

PUBLIC LAW REVIEW

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Examining the Intersection of Constitutional and Administrative Review under the Wotton Approach – Joshua Thomson SC and Tristan Taylor

In *Wotton v Queensland (Wotton)*, the High Court adopted an analytical framework for resolving constitutional questions where a conferral of executive power is sourced in statute. The “Wotton approach” keeps the constitutional and statutory questions distinct: the question of whether the statute is valid is one of constitutional law; whether executive action is valid is a question of whether the power is exercised within its statutory limits. In *Palmer v Western Australia*, the Wotton approach was applied to the promulgation of subordinate legislation, which was passed to aid in the State of Western Australia’s fight against COVID-19. This article seeks to explain the operation of the Wotton approach by reference to these two cases. It then explores the conceptual justification for the Wotton approach, before finally turning to some practical observations about the approach. While the ramifications of the approach are still being fully worked out, it is clear that it will continue to have an important role in defining how to analyse the validity of future government action. 315

A Matter of Principle and of the Rule of Law: Holding the Executive Accountable for Jurisdictional Error – *Inderpreet Kaur Singh*

In early 2021, the High Court held by a 4:3 majority in *MZAPC v Minister for Immigration and Border Protection* that an applicant in judicial review proceedings bears the onus of proving that a legal error committed in the course of administrative decision-making by reason of its materiality constitutes a jurisdictional error. This article offers support for the position of the minority judges by promoting and expanding upon the objection taken by Gordon and Steward JJ on the basis of preserving the rule of law. It contends that the principled reconciliation of three considerations, namely the requirement that the exercise of public power be justified, the protective qualities of judicial review and the constitutional context within which jurisdictional error finds expression and takes meaning, requires that the Executive bear the onus of demonstrating the immateriality of its legal error as a means of demonstrating that its error is non-jurisdictional. 330

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