[175] Gummow and Crennan JJ described the test as 'the great workhorse of the common law'.[176]

171. *Seas and Submerged Lands Case* (n 119) 388–9 (Gibbs J); *Petrotimor* (n 114) 365 [28] (Black CJ and Hill J).
172. *Gerhardy v Brown* (1985) 159 CLR 70, 138–9 (Brennan J) ('*Gerhardy v Brown*').
173. *Tasmanian Breweries* (n 156) 376 (Kitto J).
174. *Gerhardy v Brown* (n 172) 138–9. See also *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 288 FCR 23, 35 [39] (Kenny J).
175. *Thomas* (n 1) 330-3 [20]–[27]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 260 [88] (Bell, Keane, Nettle and Edelman JJ).
176. *Thomas* (n 1) 352 [100].

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However, Kirby and Hayne JJ (dissenting separately) considered that the problem was not with the legal test but rather with the purpose of protecting the public from a terrorist act.[177] Their Honours considered that asking whether a measure is necessary to protect the public is inherently political and for Parliament to decide.[178] Otherwise, the court would be making evaluative judgments about intelligence material to predict the future.[179]

The disagreement, then, was about whether the legal tests of reasonableness could extend to national security decisions — that is, what limits could be placed on the Executive's assessment that the order would likely protect the public from a terrorist act.

V Commitment to Other Branches of Government

The primary concern of this category is whether the *Constitution* has committed the resolution of a particular dispute to another branch of government. This could be to another branch of the federal government, such as internal Parliamentary procedures being left to the legislature or certain prerogative powers left to the executive. Or it could be a dispute between sovereign entities within the federal compact (ie, between the States and the Commonwealth) being left to those polities to resolve through political means rather than legal means.[180]

This Part discusses three characterisation issues in determining whether a particular dispute involves a commitment to other branches of government. The first is the role of discretion and whether the court has a discretion to decide whether to take jurisdiction. The second is the role of the common law in determining whether a matter has been reserved to another branch. The third issue is that blanket statements that prerogative powers are non-justiciable should be rejected in the Australian constitutional context.

A Role of Discretion

The first issue is the role of judicial discretion in determining justiciability, that is, whether courts have a discretion to take or refuse jurisdiction on discretionary grounds. This issue has arisen in relation to the interpretation of s 57 of the *Constitution* regarding the double dissolution procedure. In *Cormack v Cope*, senators sought declarations and injunctions to restrain Ministers and Parliamentary officers from introducing certain Bills to a joint sitting because those Bills had not satisfied the criteria in s 57.[181] The High Court declined to make such orders, but for different reasons.

Justice McTiernan found it was non-justiciable because the matters were 'intrinsically of concern to the Senate and the House of Representatives'.[182] Chief Justice Barwick considered that although the Court would not interfere in 'intra-mural deliberative activities', where the *Constitution* prescribed a particular law-making process, 'the courts have a right and duty to ensure that law-making process is observed'.[183] However, Barwick CJ thought that as a matter of discretion, no injunction should issue because the Court could always declare the relevant Acts void after the joint sitting

177. Ibid 417 [317] (Kirby J), 468 [475]–[476] (Hayne J).
178. Ibid 419 [323] (Kirby J), 475 [504], 479 [516] (Hayne J).
179. Ibid 477 [510] (Hayne J).
180. *South Australia v Commonwealth* (n 43), 141 (Dixon J). See also *Melbourne Corporation* (n 100) 82.
181. *Cormack v Cope* (n 41).
182. Ibid 461.
183. Ibid 454.

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passed them, without immediate time pressure and with the benefit of full argument.[184] Justice Gibbs agreed that the Court had jurisdiction 'to interfere at any stage' but would not do so as an exercise of discretion because the motion was 'premature'.[185] Justice Stephen considered that the Court 'does not' intervene but emphasised that this 'depends not upon discretionary but on jurisdictional grounds'.[186]

The High Court subsequently heard two challenges to the impugned Bills after they had been passed by the joint sitting in the *PMA Case*[187] and *Western Australia v Commonwealth*,[188] holding that the challenges were justiciable.

On my approach, there should be no room for discretion in determining whether an issue is capable of resolution by through the exercise of judicial power. Where jurisdiction exists, particularly to enforce the constitutional limits of power, there is a constitutional duty to exercise that jurisdiction. Accordingly, references to discretion in *Cormack v Cope* should be understood as not referring to a discretion as to whether jurisdiction exists but rather the Court's inherent remedial discretion in determining whether to issue constitutional writs or equitable relief. The exercise of that discretion is itself conditional on there being authority to decide the case. Thus, Barwick CJ said:

> It is one thing by judicial restraint not to exercise a power, and quite another thing to deny the existence of the power…[T]he decision not to exercise a power in point of discretion is indeed an exercise of the power.[189]

It is significant that the factors considered by the Court in refusing relief did not include typical justiciability grounds. Chief Justice Barwick considered: the time pressure; that the application was for an interlocutory injunction; and that any legislation could later be found void anyway. Similarly, Gibbs J considered the 'rushed' nature of the proceeding resulted in the issue being 'premature'.[190] Mason J placed weight on the fact that the impugned Bills were still open to challenge after the joint sitting had passed the Bills.[191]

This approach was recently confirmed in *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*AZC20*'), albeit the ground of non-justiciability was mootness of an appeal rather than commitment to another branch. The issue was whether the Full Federal Court had the power to determine an appeal from orders made by the primary judge relating to certain statutory provisions in circumstances where, after the orders were made, factual circumstances had changed such that those provisions no longer applied. The majority held that the Full Court erred in treating the issue as a matter of discretion (holding it was in the public interest in the administration of justice to determine a question of law despite the facts making it moot) rather than a matter of jurisdiction.[192] *ACZ20* confirms that federal courts do not have a discretion to determine matters that lie outside the exercise of judicial power, even if the resolution of the issue would save resources and reduce legal uncertainty for future cases. In other words, a federal court

184. Ibid 460.
185. Ibid 466, 467.
186. Ibid 472.
187. *PMA Case* (n 83).
188. (1975) 134 CLR 201.
189. *PMA Case* (n 83) 118.
190. *Cormack v Cope* (n 41) 467.
191. Ibid 474.
192. *AZC20* (n 32) [3], [29], [47] (Kiefel CJ, Gordon and Steward JJ), [89]–[90] (Edelman J).

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cannot take jurisdiction solely because it would develop the common law by resolving an appeal from a contested issue devoid from the facts.

B The Relevance of the Common Law to Justiciability

The second issue is the relevance of the common law to determining whether an issue is justiciable. On my approach, justiciability ought to be derived from the text and structure of the *Constitution*, rather than the common law. However, common law doctrines might inform these constitutional limitations.

A good illustration is parliamentary privilege, a clear example of the *Constitution* picking up a long-standing common law principle. Section 49 of the *Constitution* provides that the 'powers, privilege and immunities of the Senate and the House of Representatives' shall be those of the 'Commons House of Parliament of the United Kingdom … at the establishment of the Commonwealth', until the Commonwealth Parliament otherwise declares.

Parliamentary privilege was codified in Article 9 of the *Bill of Rights 1689* (UK), but the common law principle is wider than Article 9. It traditionally refers to matters lying within the 'exclusive cognisance of Parliament'.[193] In *R v Chaytor*, the Supreme Court held that parliamentary privilege did not protect Members of Parliament from criminal prosecution, where they had submitted fraudulent expense reports.[194] Expense claims were not proceedings in Parliament nor within its exclusive cognisance, defined as 'the exclusive right of each House to manage its own affairs without interference'.[195] However, it was within the Court's jurisdiction to determine the scope and limits of parliamentary privilege.[196]

In Australia, in *Alley v Gillespie*, the High Court held that the question of whether a person is incapable of sitting as a member of the House of Representatives is for the House to determine, or for the House to refer to the Court of Disputed Returns, rather than for the Court to determine on the suit of a common informer.[197] Sections 46 and 47 of the *Constitution* did not authorise the courts to do so without express authorisation by Parliament.[198] The majority explained that s 47 'reflects the long-standing tradition of the House of Commons in the United Kingdom, which reserved to itself questions concerning disputed elections and the qualifications of members'.[199] But significantly, their Honours held that it was unnecessary to consider historical changes to parliamentary privilege or whether those changes were imported through s 49, because s 47 makes express provision and supersedes any historical changes.[200]

Similarly, in *R v Richards; Ex parte Fitzpatrick and Browne*, the High Court refused to issue writs of habeas corpus to the applicants who had been imprisoned pursuant to warrants issued by the Speaker of the House of Representatives alleging contempt of Parliament.[201] Dixon CJ held it was

193. *R v Chaytor* [2011] 1 AC 684, [13], [26] (Lord Phillips).
194. Ibid.
195. Ibid 712 [63].
196. Ibid 697–8 [14]–[16], affd *R (Miller) v Prime Minister* [2020] AC 373, 411 [65]–[69] (Lady Hale and Lord Reed) ('*Miller (No 2)*').
197. (2018) 264 CLR 328 (Kiefel CJ, Bell, Keane and Edelman JJ).
198. Ibid 347 [53].
199. Ibid 341 [29].
200. Ibid 341 [29]; 357 [107]–[108], 359 [112]–[113] (Nettle and Gordon JJ).
201. *R v Richards; Ex parte Fitzpatrick and Browne* (n 79).

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'beyond doubt' that 'the House of Commons have the right to be the judges themselves of what is contempt' and that this power had been picked up by s 49.[202]

We must be careful that doctrines developed in a different constitutional context do not undermine the Australian constitutional framework. In the United Kingdom, it is settled law, deriving from Parliamentary sovereignty, that courts cannot invalidate an Act of Parliament by examining the internal procedure by which legislation had been passed.[203] But this rule did not apply to cases in which 'a legislature is established under or governed by an instrument which prescribes that laws of a certain kind may only be passed if the legislature is constituted or exercises its functions in a particular manner'.[204]

The Commonwealth Parliament is established under and limited by the *Constitution*. In *Cormack v Cope*, Barwick CJ held that this historical rule relating to the privileges and immunities of the UK Parliament was not picked up by s 49 of the *Constitution* because s 57 of the *Constitution* had prescribed a procedure by which joint sittings were to take place.[205] Chief Justice Barwick asserted 'there is no parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law-making are observed'.[206] Common law history can only go so far in illuminating the scope of justiciability, which is illustrated by the problem discussed in the next section.

C Determining the Limits of a Power Conferred on Another Branch

The third issue relates to the justiciability of prerogative power, a doctrine which is also derived from British common law traditions. It is not my intention to reproduce discussions covered in more depth elsewhere.[207] However, it is necessary to point out that although the *Constitution* is relatively clear on what powers are expressly committed to the legislature, it is less clear on the powers committed to the Executive. Accordingly, it would be difficult to argue that there is an express or implied constitutional commitment to the Executive to resolve disputes regarding the prerogative powers.[208]

In any case, it is clear that even in the United Kingdom, the mere fact that a power is a prerogative power does not necessarily make it non-justiciable. What matters is the subject matter and nature of the power: *Council of Civil Service Unions v Minister for the Civil Service* ('*CCSU*').[209] The House of Lords in *CCSU* dismissed the appeal on the grounds that issues of national security were non-justiciable. Lord Roskill listed several other non-justiciable prerogative powers:

> the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible

202. Ibid 162–5.
203. *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 1 Bell 252, 278–9 (Lord Campbell). See *Pickin v British Railways Board* [1974] AC 765, 786–7. See also *R (Jackson) v Attorney-General* [2006] 1 AC 262, 281 [27].
204. *PMA Case* (n 83) 163 (McTiernan J). Cf *Bribery Commissioner v Ranasinghe* [1965] AC 172; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.
205. *Cormack v Cope* (n 41) 452.
206. Ibid 454.
207. See, eg, Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020).
208. *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, 468 [80]–[81] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Re Ditfort* (n 80) 369 (Gummow J); *Ruddock v Vadarlis* (2001) 110 FCR 491, 539–41 (French J).
209. [1985] 1 AC 374, 410, 418 ('*CCSU*'). In Australia: *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 220 (Mason J); *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 469–70 [98] (Black CJ).

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> to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.[210]

Blanket statements that certain subject matters are non-justiciable cannot be sustained in light of s 61 in the Australian constitutional context, particularly where a court is asked to determine whether the Executive has exceeded its powers. Instead, what must be done is to identify exactly what grounds makes a particular subject matter non-justiciable.

Thus, in *Attorney-General (Cth) v Ogawa* ('*Ogawa*'), concerning the prerogative of mercy, the Full Federal Court doubted whether that power is 'totally immune from judicial review' and considered:

> A recognition of the fact that there may well be some aspects of the decision-making power to grant or refuse mercy which are essentially political or non-justiciable, does not necessarily carry the consequence that any legal error manifest in that decision-making process should remain immune from judicial scrutiny.[211]

It might be that some issues that have been regarded as non-justiciable in the past are simply powers are subject to very wide limits.[212] In *Ogawa*, the Court speculated that an exercise of the prerogative of mercy might be reviewable in cases of bad faith or fraud.[213] The question of whether the government acted reasonably is a question going to the scope of the limits of the power. Accordingly, although the *Constitution* might have committed a particular power to another branch of government, it is for the courts to determine what the limits of that constitutional commitment are.

This conclusion was, in part, reached by the UK Supreme Court in *R (Miller) v Prime Minister* ('*Miller (No 2)*') concerning the justiciability of a decision to prorogue Parliament.[214] A unanimous Court held that the matter was justiciable because it had the power to rule on the limits of the prorogation power and found that prorogation could not prevent 'the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive'.[215]

Miller (No 2) also demonstrates the potential for elision between justiciability and identifying the scope of a power. The first is a question about whether a court has jurisdiction; the second is a substantive legal question. While the two concepts are related (a question on the legal limits of an exercise of power is generally justiciable), they should not be conflated. The court has jurisdiction *because* there is a legal question about the scope of the power. In *Miller (No 2)*, the Supreme Court distinguished between two questions in the context of prerogative powers: 'The first question is whether a prerogative power exists, and if it does exist, its extent. The second is whether, assuming a prerogative power exists and it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis.'[216] The first question is justiciable, but the second might not be. That conclusion, reached in the context of an unwritten UK constitution, would have even more force in Australia, where there is a written constitution that expressly limits governmental power.

210. *CCSU* (n 209) 481.
211. (2020) 281 FCR 1, 16 [73], 17 [75] (Allsop CJ, Flick and Griffiths JJ) ('*Ogawa*').
212. *Buck v Bavone* (1976) 135 CLR 110, 118–19 (Gibbs J).
213. *Ogawa* (n 211) 20 [84].
214. *Miller (No 2)* (n 196).
215. Ibid 407 (Lady Hale and Lord Reed).
216. Ibid 403 [35].

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VI Conclusion

This article has defined justiciability as a lack of constitutional competence caused by the absence of judicial power to determine a particular issue before a court. This is because only other constitutional principles have the capacity to cut across a court's constitutional role in ensuring that the other branches of government remain within the limits of their power. Accordingly, doctrines such as the act of state doctrine, which would ordinarily prevent courts from determining the validity of actions of foreign governments in their own territory, cannot deprive Australian courts of their jurisdiction. Similarly, blanket statements derived from British or American legal principles that exclude review of decisions in broad subject matters should not be accepted. Instead, an examination of the nature and circumstances in which the action being reviewed is required to determine whether there is a lack of judicial power to determine the particular issue.

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https://doi.org/10.1177/0067205X241253295 Published online by Cambridge University Press