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# Pouring oil on troubled waters: The use of equitable remedies in judicial review

## Abstract

In earlier times, the pouring of oil into the sea is said to have been done deliberately in order to forestall rough seas. Although oil may be highly effective at calming troubled waters, we know that seafarers would not rely on this ancillary technique alone. Instead, they tried to engineer strong ships capable of breaking waves on their own. In Australia, there are two distinct types of remedies available to a litigant when seeking judicial review through constitutional means. First, the writs of mandamus, certiorari and prohibition which are called 'constitutional writs'. Second, injunctions and declarations which are 'equitable remedies'. The constitutional writs are often criticised for being only obtainable through archaic processes and governed by technical rules. Accordingly, equitable remedies, which are available in the field of public law precisely because of the inadequacies of the constitutional writs, have played a critical part in shaping modern Australian administrative law. However, mainly due to their different historical backgrounds, the constitutional writs and the equitable remedies operate in a fundamentally different manner. It has been proposed by some Australian legal minds that equitable remedies will have a "knock-on" effect for the other remedies by refocusing judicial review. However, it will be suggested by the author of this text that administrative lawyers should not rely too heavily upon the capacity of equitable remedies to become the forefront of judicial review. Instead of trying to pour oil on troubled waters, focus should be shifted to the constitutional writs, which have the innate potential of fulfilling the constitutional mandate of Section 75(v) as intended.

## Keywords

constitutional writs, writs of mandamus and prohibition, judicial review, equity and administrative law

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# POURING OIL ON TROUBLED WATERS: THE USE OF EQUITABLE REMEDIES IN JUDICIAL REVIEW

LOUIS THIVIERGE

## INTRODUCTION

One of Australia's principal concerns when drafting its Constitution was to confer to the High Court the power to engage in judicial review.<sup>1</sup> Section 75(v) of the *Australian Constitution*, to achieve the intended goal, gives the High Court original jurisdiction to grant three listed remedies.

Section 75(v) seems odd. First, the equitable remedy of injunction is found next to the public law constitutional writs of mandamus and prohibition. Why are injunctions placed together with mandamus and prohibition? Second, why injunctions and not other remedies such as the writ of certiorari and declarations?

Many explanations have been put forward by academics who have analysed the intentions of the framers, the history of the different constitutional drafts, and even the exchange of telegrams and hand written notes between Andrew Inglis Clark and Edmund Barton.<sup>2</sup> Although a definitive explanation is unlikely to surface, injunctions are certainly on a different footing from mandamus and prohibition due to their inherent nature as an equitable remedy.<sup>3</sup>

To this day, there are two distinct types of remedies available to a litigant when seeking judicial review through constitutional means. First, the constitutional writs of mandamus, certiorari and prohibition. Second, the equitable remedies of injunction and declaration. Due mainly to their different historical backgrounds, the constitutional writs and the equitable remedies operate in a fundamentally different manner.

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<sup>1</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 27 [2.110]; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 783.

<sup>2</sup> Letter to Inglis Clark on 14 February 1898, University of Tasmania Archives, Andrew Inglis Clark papers, C4/C15.

<sup>3</sup> *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 251.

Constitutional writs have been criticised for “being only obtainable through anachronistic processes and beset with technical rules and requirements”<sup>4</sup> (for example, the requirement that an error of law appear on the face of the record for the purposes of the grant of certiorari).<sup>5</sup> Accordingly, the availability of the equitable remedies has proven particularly useful for overcoming some of the technicalities known to the availability of constitutional writs.<sup>6</sup>

However, the equitable remedies of injunction and declaration are subject to considerable limitations which are unique to them. They certainly play a much needed complimentary role in judicial review but they are not capable of accomplishing, to the same extent, what can be done by the constitutional writs.

It has been proposed by some Australian legal minds that equitable remedies will have a “knock-on” effect for the other remedies by refocusing judicial review.<sup>7</sup> However, it is suggested that administrative lawyers should not lean too heavily on the capacity of declarations and injunctions to become the forefront of judicial review. Instead, focus should be shifted to the constitutional writs which have the innate potential of fulfilling the constitutional mandate of Section 75(v) as it was intended.

In order to understand the role that equitable remedies play in Australian judicial review and the future ahead of them, Part I of this article will briefly explore the relationship between equity and administrative law. Part II will acknowledge the advantages of the equitable remedies by comparing them to the constitutional writs. Part II exposes the limitations inherent to equitable remedies. Finally, Part IV concludes by addressing the validity of some suggested approaches of reform for constitutional judicial review.

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<sup>4</sup> The Hon Wayne Martin, *Perspectives on Declaratory Relief: Declaratory Relief Since 1970* (University Club, 2007), 30.

<sup>5</sup> *Craig v South Australia* (1995) 184 CLR 163, 177.

<sup>6</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 572.

<sup>7</sup> *Ibid.*

## I THE RELATIONSHIP BETWEEN EQUITABLE REMEDIES AND ADMINISTRATIVE LAW

By opening any book written on the general subject of equity, it becomes evident that the role of equity in the public law arena is a subject that has not been explored in great details by commentators.<sup>8</sup>

However, Sir Anthony Mason, in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*<sup>9</sup> said:

“Equitable doctrines and relief have extended beyond old boundaries into new territory where no Lord Chancellor’s foot has previously left its imprint. In the field of public law, equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers”.<sup>10</sup>

Gaudron, Gummow and Kirby JJ further discussed the application of equitable doctrines in administrative law in *Bateman’s Bay*.<sup>11</sup> In their judgement, equity is said to have always proceeded on the footing of the inadequacy of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration.<sup>12</sup> The position is expressed in traditional form by asking of the plaintiff whether there is an equity which founds the invocation of equitable jurisdiction.<sup>13</sup>

In *Ainsworth v Criminal Justice Commission*,<sup>14</sup> the High Court declared that it was now accepted that superior courts have inherent power to grant declaratory relief.<sup>15</sup> *Ainsworth v Criminal Justice Commission* also established that declarations were not solely a statutory remedy; rather, superior

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<sup>8</sup> GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia and New Zealand* (LBC Information Services, 1996), 116.

<sup>9</sup> (1998) 194 CLR 247, 256.

<sup>10</sup> A Mason, *The Place of Equity and Equitable Remedies in the Contemporary Common Law World* (1994) 110 *Law Quarterly Review* 238, 238; *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262.

<sup>11</sup> *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 258.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> (1992) 175 CLR 564, 570.

<sup>15</sup> *Ibid.*

courts have an inherent power to grant them and this inherent jurisdiction was transferred by the Court of Exchequer.<sup>16</sup> The same logic applies to injunctive relief.

Subsequently, in *Corporation of the City of Enfield v Development Assessment Commission*,<sup>17</sup> Gleeson CJ, Gummow, Kirby and Hayne JJ confirmed the important role of equity in public law:

“Equitable remedies have long had a role to play in public law. And, because of the limitations and technicalities which beset the prerogative writs, that role is a continuing and important one. Equitable remedies are available in the field of public law precisely because of the inadequacies of the prerogative writs”.<sup>18</sup>

It is clear from these passages that the remedies of injunction and declaration which are obtainable in constitutional judicial review are deeply rooted in the equitable jurisdiction. The equitable nature of these remedies is not severed by their application in public law. This point may be overlooked by those who see equitable remedies as judicial review’s new hero and urge for a broadening (or abolition) of the standing requirements of such remedies.

## II THE ADVANTAGE OF EQUITABLE REMEDIES IN JUDICIAL REVIEW

Equitable remedies are known to be more flexible in their application. After all, equity is mainly concerned with justice and fairness.<sup>19</sup> Constitutional writs, as creatures of statute and the common law are therefore a bit more rigid in their application. The High Court in *Plaintiff S157/2002 v Commonwealth* recognised a “jurisdictional error” as an entrenched minimum in the constitutional writs jurisdiction.<sup>20</sup> The constitutional writs are therefore only available for grounds of review in which there is a jurisdictional error.<sup>21</sup> The concept of jurisdictional error is often considered to be obscure and difficult to define.<sup>22</sup> As stated in *Kirk v Industrial Court* “it is neither necessary, nor

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<sup>16</sup> Ibid.

<sup>17</sup> (2000) 199 CLR 135, 152.

<sup>18</sup> *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 141.

<sup>19</sup> Mason Sir Anthony, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *LQR* 238, 238.

<sup>20</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513.

<sup>21</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 15 [1.110].

<sup>22</sup> M Aronson, *Jurisdictional error without tears*, in M Groves and HP Lee, *Australian Administrative Law* (Camb UP, 2007), Ch 21.

possible, to attempt to mark the metes and bounds of jurisdictional error”.<sup>23</sup> In broad terms, constitutional writs are only available on the grounds that an officer of the commonwealth has acted (or is about to act) without lawful power and that his or her action amounts (or can amount) to a nullity.<sup>24</sup>

Without wanting to dive too deeply into the intricacies of constitutional writs, the writ of certiorari is only available for an error “on the face of the record”.<sup>25</sup> The error must also, due to the entrenched minimum in constitutional writs jurisdiction, be a jurisdictional error. In *Kirk v Industrial Court*,<sup>26</sup> the High Court held that what constitutes “the record” for these purposes now includes the reasons for judgment of an inferior court.<sup>27</sup>

It could be put forward that constitutional writs are not as complicated as they are sometimes made out to be. Brennan J observed that “movement is all one way, that is, towards relaxing earlier restrictions.”<sup>28</sup> However, for constitutional writs, the main difficulty certainly remains defining when an error is jurisdictional instead of non-judicial.

As opposed to constitutional writs, both injunctions and declarations have their origin in private law matters where distinctions between jurisdictional and non-jurisdictional errors are irrelevant.<sup>29</sup> They carried this characteristic with them in the public law area and this is why injunctions and declarations are available for the resolution of non-jurisdictional issues.<sup>30</sup> As equitable remedies, they are available to redress illegality in itself, rather than only categories of illegalities, which result in the nullity of an act or omission.<sup>31</sup>

<sup>23</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 535.

<sup>24</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 39 [2.130].

<sup>25</sup> An error ‘on the face of the record’ is an error that is identifiable from the written record of the decision.

<sup>26</sup> *(NSW)* (2010) 239 CLR 531, 542.

<sup>27</sup> (2002) 209 CLR 372, 393–4 (Gleeson CJ), 403 (Gummow and Gaudron JJ), 440–1 (Kirby J). See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90–91 (Gaudron and Gummow JJ).

<sup>28</sup> G Brennan, “*The Purpose and Scope of Judicial Review*”, in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (OUP, 1986), 24.

<sup>29</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 892 [15.110].

<sup>30</sup> *Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319, 344.

<sup>31</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 8 [1.50].

Being able to do away with the hurdle of jurisdictional error is what makes injunctions and declarations such popular remedies.<sup>32</sup> Furthermore, discovery used to be freely available in a claim for a declaration but rarely available for constitutional writs.<sup>33</sup> Oral evidence was also difficult to adduce in writ proceedings.<sup>34</sup> However, these gaps between declaratory and writ proceedings have been narrowed.<sup>35</sup>

### III THE LIMITATIONS OF EQUITABLE REMEDIES IN JUDICIAL REVIEW

Applicants for equitable remedies in administrative law (other than the Attorney-General) must have a “special interest” affected by the action of which the complaint is made.<sup>36</sup> If a private right is at risk of being affected by government action this will surely satisfy the “special interest” test.<sup>37</sup> However things become more complex when other interests are at play.

*Australian Conservation Foundation Inc v Commonwealth* is the current leading test for those without a private right or equity and who seek declaratory or injunctive relief.<sup>38</sup> Such a plaintiff must be able to show a “special interest” in the subject matter of the action.<sup>39</sup> The interest cannot be a mere intellectual or emotional concern.<sup>40</sup>

The equitable remedies are therefore difficult to obtain when the rights of the plaintiff are not directly affected. In *Ogle v Strickland*,<sup>41</sup> standing was granted to priests who challenged the censorship barriers relating to a movie that they believed should never have been imported. McHugh J said in *Re Mc Bain; Ex Parte Australian Catholic Bishops Conference* that he was sure

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<sup>32</sup> *Ibid*, 891 [15.100].

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 499.

<sup>37</sup> *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114.

<sup>38</sup> (1980) 146 CLR 493, 499.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ogle v Strickland* (1987) 71 ALR 41, 42.

that the priests would have lacked standing under the “special interest” test if they had sought declaratory or injunctive relief.<sup>42</sup>

In an opposite situation, the constitutional writs are not affected by the same issues of standing. In a previous period, constitutional writs were subject to standing tests which varied depending on the specific writ sought.<sup>43</sup> This has surely contributed in casting the everlasting shadow of complexity that is said to loom over constitutional writs. The interpretation of standing has evolved over numerous cases to result in the modern approach that certiorari and prohibition are now available to those without any stake in the matter whatsoever.<sup>44</sup> Hayne J in *McBane* noted that there are possible incongruity in issuing the writ of mandamus to a stranger to compel the performance of a duty owed towards someone who has no complaint.<sup>45</sup>

As a last resort, an individual seeking equitable remedies who fails the “special interest” test can seek the fiat of the Attorney-General (to whom standing does not apply).<sup>46</sup> However, the relator procedure has declined in the last few decades since the office of the Attorney-General lost its political neutrality.<sup>47</sup> Some may want to question whether it is legitimate for the Attorney-General to maintain a privileged position in relation to standing in judicial review.<sup>48</sup>

### 3.1 *Additional considerations relating to equitable remedies in judicial review*

Hurdles relating to standing, although important, are not the only limitations that affect the utility of equitable remedies in judicial review. What can be accomplished by the constitutional writs cannot be emulated by injunctions or declarations.

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<sup>42</sup> (2002) 209 CLR 372, 381.

<sup>43</sup> *R v Northumberland Compensation Appeal Tribunal; Ex p Shaw* [1952] 1 KB 338, 390.

<sup>44</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 757 [11.210]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 562.

<sup>45</sup> *Re Mc Bain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 380.

<sup>46</sup> *Ibid.*

<sup>47</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 757 [11.210].

<sup>48</sup> E Campbell and M Groves, “Attacks on Judges under Parliamentary Privilege: a Sorry Australian Episode” [2002] PL 626, 631.

Declarations, contrary to constitutional writs, have no mandatory or restraining effect.<sup>49</sup> Declarations are sometimes accompanied by some relief ordering or restraining certain conduct, however such reliefs are not enforceable by law.<sup>50</sup> A declaration is nothing more than the “judicial snapshot” which records the existing state of the law but it changes nothing.<sup>51</sup> A declaration can only be legally enforceable by subsequent orders of the court.<sup>52</sup>

It has been said that the unenforceability of declarations does not matter as it is not conceivable that tribunals or officials who are law-abiding would disregard them.<sup>53</sup> However, such logic is not very reassuring. In fact, it is easy to imagine how a rogue government official may fail to comply with a declaration. He or she could be forced to comply with the declaration through subsequent orders of the court, however it would result in delays. For argument’s sake, it would also be difficult to give much weight to a declaration if the state of the law is rapidly changing.

Another consideration that comes to mind when researching equitable remedies is the way in which equitable doctrines affect them. Many of us are familiar with the “maxims of equity” such as: He who comes into equity must come with clean hands, equity aids the vigilant not those who slumber on their rights, equity acts *in personam*, etc. As outlined previously, the remedies of injunction and declaration sought through Section 75(v) of the *Australian Constitution* are historically entrenched in equity.<sup>54</sup> The declarations or injunctions sought in constitutional judicial review are not statutory injunctions or statutory declarations as made clear by the High Court in *Bateman’s Bay*,<sup>55</sup> and subsequently *Ainsworth*.<sup>56</sup>

Therefore, it would seem only logical that judges should consider equitable doctrines when exercising the discretion to grant or refuse equitable remedies. Of course, all constitutional remedies

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<sup>49</sup> *Truth About Motorways Pty Ltd v Macquarie In Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 600.

<sup>50</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 909 [15.300].

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomas Reuters, 5<sup>th</sup> ed, 2013), 909 [15.300].

<sup>54</sup> *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 250.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 570.

are discretionary.<sup>57</sup> However, equitable remedies in judicial review would be significantly weaker as judges would be compelled to follow the rather strict discretionary grounds known to equity. Are judges bound to consider equitable doctrines when granting injunctions or declarations pursuant to Section 75 (v)?

Very few cases known to this author have touched on this interesting question and unfortunately, none of the cases found seem to answer the question in satisfactory manner. In *H Stanke & Sons Pty Ltd v O'Meara*<sup>58</sup> it was found that:

“The declaratory orders sought by the plaintiffs would simply express the result of the application of the relevant equitable principles. Whether or not this results in the declarations themselves being properly regarded as equitable, there is little doubt that the plaintiffs are seeking the aid of equity. Accordingly, there is no reason to exclude from the court’s consideration other equitable principles such as the requirement as to clean hands”.<sup>59</sup>

In *Tavitian v Commissioner of Highways*,<sup>60</sup> Kourakis J said, “it was important not to burden the declaratory injunction with equitable doctrine, although equity’s discretionary principles might on occasion be analogous”.<sup>61</sup> Although Kourakis J fails to explain why “it was important” to do so, we can assume that he believed that burdening declarations or injunctions with equitable doctrines would create yet another obstacle in the exercise of judicial review. On the other hand, doctrines which have been established over hundreds of years cannot be brushed off simply because it is convenient to do so. The answer to the question remains uncertain.

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<sup>57</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52, 67.

<sup>58</sup> *H Stanke & Sons Pty Ltd v O'Meara* (2007) 98 SASR 450, 459.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Tavitian v Commissioner of Highways* [2010] SASC 206, 222.

<sup>61</sup> *Ibid.*

## IV CONCLUSION

Because of their wide scope and flexibility, declaratory and injunctive relief are very useful remedies in constitutional judicial review. They may however have carried with them other remnants from their historical equitable background which make them more discretionary. Equitable remedies are also vulnerable when it comes to issues of standing. What amounts to more than a mere intellectual or emotional concern and what does not remains perplexing. Such issues may need to be explored further by the High Court as the equitable remedies continue to play an evolving role in Australian judicial review.

So far as the constitutional writs are concerned, they do not appear to be an endangered species, even though they have quaint Latin names which may be difficult to pronounce for some. Since their re-branding in *Re Refugee Review Tribunal; Ex parte Aala*,<sup>62</sup> it seems likely that they will continue to play an important role that cannot easily be substituted.

Some legal academics believe that there is growing discontent with the existing standing requirement limiting the availability of injunctions and declarations. The majority in *Bateman's Bay* addressed the point and have suggested a relaxation of standing.<sup>63</sup>

However, to relax standing any further would amount to a total denaturalisation of declaratory and injunctive relief from their historical equitable jurisdiction. If such action is taken, a difference would emerge in the standing requirements for Section 75(v) equitable remedies and equitable remedies in other areas of private and public law. This would appear strained and it could potentially create imbalances between private and public law.

A more sensible way to achieve reform in judicial review would be to remove the technical restrictions on the availability of relief via constitutional writ (jurisdictional and non-jurisdictional errors). The architects of the common law of Australia often displayed an historical enthusiasm for

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<sup>62</sup> (2000) 75 ALJR 52.

<sup>63</sup> *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 251.

technicality and rigidity.<sup>64</sup> However, the High Court unanimously rejected a historically restricted approach to its powers.<sup>65</sup> In *Ex parte Aala*,<sup>66</sup> Hayne J stated:

“The grounds for issue of mandamus or prohibition are not frozen according to practices prevailing at 1900 [...] The common law rules describing the kinds of departure from the lawful manner of exercise of power that will attract a grant of prohibition have changed over time [...] The doctrinal basis for the constitutional writs provided for in Section 75(v) should be seen as accommodating that subsequent development when it is consistent with the text and structure of the Constitution as a whole”.<sup>67</sup>

The growth of government regulation in business, commerce, and everyday life, coupled with the substantial increasing in cases of judicial review may be a clear signal that Section 75(v) should be reinterpreted in a way consistent with the times. After all, in the United Kingdom and New Zealand, the distinction between jurisdictional and non-jurisdictional errors has been rejected for many years.<sup>68</sup>

In earlier times, the pouring of oil into the sea is said to have been done deliberately in order to forestall rough seas. Small quantities of oil can cover a surprisingly large area as it spreads into a thin layer. The surface tension of the oil layer has an effect similar to that of a thin skin. Although oil may be highly effective at calming troubled water, sailors cannot rely on this technique alone. They must engineer a ship capable of breaking waves and face storms on its own.

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<sup>64</sup> The Hon Wayne Martin, *Perspectives on Declaratory Relief: Declaratory Relief Since 1970* (University Club, 2007), 34.

<sup>65</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52, 66.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 157; *R v Lord President of the Privy Council, Ex parte Page* [1993] AC 682, 690.