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Sir Anthony Mason Constitutional Law Essay 2026

A. Introduction

Governmental automated decision-making spans AI-assisted decision software, AI-made decisions producing operative outcomes, and rules-based automation applying predetermined criteria rather than probabilistic machine learning.[1] Robodebt belonged principally to the last category rather than modern machine-learning AI,[2] yet remains instructive: it shows how computational systems can mediate public power, amplify legal error, and diffuse practical accountability at scale.[3] The question is not whether constitutional law requires government to remain flesh and blood, but whether constitutionally required review, independent judicial authority, and political accountability persist when machines increasingly perform the decisional work.

B. Section 75(v)

Section 75(v) entrenches the High Court's original jurisdiction to grant mandamus, prohibition or an injunction against an officer of the Commonwealth.[4] *Plaintiff S157/2002 v Commonwealth* confirms that s 75(v) secures a minimum provision of judicial review of Commonwealth executive legality notwithstanding privative clauses.[5] AI therefore challenges not the existence of supervisory jurisdiction, but whether an automated exercise of public power can be attributed to an officer and its legality meaningfully tested.

Pintarich v Deputy Commissioner of Taxation exposes the human-centred assumptions that complicate that task.[6] Although not a s 75(v) case, the Full Court majority treated decision-making as ordinarily involving a human mental process followed by an external manifestation of that conclusion. Where a machine generates the operative result without a corresponding human conclusion or validation, traditional doctrine may struggle to identify the legally cognisable 'decision'.

eSafety Commissioner v Baumgarten reduces, but does not resolve, that concern.[7] The Full Court upheld the ART's jurisdiction although the officer did not subjectively intend to exercise the statutory removal-notice power: once made, an administrative decision's

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[1] Benedict Sheehy and Yee-Fui Ng, 'The Challenges of AI Decision-Making in Government and Administrative Law: A Proposal for Regulatory Design' (2024) 57 *Indiana Law Review* 665, 668.

[2] Law Council of Australia, Submission to Select Committee on Adopting Artificial Intelligence, *Inquiry into the Opportunities and Impacts of the Uptake of Artificial Intelligence Technologies in Australia* (20 May 2024) 12 [40]; *Royal Commission into the Robodebt Scheme* (Report, 7 July 2023) vol 1, xxiv–xxv ('*Robodebt Royal Commission*').

[3] Melissa Perry and Sonya Campbell, 'AI and Automated Decision-Making: Are You Just Another Number?' (Speech, 'Kerr's Vision Splendid for Administrative Law: Still Fit for Purpose?' Online Symposium, 21 October 2021).

[4] *Australian Constitution* s 75(v).

[5] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [104].

[6] *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41, 67 ('*Pintarich*'). The majority reasoning is also discussed in *eSafety Commissioner v Baumgarten* [2026] FCAFC 12, [221]–[224] ('*Baumgarten*').

[7] *Baumgarten* (n 6) [191]–[203], [238]–[244].

character as a purported exercise of statutory power need not depend upon the official's subjective understanding. By distinguishing *Pintarich* and leaving autonomous decision-making unresolved, however, the Full Court preserves the harder question: whether public law can recognise a legally operative decision where no human has formed the legally relevant conclusion.[8]

A more direct response is legislation providing that an automated outcome is taken to be the decision of a statutory officer. Andrew Ray identifies Commonwealth provisions deeming computer-generated outcomes to be decisions of named decision-makers, such as s 495A of the *Migration Act 1958* (Cth), preserving ordinary judicial-review pathways.[9]

AI tests the practical effectiveness of s 75(v) but not its principle: automated exercises of Commonwealth power must remain identifiable, attributable to an officer, and open to effective judicial supervision. The danger is not that s 75(v) formally disappears, but that technological architecture could leave entrenched review theoretically available while making the responsible exercise of power practically difficult to locate.

C. Chapter III and judicial power

Section 71 vests Commonwealth judicial power in the High Court and other courts contemplated by Chapter III.[10] *R v Kirby; Ex parte Boilermakers' Society of Australia* establishes that Commonwealth judicial power cannot be vested in a body outside that structure.[11] AI accordingly presents its strongest Chapter III difficulty where it moves beyond assistance and becomes an independent source of binding determination. That proposition requires qualification: administrative bodies routinely determine tax liabilities, welfare entitlements, visas and licences, and deterministic calculation does not, in itself, encroach upon judicial power.

Brandy v Human Rights and Equal Opportunity Commission illustrates the significance of legal effect: registration rendering HREOC determinations enforceable as court orders indicated an impermissible vesting of judicial power.[12] *New South Wales v Wojciechowska* distinguished *Brandy*, reaffirming that judicial power cannot be exhaustively defined and that some functions take their character partly from their statutory and institutional setting.[13] What

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[8] Ibid [203]; see also [222]–[224].

[9] Andrew Ray, 'Implications of the Future Use of Machine Learning in Complex Government Decision-Making in Australia' (2020) 1(1) *Australian National University Journal of Law and Technology* 5, 9–10; *Migration Act 1958* (Cth) s 495A.

[10] *Australian Constitution* s 71.

[11] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[12] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ('*Brandy*').

[13] *New South Wales v Wojciechowska* [2025] HCA 27, [15]–[17], [27]–[37]. The Court held *Brandy* distinguishable and emphasised that some powers have a 'double aspect', taking character from their repository and statutory setting.

matters is not merely whether AI determines rights, but what function it performs, where authority is located, and how it is exercised.

Harris v Caladine provides a cautious analogy.[14] It concerned judicial functions exercised by registrars of a Chapter III court under arrangements where judges retained effective control and review. AI is not institutionally analogous to a registrar, but the case supports a distinction between subordinate assistance and substitution for judicial authority. Placing a judge nominally 'in the loop' cannot sanction an implementation in which decisional authority has functionally migrated elsewhere.

The *Kable* line of State-court institutional-integrity cases reflects the same concern: *South Australia v Totani* invalidated legislation that effectively enlisted a court to implement an executive determination,[15] while *Wainohu v New South Wales* associates reasoned decision-making and decisional independence with judicial process and institutional integrity.[16] Legislation obliging a court to act upon an algorithmic assessment without independent evaluation would replicate the *Totani* vice: enlistment of the court to give effect to a determination made elsewhere. Justice Kyrou's 2026 account of judicial practice illustrates, rather than establishes, the same distinction: current guidance prohibits generative AI for judicial decision-making while permitting supportive uses, but the court must remain able independently to determine and explain the application of law to facts.[17]

D. Responsible government and Robodebt

Responsible government requires executive government to remain politically answerable to Parliament for administration.[18] That accountability operates substantially through convention and parliamentary practice rather than judicially enforceable rules, so AI's challenge here is institutional rather than doctrinal. AI may distribute causal contribution across officials, designers and technical systems, but distributed causation does not dissolve governmental responsibility. Because AI cannot answer to Parliament, its increasing decisional role makes continued attribution of responsibility to ministers, agencies and officers more, not less, important.

While purely deterministic, Robodebt shows how automation may amplify rather than autonomously create governmental failure. Perry and Campbell contrast its capacity to produce approximately 20,000 debt-discrepancy notices weekly with the previous annual average of around 20,000 manually investigated discrepancies, reproducing an erroneous

[14] *Harris v Caladine* (1991) 172 CLR 84.

[15] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*'); *South Australia v Totani* (2010) 242 CLR 1, 50–1 [75]–[83] ('*Totani*').

[16] *Wainohu v New South Wales* (2011) 243 CLR 181, 208–12 [44]–[52] ('*Wainohu*').

[17] Emilios Kyrou, 'President's Speech on the Australian Perspective on AI and Judging' (Speech, Judging in the Digital Age Seminar, National Judicial Institute of Canada, Edmonton, 25 June 2026) 2–4.

[18] *Egan v Willis* (1998) 195 CLR 424, 451–2.

view of the law at exceptional scale.[19] Sheehy and Ng similarly locate Robodebt's failure in technology design, legality, procedural fairness and institutional accountability rather than treating automation as an independent bearer of responsibility.[20] The Royal Commission's findings reflect the same allocation: the Scheme was 'devised without regard to the social security law', and accountability fell on identifiable ministers and officials, including through sealed referrals, rather than on the technology.[21] Current Commonwealth policy reinforces the principle, requiring accountable officials, use-case owners, transparency statements, impact assessment and APS officers able to explain, justify and own AI-informed decisions.[22]

E. Procedural fairness, reasons and efficiency

Procedural fairness is not an explicit or unqualified constitutional right, but commonly arises through the common law or statutory administrative law. Yet its denial may constitute jurisdictional error, linking back to the entrenched supervision under s 75(v). Neither opacity, erroneous data nor mechanical decision-making is unique to AI; human administrators exhibit the same deficiencies, so automated systems should not be judged against an idealised transparent human comparator. The relevant question is whether AI displaces legally required judgment or materially amplifies familiar risks to legality and reviewability. Perry and Campbell warn that applying predetermined automation to genuine statutory discretion, without meaningful human judgment, may be a constructive failure to exercise that discretion.[23]

Public Service Board (NSW) v Osmond nevertheless establishes no general common-law duty upon administrators to give reasons; a fortiori, there is no constitutional 'right to an AI explanation'.[24] Opacity may still make judicial review practically ineffective if a person cannot identify whether relevant considerations, statutory criteria or legal constraints were applied. This supports the AHRC's recommendation that government should not make AI-informed decisions where reasons or a technical explanation cannot be produced.[25] That is a proposed safeguard, not existing constitutional doctrine. For judicial decisions, *Wainohu* places reasoned decision-making closer to the constitutional concerns of judicial process and institutional integrity.

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[19] Perry and Campbell (n 3) 1; see also *Robodebt Royal Commission* (n 2) vol 1, xxiv, xxvii.

[20] Sheehy and Ng (n 1) 665.

[21] *Robodebt Royal Commission* (n 2) vol 1, iii, xxvi, xxix.

[22] Digital Transformation Agency, *Policy for the Responsible Use of AI in Government* (Version 2.0, 2025) 10–14.

[23] Perry and Campbell (n 3) 4; see also *Green v Daniels* (1977) 13 ALR 1 (rigid application of predetermined policy criteria in place of the statutory question). Perry and Campbell also expressly acknowledge the cognitive biases and other limitations of human decision-making.

[24] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 662–3.

[25] Australian Human Rights Commission, *Use of Automated Decision-Making by Government* (Submission to the Attorney-General's Department, 15 January 2025) 5, 8.

Against these risks stand substantial benefits. Automated systems may improve timeliness, consistency and accuracy, expand administrative capacity, reduce costs, and increase access to government services. Perry and Campbell frame administrative justice itself as reconciling administrative efficiency with justice to the citizen.[26] Ray likewise notes that administrative delay can itself seriously harm people dependent on government decisions.[27] The appropriate response is calibrated accountability, not a presumption that machine decision-making is inherently inferior to human administration.

F. Conclusion

The increasing use of artificial intelligence challenges Australian constitutional law substantially in operation, but less substantially in principle. Section 75(v), Chapter III and responsible government remain capable of regulating technologically mediated power, although AI exposes assumptions about identifiable human decision-makers, intelligible decisional acts and traceable responsibility. *Pintarich* illustrates uncertainty where an operative outcome lacks a corresponding human conclusion, while *eSafety Commissioner v Baumgarten* confirms that the statutory character of a governmental decision may be determined objectively rather than by the official's subjective understanding. Chapter III constrains technological substitution for judicial authority rather than AI assistance, provided judicial control remains substantive. Robodebt shows how automation may amplify illegality and obscure practical responsibility without itself becoming the bearer of constitutional responsibility.

The constitutional response should not privilege human decision-making merely because it is human. Human administration can itself be opaque, erroneous and mechanistic, while automation may improve consistency, timeliness and accessibility. What constitutional principle demands is that public power remain attributable, reviewable and accountable, with genuine human judgment where the particular power requires it. AI calls principally for institutional adaptation, not constitutional reconstruction. Clearer attribution, auditable decisional processes, substantive judicial control and continuing political responsibility are adaptations of precisely that kind.

[26] Perry and Campbell (n 3) 1.

[27] Ray (n 9) 5, 7.

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