

MATERIALITY AND JURISDICTIONAL ERROR: CONSTITUTIONAL DIMENSIONS FOR ENTRENCHED REVIEW OF EXECUTIVE DECISIONS

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While the High Court of Australia has confirmed a materiality threshold for jurisdictional error, there is ongoing debate about its rationale. This comment contributes to the debate by outlining a constitutional rationale for the materiality element in judicial review of executive decisions. Critically, the Commonwealth Constitution denies Australian parliaments power to legislate a prospective rule that rights or obligations are to be as specified in an invalid executive decision in a federal matter. As such, a jurisdictional error by a non-court exercising power in a federal matter engages a significant practical limit on legislative power. Once this is appreciated, a rationale for the materiality threshold for jurisdictional error becomes clear: the threshold calibrates review to the limit on legislative power, by ensuring review is focused on errors that affect the decisions through which legislation operates.

I INTRODUCTION

The *Commonwealth Constitution* ‘secures a basic element of the rule of law’¹ by entrenching a minimum provision for legal accountability for jurisdictional errors in the exercise of Commonwealth² and state³ public powers. ‘Jurisdictional

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- 1 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*‘Plaintiff S157/2002’*). This is read as an institutional approach to the rule of law: see generally Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14.
- 2 *Plaintiff S157/2002* (2003) 211 CLR 476, 513–14 [103]–[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 [45]–[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (*‘Bodruddaza’*); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 27 [48]–[49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (*‘Graham’*).
- 3 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580–1 [96]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*‘Kirk’*). See also *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 421–23 [60]–[63] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 13 [29]–[30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

error’ is a conclusory term for legal errors which are *not* authorised.⁴ Recent High Court of Australia decisions confirm a materiality precondition for jurisdictional error, and a presumptive ‘practical injustice’ threshold for materiality.⁵ On the ‘practical injustice’ test, materiality involves a causal link between an error and a reviewable decision.⁶ The decision must *be affected* by the error, in the sense that there is ‘a realistic possibility that the decision in fact made could have been different had the breach of the condition not occurred’.⁷ While the courts’ attention turn to more detailed issues of implementation, questions about the rationale for the ‘practical injustice’ requirement remain. The High Court has presented this materiality threshold as a common law principle of statutory interpretation.⁸ Scholarly attention has therefore, quite reasonably, focused on the process of statutory construction that gives rise to the materiality element,⁹ and its coherence with existing authorities.¹⁰ In this comment, I focus instead on the *Constitution*’s separation of judicial power in federal matters as a basis for a materiality element. I outline a constitutional rationale for a materiality inquiry in review of executive decisions in federal matters and indicate – in broad terms – how it may inform thinking about the precondition’s status, content and operation.

My principal aim in this comment is to present an explanation of a materiality threshold grounded in Chapter III of the *Constitution*. That is, to outline a hypothesis that a materiality precondition plays a role in managing an important practical limit on legislative power associated with the *Constitution*’s separation of judicial power in federal matters. As explained further below, the limit in question prevents Australian parliaments from legislating a prospective rule that rights or obligations are as specified in a *pretended* executive decision on a federal matter – ie, a purported decision affected by jurisdictional error. Once this limit on legislative power is recognised, the rationale for a materiality criterion is revealed. The criterion serves to calibrate the impact of administrative errors on the valid operation of legislation.

4 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 132 [23] (Kiefel CJ, Gageler and Keane JJ) (*‘Hossain’*).

5 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 449 [2] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 462 [84] (Gordon and Steward JJ), 478 [164] (Edelman J) (*‘MZAPC’*); *ibid* 134–5 [29]–[31] (Kiefel CJ, Gageler and Keane JJ), 145–8 [66]–[72] (Edelman J); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 443 [38], 444–5 [44]–[45] (Bell, Gageler and Keane JJ) (*‘SZMTA’*). Cf *ibid* 137 [40] (Nettle J); *SZMTA* (2019) 264 CLR 421, 455–60 [81]–[95] (Nettle and Gordon JJ).

6 Cf Paul Daly, ‘A Typology of Materiality’ (2019) 26 *Australian Journal of Administrative Law* 134, 137–9.

7 *MZAPC* (2021) 95 ALJR 441, 449 [2] (Kiefel CJ, Gageler, Keane and Gleeson JJ). See also *Hossain* (2018) 264 CLR 123, 134–5 [30]–[31] (Kiefel CJ, Gageler and Keane JJ), 147–8 [72] (Edelman J); *SZMTA* (2019) 264 CLR 421, 444 [44] (Bell, Gageler and Keane JJ).

8 *Hossain* (2018) 264 CLR 123, 134 [28]–[29] (Kiefel CJ, Gageler and Keane JJ).

9 See, eg, Lisa Burton Crawford, ‘Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power’ (2019) 30(4) *Public Law Review* 281 (*‘Immaterial Errors’*).

10 See, eg, Harry Anilius, ‘Materiality: Marking the Metes and Bounds of Jurisdictional Error?’ (2020) 27(2) *Australian Journal of Administrative Law* 88; Nicholas Carey, ‘Presumptions Upon Presumptions: Problems with the Threshold of Materiality’ (2021) 44(2) *University of New South Wales Law Journal* 548.

The comment will also briefly touch on the practical value of recognising the constitutional premise for the materiality criterion. My argument, in essence, is that the *Constitution* supports an approach to the materiality inquiry that ensures review whenever there is a risk that legal rights or obligations are treated as validly affected by legislation operating on invalid executive decisions in federal matters. At one level, the materiality precondition for jurisdictional error ensures that the limit on legislative power associated with the separation of judicial power in federal matters goes no further than ‘logically or practically necessary’.¹¹ But it is important to appreciate that, in performing this role, the precondition must *also* give effect to the constitutionally mandated separation. This requires the court to adopt an approach to the materiality inquiry in review of non-court decisions that facilitates review whenever there is a risk that an error has affected a decision by a non-court constitutionally incapable of exercising judicial power. Relatedly, drawing out the constitutional rationale for a materiality precondition may help us to contextualise and critique the ‘practical injustice’ threshold applied in recent High Court authorities.

II A MATERIALITY PRECONDITION FOR JURISDICTIONAL ERROR CONFIRMED

Judgments handed down by the High Court since 2018 articulate a materiality precondition for jurisdictional error more clearly and forcefully than earlier authorities, and elevate ‘practical injustice’ as the default threshold for materiality.¹² With the benefit of hindsight, a materiality requirement is present in earlier influential statements from the Court about the scope of jurisdictional error in executive decisions. Notably, in *Craig v South Australia* the Court states that, where the *Constitution* denies legislative power to confer judicial power on a non-court, errors which ‘affect’ a purported exercise of power by a non-court are jurisdictional errors.¹³ A materiality requirement for jurisdictional error would seem to explain some earlier cases where courts have held that legal errors are non-jurisdictional.¹⁴ A materiality requirement has long been applied to claims of procedural unfairness,¹⁵ failure to consider matters of mandatory relevance or considering prohibited matters,¹⁶ or pursuing prohibited purposes.¹⁷ Applying a

11 That is, a non-textual constitutional limitation can be implied if it is ‘logically or practically necessary for the preservation of the integrity of [the constitutional] structure’: *Burns v Corbett* (2018) 265 CLR 304, 355 [94] (Gageler J) (*‘Burns’*), applying *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 168–9 (Brennan CJ).

12 Cf Crawford, ‘Immaterial Errors’ (n 9) 284–5.

13 (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

14 Cf Christopher Chiam, ‘Editorial: Materiality and Jurisdictional Error’ [2018] 4 *University of New South Wales Law Journal Forum* 1, 3–4.

15 *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145–7 (Mason, Wilson, Brennan, Deane and Dawson JJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 339–40 [42]–[46] (Kiefel, Bell and Keane JJ), 341–3 [56]–[60] (Gageler and Gordon JJ).

16 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

17 *Thompson v Council of Municipality of Randwick* (1950) 81 CLR 87, 105–6 (Williams, Webb and Kitto JJ); *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALR 467, 468–9

materiality precondition for breach of express enacted statutory requirements is a more recent development, but predates the 2018 judgments.¹⁸

The Court's recent decision in *MZAPC v Minister for Immigration and Border Protection* ('MZAPC')¹⁹ provides significant clarity concerning the 'practical injustice' materiality precondition while also pointing to continuing controversy about aspects of its content and application. All members of the Court recognised the precondition and articulated it in terms of a realistic possibility that an error has affected a decision. The outcome in the case was unanimous. Despite this, the reasons in *MZAPC* indicate continuing strong judicial differences on matters of principle affecting the materiality inquiry. In the case at hand, these gave rise to a division on the onus of proving that an error has affected a decision. A majority (Kiefel CJ, Gageler, Keane and Gleeson JJ) confirmed that the applicant for judicial review bears the onus of 'proving by admissible evidence on the balance of probabilities historical facts necessary to satisfy the court that the decision could realistically have been different ...'.²⁰ A minority (Gordon and Steward JJ; and Edelman J) proposed two steps in applying the materiality precondition: the applicant for review must identify – through a task of persuasion, rather than evidentiary onus – that an error could realistically have resulted in a different decision. If the applicant meets this task of persuasion, it becomes a matter for the respondent to establish that the error was immaterial.²¹ Additionally, comments made throughout the reasons point to other potential ongoing issues in the implementation of a materiality precondition: is materiality a separate requirement when there is a materiality element in-built in the condition?²² Are matters going to proof of materiality addressed in the same way irrespective where it is located?²³ Does the approach adequately recognise parliaments' power to enact requirements, strict compliance with which is essential? This comment does not seek to address the many doctrinal implementation issues in detail. Rather, it outlines and defends an overarching approach to a materiality inquiry in review of executive decisions that accords with the constitutional foundations for review, which may also be used

(Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ). The higher threshold for materiality of an unauthorised purpose (compared with a prohibited consideration) is critiqued in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 324–5.

18 A materiality requirement was earlier applied to statutory codes of procedure that are exhaustive statements of the natural justice hearing rule: see *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, 640 [35]–[36] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The materiality requirement is *not* present in the general approach for express enacted requirements stated in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355: at 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'). It appears in later restatements of that test, including *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 32 [23] (Gageler and Keane JJ), adopted in *Hossain* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ). This shift is noted in commentary: see, eg, Anilius (n 10) 94; Chiam (n 14).

19 (2021) 95 ALJR 441.

20 Ibid 458 [60].

21 Ibid 462–3 [84]–[88] (Gordon and Steward JJ), 476 [155] (Edelman J).

22 Cf ibid 453 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 477–8 [159]–[164] (Edelman J).

23 For instance, how proof of the materiality element is inflected by locating it within an inquiry into whether a fair-minded lay observer might reasonably apprehend the possibility that the decision may have been affected: cf ibid 461 [72] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

to contextualise the ‘practical injustice’ threshold applied in *MZAPC*. Specifically, the argument bears on the separation of powers rationale for review of decisions by *non-courts* that are constitutionally incapable of exercising judicial power. As I will now discuss, the separation of powers rationale for review of such decisions requires an approach to the materiality element that ensures judicial review where there is any risk of legislation operating to affect rights or obligations on the fact of an invalid executive decision.

III MATERIALITY IN THE CONTEXT OF ENTRENCHED REVIEW

It is notable that the High Court has articulated a materiality precondition for jurisdictional error in the context of exercising entrenched review authority. We might therefore suppose that the precondition plays a role in defining the boundaries of this entrenched measure of review. Immediately, this suggests the possibility that the precondition assists in managing limits on legislative power associated with entrenched review. More productively, it suggests that the precondition reflects salient features of the constitutional sources of entrenched review. Following this lead, we are able to see how this precondition can operate in a principled way, to optimise the constitutional guarantee of legal accountability for the exercise of government powers over legal status.

A Entrenched Review for Jurisdictional Error

As is well-known, the *Constitution* provides a minimum provision for judicial review of Commonwealth²⁴ and state²⁵ public powers that cannot be denied or foreclosed by parliaments. This entrenched provision for review covers a wide range of public powers: any exercise of Commonwealth non-judicial power;²⁶ any exercise of Commonwealth *judicial* power by a federal court other than the *High Court*;²⁷ and any exercise of state public power *outside a state supreme court*.²⁸

The High Court has identified two sources of constitutional entrenchment for review of Commonwealth powers – section 75(v)²⁹ and the exhaustive provision in Chapter III for the exercise of Commonwealth judicial power, which denies Commonwealth legislative power to confer judicial power other than on courts.³⁰ In the states, section 73 of the *Constitution* entrenches the essential characteristics

24 Leading authorities are cited in above n 2.

25 Leading authorities are cited in above n 3.

26 The breadth of this provision is attributable to sections 75(iii) and (v) together with the *second* constitutional source of entrenchment – ie, the implication that denies Commonwealth legislative power to vest judicial power other than in a court: see below n 30.

27 See authorities collated in Aronson, Groves and Weeks (n 17) 47 n 146.

28 This reflects the source of entrenchment as articulated in *Kirk* (2010) 239 CLR 531: see, eg, at 580–1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

29 *Plaintiff S157/2002* (2003) 211 CLR 476, 505–6 [75], 511–12 [98], 513–14 [103]–[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

30 *Ibid* 505 [73], 505–6 [75], 511–12. See also *Graham* (2017) 263 CLR 1, 24 [39]–[40] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

of state supreme courts, including their ‘supervisory role ... exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus)’, to determine and enforce ‘limits on the exercise of state executive and judicial power by persons and bodies other than the Supreme Court’.³¹ To this we can now add the Chapter III scheme for the adjudication of federal matters, which denies state legislative power to confer state judicial power in federal matters other than on courts.³² These sources of entrenchment are distinct, but each entrenches review for jurisdictional error.

1 Entrenched Review Limits Two Dimensions of Legislative Power

The *Constitution*’s provision for judicial review necessarily implies *some* limits on the legislative powers of Australian parliaments. To ascertain the precise nature of the limits on legislative power, it is necessary to examine the constitutional sources of entrenched review. When we do this, we can isolate two dimensions of legislative power that are denied when a decision amenable to entrenched review is affected by jurisdictional error.

(a) Power to Legislate to Exclude or Frustrate the Entrenched Review Jurisdiction

The first and most obvious dimension is power to legislate to exclude or frustrate the entrenched measure for review. This limit follows directly from the positive constitutional provision for a measure of entrenched review for jurisdictional error. That is, legislative power to oust entrenched review for the error,³³ and power to enact limits on the entrenched measure of review incompatible with the place of that review in the constitutional structure.³⁴ Determining whether a law invalidly limits review may sometimes be a difficult evaluative question.³⁵ However, this does not deny the broad proposition: a finding of jurisdictional error necessarily engages constitutional limits on legislative power over the existence, and exercise of entrenched review.

(b) Power to Enact a Prospective Rule that Rights Are as Specified in a Decision Made by a Repository Constitutionally Incapable of Exercising Judicial Power

There is a second dimension of legislative power that is necessarily implicated when a jurisdictional error is made by a decision-maker constitutionally incapable

31 *Kirk* (2010) 239 CLR 531, 580–1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

32 *Burns* (2018) 265 CLR 304, 337–41 [47]–[55] (Kiefel CJ, Bell and Keane JJ), 355–7 [94]–[99] (Gageler J).

33 That is, by direct ouster clauses: see *Plaintiff S157/2002* (2003) 211 CLR 476; *Kirk* (2010) 239 CLR 531.

34 That is, by adjectival provisions for time limits or evidence in relation to the impugned decision-making: see, eg, *Bodruddaza* (2007) 228 CLR 651; *Graham* (2017) 263 CLR 1.

35 See, eg, Lisa Burton Crawford, ‘Expanding the Entrenched Minimum Provision of Judicial Review? *Graham v Minister for Immigration and Border Protection*’ (2017) 28(4) *Public Law Review* 277, 285–8; Leighton McDonald, ‘*Graham* and the Constitutionalisation of Australian Administrative Law’ [2018] 91 *Australian Institute of Administrative Law Forum* 47.

of exercising judicial power.³⁶ That is, *all* Commonwealth non-court jurisdictions³⁷ and state non-court jurisdictions in federal matters.³⁸ This is the power to enact a prospective rule³⁹ that rights or obligations will be as specified in a purported decision. When there is an operative constitutional confinement of judicial power to courts, a jurisdictional error by a non-court necessarily denies power to legislate that rights or obligations are, by force of the statute, as specified in the non-court's purported decision.⁴⁰ Power to affect legal status despite jurisdictional error is necessarily exclusive of executive power (ie, it cannot be present in a conferral of executive power).⁴¹

This limit on legislative power reflects the constitutional incapacity of the executive to affect the legal rights or obligations of subjects coercively (ie, by unilateral determination). In our constitutional tradition, there is a fundamental distinction between legislative and judicial powers (on the one hand) and executive power (on the other). Legislative and judicial powers are distinctively governmental powers *over* the legal status of individuals. That is, they are 'public' powers unique to the government of a polity, which are not shared by other natural or legal persons. They can be exercised to affect the legal status of subjects 'in invitum',⁴² that is, unilaterally or coercively. In contrast, power to affect rights or obligations unilaterally or coercively is *not* a primary characteristic of executive action.

One consideration is that executive action often involves the exercise of capacities that polities share in common with other natural and legal persons. The exercise of capacities to undertake legal obligations is in a qualitatively different category to the exercise of *governmental* powers to unilaterally, coercively affect the legal status of subjects.⁴³ As Keane J pointed out in an extrajudicial comment on the appropriate scope of judicial review:

Broadly speaking, agencies of the executive government make two kinds of decisions: those of a governmental character, the distinguishing feature of which is the capacity to affect rights, on the one hand; and, on the other hand, those which involve the exercise of rights which the agency holds and exercises, albeit on behalf of the community, as a participant in the life of the community. The real distinction is between a decision by a public authority which affects the rights of others and a

36 The description in this Part draws on a more detailed account of the separation of powers rationale for entrenched review of non-court decisions: see Emily Hammond, 'The *Constitution's* Guarantee of Legal Accountability for Jurisdictions' (2021) 49(4) *Federal Law Review* (forthcoming); Emily Hammond, 'The Duality of Jurisdictional Error: Central (to Justifying Judicial Review of Executive Action) and Pivotal (to Review Doctrine)' (2021) 32(2) *Public Law Review* 132.

37 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

38 See above n 32.

39 Cf legislation that enacts that rights or obligations are as specified in an earlier purported decision.

40 That is, to use the executive decision as a factum by which legislation operates to alter the law in the particular case: see below nn 49–50.

41 See *New South Wales v Kable* (2013) 252 CLR 118, 134 [34] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ) ('*Kable 2*'); cf at 141–2 [59]–[60], 145 [68] (Gageler J).

42 With reference to judicial power, see *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 452 (Barton J); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court* (2013) 251 CLR 533, 554 [28] (French CJ and Gageler J).

43 See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98–9 [134]–[136] (Gageler J) ('*Plaintiff M68/2015*').

decision which gives effect to rights enjoyed by the public authority ... decisions made by agencies of the administration in the exercise of the agencies' own rights as a member of the community, as opposed to the alteration or declaration or enforcement of rights as an organ of the sovereign power of the state.⁴⁴

Moreover, when it comes to the distinctive governmental powers (to unilaterally affect legal status), there is a fundamental distinction between the executive (on the one hand) and judiciary and parliaments (on the other). Other than by engaging a prerogative or statutory power, the executive has no intrinsic governmental authority *over* the legal rights or obligations of subjects. Executive powers are *subject to law*.⁴⁵ The inherent incapacity to dispense from the general system of law is one of the settled exclusions from inherent executive authority under the system of representative responsible parliamentary government established in Australian polities.⁴⁶ It is a critical component of the rule of law in Australia.⁴⁷

It is of course true that an executive decision under statutory authority can manifest public power over legal status.⁴⁸ However, the executive decision does so as a factum for a *statutory* rule that legal status will be as specified in the decision. Thinking about a statutory decision as a 'factum' seems a little obscure or obtuse, but it usefully conveys a fundamental insight into the relationship between a decision under statutory authority to make a decision (on the one hand) and the statute operating to provide that rights and obligations are as specified in the decision (on the other hand).⁴⁹ The mere existence in fact of a decision purportedly made under statutory authority does not establish that legal rights or obligations are as stated in the decision by force of the statute. The critical consideration is whether the decision has the qualities necessary to attract the operation of the

44 Justice PA Keane, 'Judicial Review: The Courts and the Academy' (2008) 82(9) *Australian Law Journal* 623, 632.

45 See above n 41.

46 *A v Hayden* (1984) 156 CLR 532, 580 (Brennan J); *Plaintiff M68/2015* (2016) 257 CLR 42, 98–9 [135]–[136] (Gageler J, Gordon J dissenting at 158–9 [373]). While Gageler J's reasons emphasised a distinct inherent incapacity to detain (at 105 [159]), this was necessary because the detention challenged in the case occurred outside Australian territory (at 103 [153]) and his Honour's comments should not be taken to cast doubt on the inherent incapacity to dispense with the general system of law. See also *MZAPC* (2021) 95 ALJR 441, 464 [96] (Gordon and Steward JJ).

47 Cf the reliance on a historical constitutional method to limit executive power in its depth dimension: Peter Gerangelos, 'Section 61 of the *Commonwealth Constitution* and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68 Case*' (2018) 43(2) *University of Western Australia Law Review* 103.

48 I leave aside the possibility that prerogatives can also operate with unilateral coercive effect on rights or obligations: see, eg, *Plaintiff M68/2015* (2016) 257 CLR 42, 98 [135], 106 [164] (Gageler J). Prerogatives are a diminishing residue of public powers, apt to be displaced by legislation: see, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 600–2 [277]–[285] (Kiefel J).

49 That is, the decision's status as 'the incidental or ancillary determination of circumstances as a *factum* for the operation of the legislative will': *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 176 (Isaacs J) (emphasis in original). The decision made in exercise of statutory authority is viewed as 'adjunct to legislation', a 'factum on which the operation of [statute] depends' or 'the factum by reference to which the Act operates to alter the law in relation to the particular case': *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 371 (McTiernan J), 378 (Kitto J) ('*Tasmanian Breweries*'). See also *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542 ('*Alinta*'), 577–9 [94]–[97] (Hayne J).

statute on the fact of the decision, so that legal rights or obligations are affected as specified in the decision. If the decision lacks the ‘characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it’⁵⁰ it has *no independent* force and effect as an exercise of executive power.⁵¹ An executive decision is *merely* the factum upon which legislation operates to produce a legal effect – it is the statute which stamps the exercise of jurisdiction with legal effect.⁵² For this reason, if a purported executive decision does not attract the operation of the legislation, the legal rights or obligations of the individual to whom the decision relates are not as specified in that decision.⁵³

The executive’s inherent incapacity to coercively affect legal status explains the necessity of judicial review of purported decisions by decision-makers constitutionally incapable of exercising judicial power – ie, any non-court exercising Commonwealth powers, and any state non-court exercising state powers in federal matters. In all cases where the *Constitution* denies judicial power to the decision-maker, legislative power to affect legal status on the fact of an invalid decision (a decision affected by jurisdictional error) is denied. To be more precise, the *Constitution* denies legislative power to enact a prospective rule that rights or obligations are as specified in an invalid decision by a non-court forbidden to exercise judicial power.⁵⁴

It is fair to say that the authorities do not directly and unequivocally articulate the specific dimension of legislative power implicated by a separation of powers rationale for review of executive decisions in the precise terms I have used here. I have provided a more detailed argument in support of this reading of authority elsewhere.⁵⁵ As I acknowledge in that discussion, there are well-known judicial statements that would seem to recognise Commonwealth legislative power to affect rights or obligations on the fact of a purported executive decision.⁵⁶ However, the statements are ambiguous. Moreover, they are difficult to square with the emerging picture of a discernible Chapter III scheme to ensure legal accountability for public powers over legal status. It is widely recognised that a valid decision has a bundle of possible legal consequences, and not all of these are denied by jurisdictional error in all circumstances.⁵⁷ To this we might add an

50 *Hossain* (2018) 264 CLR 123, 133 [24] (Kiefel CJ, Gageler and Keane JJ).

51 Cf the exercise of judicial power: see *Kable 2* (2013) 252 CLR 118, 145 [68] (Gageler J), citing *Love v A-G (NSW)* (1990) 169 CLR 307; *Ousley v The Queen* (1997) 192 CLR 69.

52 See *Alinta* (2008) 233 CLR 542, 594 [159] (Crennan and Kiefel JJ).

53 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46] (Gaudron and Gummow JJ) (*‘Bhardwaj’*).

54 *Hossain* (2018) 264 CLR 123.

55 See above n 36.

56 A well-known instance is in *Bhardwaj* (2002) 209 CLR 597, 614 [50] (Gaudron and Gummow JJ).

57 Aronson, Groves and Weeks (n 17) 732. The idea and its relationship to entrenched review is discussed elsewhere, including in Benjamin O’Donnell, ‘Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the *Australian Constitution*’ (2007) 28(3) *Australian Bar Review* 291; Geoffrey Kennett, ‘Comment on Article by O’Donnell’ (2007) 28(3) *Australian Bar Review* 342; MA Perry, ‘The Riddle of Jurisdictional Error: Comment on Article by O’Donnell’ (2007) 28(3) *Australian Bar Review* 336; Benjamin O’Donnell, ‘A Response to Dr Perry and Mr Kennett’s Commentaries’ (2007) 28(3) *Australian Bar Review* 351.

hypothesis that the Chapter III accountability scheme necessarily and directly affects legislative power to deal with *some* (but not all) of the legal consequences of a purported decision.⁵⁸ In other words, we may use the sources of entrenched review as a guide to the specific dimensions of legislative power over purported decisions limited by Chapter III. In short, earlier judicial statements must now be read as reliable authority only insofar as they address dimensions of Commonwealth legislative power over purported non-court decisions *other than* those dimensions directly engaged by the separation of powers basis for entrenched review.⁵⁹

There are inevitably difficulties in distinguishing the dimensions of legislative power that are – and are not – denied by jurisdictional error in a decision amenable to entrenched review. These difficulties arise at one step removed from the present argument and can be left for consideration elsewhere. For present purposes, it is enough to articulate the contention that *a* specific dimension of legislative power is *necessarily* denied by jurisdictional error by a non-court that is constitutionally incapable of exercising judicial power, that is, as stated above, legislative power to enact a prospective rule that rights or obligations will be as specified in a purported decision of a non-court constitutionally incapable of exercising judicial power.

2 Materiality in Context of Entrenched Review and Associated Limits on Legislative Power

To return to the main line of argument, a materiality threshold for jurisdictional error can be understood as a means of managing the limits on legislative power associated with the entrenched provision for review. That is, the threshold ensures that the two dimensions of legislative power denied by the *Constitution* upon a finding of jurisdictional error are *not* limited any more than is practically necessary to maintain the integrity of the constitutional scheme. This is consistent with the orthodox approach to drawing implications that limit legislative power.⁶⁰

In particular, the materiality threshold calibrates the impact of the strict institutional separation of judicial power on Australian parliaments' power to legislate that rights or obligations are as specified in a purported non-court decision. It is plausible that this dimension of legislative power should be impaired only when errors *affect* the decision that is the factum by which legislation operates. This is a principled point to draw the line, given that the constitutional concern is with the operation of legislation *on the decision*. Thus, any errors that may have occurred in connection with the decision, but which do not affect it, ought not affect the exercise of legislative power over legal status on the fact of the decision.

58 Cf Kennett (n 57) 343–4; Perry (n 57) 341.

59 For instance, a decision-maker's authority to reopen a decision absent a court order determining its status: *Bhardwaj* (2002) 209 CLR 597. A further example includes whether the purported decision enlivens a statutory avenue of appeal or review: see *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217.

60 See above n 11.

As I have said, this way of articulating the rationale for the materiality threshold is sound, and consistent with the approach to implied limits on legislative power. However, there is a risk that emphasising this account, without more, would lead to an unduly cautious or stringent approach to the materiality inquiry. A narrow approach to ‘jurisdictional error’ cannot be justified simply to minimise constitutional limits on legislative power. To reason in that way might drift into an impermissible use of doctrine to undermine the *Constitution*. There is, therefore, a need to articulate the rationale in a way that *gives due effect* to the constitutional matters that underpin entrenched review.

This brings us back to the underlying separation of powers rationale for review of non-court decisions. As explained above, there is an important constitutional justification for review of purported decisions by non-courts constitutionally incapable of exercising judicial power (ie, non-courts exercising Commonwealth powers, and state powers in federal matters). In this context, there is a positive rationale for review of decisions *affected* by error. Judicial review ensures that an individual’s legal status is not affected by force of legislation operating on decisions without regard to a matter of fundamental constitutional significance: the absence of inherent executive power to produce a binding legal effect on legal status despite jurisdictional error. This explains and requires judicial review when a decision is affected by error.

IV PRACTICAL VALUE OF RECOGNISING A CONSTITUTIONAL PREMISE FOR A MATERIALITY THRESHOLD?

The argument provided in Part III addresses a need, widely identified in scholarly comment,⁶¹ for a clear and coherent justification for a materiality criterion for jurisdictional error. It offers a possible resolution to the criterion’s ‘uncertain foundations’⁶² and ‘doctrinal precariousness’.⁶³ As others have noted, a lack of justification for such a significant doctrinal development risks undermining the legitimacy of judicial review.⁶⁴ There is also an immediate practical problem if members of the High Court are at cross-purposes on the rationale for a materiality element in jurisdictional error, and thus on the appropriate approach to its application. As such, there is significant practical value in providing a coherent justification for a materiality precondition.

The constitutional basis for materiality outlined in Part III may also furnish a principled basis for its application. The constitutional premise casts light on the counterpoised elements in a materiality inquiry in review of executive decisions. On the one hand, a materiality criterion ensures that legislative power to affect rights or obligations through administrative decisions is not affected by immaterial administrative errors. On the other hand, the scheme laid down by Chapter III

61 See, eg, Crawford, ‘Immaterial Errors’ (n 9); Aniolis (n 10); Carey (n 10).

62 Crawford, ‘Immaterial Errors’ (n 9) 297.

63 Carey (n 10) 1.

64 Crawford, ‘Immaterial Errors’ (n 9) 298.

imposes an important constitutional limit on legislative power to operate through executive decisions affected by error. It is important that *both* elements of the materiality inquiry are kept in view. Thinking of materiality as a tool to manage limits on legislative power might initially suggest a need to be sparing and cautious in finding that an error is material. However, understanding materiality as a characteristic that attracts a constitutional safeguard against excess of legislative power suggests that it should operate to facilitate review of unauthorised executive decisions. In principle, the materiality inquiry should be approached in a way that ensures review whenever there is any risk that legislation may be attributed with an operation incompatible with the *Constitution's* strict institutional separation of judicial power in federal matters.

It is open to question whether the High Court's presentation of a 'practical injustice' threshold for materiality in recent decisions strikes the right balance in this regard. A full evaluation is beyond scope for this article. I will briefly mention two features of the current approach that are at odds with the constitutional rationale outlined above, before briefly mentioning some features of the Court's recent decisions that lay the foundations for a more conceptually integrated approach.

One troubling feature of the current approach is of course the *MZAPC* majority ruling that 'the onus of proving by admissible evidence on the balance of probabilities historical facts necessary to satisfy the court that the decision could realistically have been different had the breach not occurred lies unwaveringly on the plaintiff'.⁶⁵ This ruling does not register the importance of ensuring against excess of legislative power to operate on rights and obligations through executive decisions.⁶⁶ Placing the onus on the decision-maker to prove immateriality, in the manner proposed by Gordon and Steward JJ,⁶⁷ would better reflect the constitutional context:

Fundamental principles – namely, the rule of law; the constitutional relationship between the Executive and the judicial branch; the relationship between individuals and the State; and, in particular, the role of the judicial branch in the protection of the individual against incursions of executive power – together weigh decisively in favour of a conclusion that it is the respondent (the Executive) in an application for judicial review who should and must bear the onus of establishing immateriality of error.⁶⁸

Another troubling feature of the current approach to materiality is the impression created in the cases that a 'practical injustice' criterion is the default, presumptive, method of establishing materiality. This presumption is particularly worrying for *enacted* conditions on power. In *Hossain v Minister for Immigration and Border Protection*⁶⁹ and *Minister for Immigration and Border Protection v SZMTA*,⁷⁰ it was said that statutes are ordinarily to be interpreted as incorporating

65 *MZAPC* (2021) 95 ALJR 441, 458 [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

66 Cf the analysis provided by Gordon and Steward JJ in *ibid*: especially at 464–5 [93]–[99], 466 [103]–[105].

67 *Ibid* 462–3 [84]–[87] (Gordon and Steward JJ).

68 *Ibid* 466 [103].

69 (2018) 264 CLR 123.

70 (2019) 264 CLR 421.

a threshold of materiality in the event of noncompliance with express or implied conditions on decision-making power.⁷¹ So articulated, the materiality criterion implied a two-step inquiry (breach; materiality). This deflected from the possibility that materiality of breach flows automatically from the very nature of a condition on decision-making power. In *MZAPC*, the plurality clarified that this is *not* the case for conditions implied from the common law:

There are conditions routinely implied into conferrals of statutory decision-making authority by common law principles of interpretation which, of their nature, incorporate an element of materiality, non-compliance with which will result in a decision exceeding the limits of decision-making authority without any additional threshold needing to be met.⁷²

This is a welcome clarification for conditions implied from the common law. It is welcome because it recognises that the ‘practical injustice’ threshold is appropriate having regard to the nature of the conditions implied from the common law. The ‘practical injustice’ method of establishing materiality suits the normative commitments underpinning those conditions. Yet this does not explain the Court’s elevation of ‘practical injustice’ as the presumptive method to establish materiality for *enacted* conditions on decision-making power.

As others have pointed out, it is unclear why a separate practical injustice inquiry is presumptively required for enacted conditions on power.⁷³ The presumption creates a default that jeopardises appropriate judicial enforcement of enacted constraints that define and delimit the power itself.⁷⁴ For example, we might think that Parliament’s provision as to who is authorised to exercise a power is something that defines and delimits the power itself, such that *any* departure from that statutory provision is material.⁷⁵ Similarly, if Parliament enacts an objective jurisdictional fact, this makes the existence of the fact essential (ie, proceeding in the absence of the fact is *always* a material error).⁷⁶ As these examples illustrate, many enacted conditions are constitutive of the decision-making power itself. The constitutional premise for a materiality threshold supports review when statutory conditions that define and delimit decision-making power are breached. Thus, it supports further clarification that the ‘practical injustice’ materiality inquiry is not presumptively appropriate for all enacted conditions on power. There would appear to be some footholds in the current authorities for this development: the ‘practical injustice’ threshold does not seem

71 *MZAPC* (2021) 95 ALJR 441, 452–3 [31]–[32] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Hossain* (2018) 264 CLR 123, 134 [28] (Kiefel CJ, Gageler and Keane JJ).

72 *MZAPC* (2021) 95 ALJR 441, 453 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

73 Crawford, ‘Immaterial Errors’ (n 9).

74 Cf *Project Blue Sky* (1998) 194 CLR 355, 372–4, [34]–[38] (Brennan CJ).

75 Cf cases decided on the basis that a decision in fact made through delegates or agents is necessarily invalid if the statute requires the repository of statutory power to exercise that power personally: see, eg, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2014) 88 NSWLR 125.

76 Cf *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, 64 [37]–[40] (Spigelman CJ).

to apply to preconditions to power,⁷⁷ nor to those enacted conditions that go ‘to the heart’ of a decision-making process.⁷⁸ Going forward, the Court’s approach to materiality should more clearly allow that the ‘practical injustice’ threshold is not presumptively appropriate for all enacted conditions. Some enacted conditions may be *so* central to the legislation’s operation on rights or obligations that *any* breach must be considered material.

Despite such areas of concern, there are aspects of *MZAPC* that lay the foundation for a principled approach to materiality consistent with its constitutional rationale. *MZAPC* registers unanimous strong support for a low default threshold for materiality,⁷⁹ and majority recognition that the threshold is incorporated into some conditions on authority.⁸⁰ Gordon and Steward JJ’s trenchant analysis of the constitutional stakes is important. So too is the majority’s statement that the contemporary understanding of jurisdictional error reflects ‘the acceptance of propositions embraced incrementally’ in decisions articulating the concept as an explanation of the scope of the entrenched provision for judicial review in Chapter III of the *Constitution*.⁸¹ Relatedly, it is encouraging to see further hints of an implicit consensus that Chapter III denies legislative power to affect rights or obligations on the fact of purported non-court decisions in federal matters.⁸² Drawing this implicit consensus to the surface will not resolve all disagreements about the implementation of a materiality element, but it may well place issues of implementation on a more productive footing.

V CONCLUSION

As *MZAPC* illustrates, implementing a materiality precondition for jurisdictional error is a complex undertaking. Clarifying the constitutional basis for the requirement can assist in navigating the complexities. At one level, it is true that a materiality element assists in managing the impact of entrenched review on legislative power. It enables the courts to refine the point at which constitutional limits on legislative power associated with entrenched review are engaged. At a deeper level, the materiality inquiry is an important element in securing the constitutional foundations for entrenched review. In particular, materiality plays a role in ensuring that legislation does not operate to affect rights or obligations on the fact of invalid decisions by non-courts constitutionally incapable of exercising judicial power. While it is of course important that implied limits on legislative power have a firm basis in the *Constitution*’s text and structure, it is also imperative

77 *MZAPC* (2021) 95 ALJR 441, 453 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ). See also the distinction between two types of conditions on power in *Hossain* (2018) 264 CLR 123, 132–3 [23]–[24] (Kiefel CJ, Gageler and Keane JJ).

78 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 321–2 [77] (McHugh J). See also *Hossain* (2018) 264 CLR 123, 134 [30] (Kiefel CJ, Gageler and Keane JJ).

79 See above n 7.

80 *MZAPC* (2021) 95 ALJR 441, 453 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

81 *Ibid* 452 [27]–[28] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 463–4 [91]–[93] (Gordon and Steward JJ).

82 *Ibid* 452 [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 464 [96] (Gordon and Steward JJ).

that the limits are maintained. For this reason, it is critical that the courts' approach to the materiality inquiry enable review whenever there is any risk that legislation may be purporting to operate on the fact of a non-court decision in an unconstitutional – as well as unjust – way.