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Australian administrative law: The constitutional and legal matrix

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Administrative law is difficult to define, and we will not attempt to do so in an exact way. For most Australian scholars, administrative law might simply mean the parts of public law that do not include constitutional law – but many chapters of this book demonstrate that constitutional law and its consequences can never be entirely separated from administrative law. That said, administrative law can still be defined in part by reference to constitutional law. Constitutional law is largely concerned with the nature and scope of the powers held by each arm of government within the Constitution. Administrative law is all about what the agencies of the executive government (ministers, departments, agencies and the individual officials who work within these bodies) can and cannot do. More particularly, administrative law encompasses the different mechanisms and principles that enable people to question or challenge the decisions of these agencies of government.

While the courts play a significant role in these processes (principally through the exercise of their judicial review jurisdiction and, to a lesser extent, through their appellate jurisdiction over many other administrative decisions), they form only one part of the picture. A defining feature of administrative law is the important role played by non-judicial bodies, such as tribunals and Ombudsmen, who receive many more complaints than the courts. Another defining feature of administrative law is the different remedies offered by its different institutions. Some can provide a new decision (tribunals are the notable example), while others can quash or set aside a decision but cannot make a new decision (this is a hallmark of judicial review). Others can do neither (Ombudsmen have a recommendatory power and cannot either set aside or remake a decision no matter how unfair or unlawful it might be). Other avenues cannot possibly affect a decision (freedom of information [FOI] legislation facilitates access to information,

which does not itself affect the decision or action to which the information relates).

The common theme in these different mechanisms of administrative law is an emphasis on the control of government power. That desire for control is guided by a range of values that are often gathered under the heading of 'administrative justice'. That term is often treated as a doctrine in its own right,[1] but administrative justice is best understood as the sum total of the values or goals of administrative law. These values include transparency, accountability, consistency, rationality, impartiality, participation, procedural fairness and reasonable access to judicial and non-judicial grievance mechanisms.[2] These values might sometimes be vague or all-encompassing, but they are useful to explain the underlying purpose of administrative law. Administrative law does not exist in a vacuum or operate according to purely legal principles (if there is such a thing). It is always driven by a concern for fair and proper treatment, even if that concern is not always openly discussed.

The influences that have shaped Australian administrative law are as diverse as the values that have driven this process, but three are of particular importance. One influence is our English common law heritage, from which fundamental common law doctrines and interpretive principles are drawn. The Australian model of judicial review originated from the principles that governed English courts in their exercise of their supervisory jurisdiction to conduct judicial review. Australian and English judicial review have become increasingly different, particularly with the radical effect that the Human Rights Act 1998 (UK) has had on English public law, but Australian administrative law still cannot be fully understood without reference to its English heritage. The Commonwealth Constitution is another important influence upon Australian administrative law. The adoption of a written constitution marked a crucial point of difference between Australia and England. The Constitution introduced a division or separation of powers that underpins the role of the courts and many other consequences that flow from that separation, such as the constitutional limitations on judicial power. A further key influence is the body of reforms, known as the 'New Administrative Law', which were adopted at the Commonwealth level in the 1970s and replicated in whole or in part in most states and territories. These reforms signalled the birth of a uniquely Australian system of administrative law that continues to evolve.

A starting proposition: All power has its limits

Administrative law is mostly about power and discretion. The 'power' aspect of administrative law includes those principles which require public officials to either establish the source of their authority or force them to remain within the scope of that authority. Authority and similar concepts, such as jurisdiction, are central to administrative law because they underpin the focus upon the need for public officials to explain the exercise of their powers. The 'discretion' aspect of

administrative law comes into play after the 'power' issues are satisfied. Discretion means choice – namely, that an official who is granted power to act or decide is also granted the freedom to choose from a range of possible outcomes which an exercise of that power might allow. But administrative law has long decreed that this freedom is not absolute. Even the most discretionary powers are not taken to be arbitrary powers. This is a statement of the obvious in a country in which the 'rule of law' is recognised as an 'assumption' among the 'traditional conceptions' buttressing the Australian Constitution.[3] Even as far back as 1891, Lord Halsbury in *Sharp v Wakefield*[4] asserted this distinction in the following terms:

> . . . when it is said that something is to be done within the discretion of the authorities (then) that something is to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.[5]

The High Court of Australia has repeatedly adopted a similar view.[6] The idea that public powers are subject to implicit or unspoken limits is one example of the wider influence that fundamental common law principles and rules of interpretation can exert on discretionary powers. These principles and rules provide a background against which the courts can both interpret and control discretionary powers. Professor Denis Galligan explained:

> Any official exercising power does so within a framework of legal and political principles, and that these principles are important in the justification and legitimation of decisions . . . One principle, of particular importance in democratic systems is that officials to whom powers have been delegated must account for their actions to the community. The underlying assumption is that all government powers, whether the sovereign powers of legislatures or the delegated powers of administrative officials, are held on behalf of the community and therefore account must be made to it. Because of the difficulties in large and complex societies of requiring accountability in any direct or populist sense, a network of principles and practices develop which mediate between the exercise of powers by officials and the community, and thus provide accountability in a more indirect way.[7]

The leading works on judicial review adopt a similar view when they argue that all public powers have implicit limits.[8] This view taps into a deeper and more important aspect of administrative law, which is the notion that the power of parliament – and the officials who act under the authority of laws enacted by parliament – is subject to unspoken limits. Many of these limits are political in nature. These are the rules and conventions by which governments act. They are usually created and enforced in the political arena but other limits on public power are created and enforced in the legal arena, and this is the province of administrative law.

The implicit nature of these limits upon public power can be particularly useful to judicial review. Importantly, it enables the courts to enforce those limits even when not expressly included within legislation (which is usually the case).

It also places the onus squarely upon the legislature to restrict or remove these underlying assumptions.[9] But it would be wrong to conceive of the implicit limits on public power as a concept for judicial review alone. The notion that public power is limited in nature and that its exercise should always be able to be justified according to principles of reason and justice underpins every aspect of administrative law.[10]

The Constitutional backdrop

The Australian polity is a federal entity. The primary focus of the framers of the Commonwealth Constitution was the division of legislative powers between the Commonwealth and the entities comprising the six states. Legislative powers are exercised in Australia today by a federal parliament, six state parliaments (all are bicameral, except for Queensland) and legislative assemblies in the Australian Capital Territory and the Northern Territory. Within these arrangements lie some foundational principles that have exerted considerable influence over the form of Australian administrative law.

The role of responsible government

The Commonwealth Constitution provided for a system of representative government. Members of all parliaments are elected by popular vote. In *Australian Capital Television Pty Ltd v Commonwealth*[11] Mason CJ said:

> The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives . . . The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.[12]

At federal level, the executive power is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. However, the Governor-General exercises the executive power on the advice of the Federal Executive Council which comprises Ministers of State who 'shall hold office during the pleasure of the Governor-General'.[13] Ministers of State are drawn from the House of Representatives and the Senate, thus giving expression to the principle of responsible government.[14] Ministers are collectively responsible to parliament. A government which ceases to command the confidence of the House of Representatives would have, as a matter of constitutional convention, to resign. Ministers of State are also individually responsible to parliament in their administration of their assigned governmental department. They are answerable to parliament

for the failings of their departments. The courts have recognised that these basic elements of responsible government underpin all Australian governments,[15] but they have also accepted that the various Australian constitutions give direct effect to few if any of the requirements of responsible government.[16]

Doubt is often expressed about elements of responsible government, particularly whether ministerial responsibility provides an effective form of accountability.[17] The courts have largely avoided this debate though it is clear that they do not generally accept the availability of ministerial and other forms of political accountability as a sufficient reason to refrain from exercising their supervisory jurisdiction. At the same time, however, it is clear that the scope and intensity of judicial review can be affected by the possible role of political mechanisms of accountability, particularly for decisions with a high political content. *Prisoners A to XX inclusive v NSW*[18] is an example. That case involved a decision refusing to give condoms to prisoners. The issue had been hotly argued in parliament, laws were passed to empower prison authorities to issue condoms but they ultimately decided not to. The court refused to consider an application for judicial review of this decision for the following reason:

> The power to direct and manage prisons conferred on the Commissioner [of Corrections] . . . is subject to the direction and control of the Minister . . . who in turn is a member of the Cabinet and as such is answerable to Parliament, and through Parliament to the electorate. Such is the nature of our democratic process that the determination of government policy often involves political considerations, and if the courts were to assume the power to review decisions of government policy, political power would pass from Parliament and the electorate to the courts.[19]

The absence of a Bill of Rights

The framers of the Commonwealth Constitution did not opt for the incorporation into the constitutional framework of an express Bill of Rights. Such an omission is becoming more conspicuous given that other western democracies, such as Canada, New Zealand and the United Kingdom, have adopted either constitutionally-entrenched or statutory Bill of Rights. It was felt that the adoption of the principle of responsible government precluded the necessity for the incorporation of express guarantees of individual rights. In *Australian Capital Television Pty Ltd v Commonwealth*[20] Mason CJ remarked:

> The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.[21]

The reluctance to adopt a national Bill of Rights is being slowly eroded by the adoption of a statutory Bill of Rights in the Australian Capital Territory and Victoria.[22] The full impact of these instruments remains to be seen but, if the experience of other common law jurisdictions is any indication, a Bill of Rights might greatly invigorate those jurisdictions to which it applies. The English courts have recently

suggested that the enactment of the Human Rights Act 1998 (UK) has strengthened the position of the courts because the Act essentially provides a crucial role for the courts (which is to declare and enforce the Human Rights Act) that parliament cannot easily, if at all, diminish. English courts have also begun to question whether parliament is absolutely sovereign.[23] These propositions are not radical to Australia because they have long been accepted as ones arising from our written constitution, but they would prove radical if transplanted to the non-federal jurisdictions that have enacted or are considering a Bill of Rights. There are several other consequences an equivalent of the Human Rights Act 1998 (UK) could have in any Australian jurisdiction. One is the extraordinary intensity with which judicial review applies to decisions that affect fundamental rights.[24] Another is the acceptance of proportionality as a separate ground of judicial review, which could blur or even collapse the distinction between judicial and merits review.[25] Yet another consequence might be the apparent willingness of the English judiciary to enter politically sensitive areas.

The separation of powers

A full understanding of Australian administrative law must also take account of another essential facet of the constitutional framework, namely the separation of powers. The Commonwealth Constitution does not expressly spell out the existence of a separation of powers doctrine but the High Court held that the compartmentalisation of the legislative, executive and judicial powers into Chapters I, II and III of the Constitution respectively led inevitably to the proposition that Australia's constitutional framework dictated a separation of powers.[26]

The separation of powers doctrine does not operate in a strict fashion in Australia. The Westminster system of responsible government was grafted by the framers of the Australian Constitution onto a federal framework modelled on the United States Constitution. A conspicuous feature of the Westminster system is the absence of a sharp separation of powers between the legislature and the executive. Ministers of the Crown are drawn from the ranks of parliamentarians or those who become members of parliament within a short time after their appointment as ministers. Responsible government means that the executive branch of government holds a mandate to govern as long as it commands the confidence of a majority of members of the lower house of parliament. The federal parliament is permitted to delegate its law-making power to the executive.[27] Given the complexities and demands of modern-day life, delegated legislation is a common route for legislative implementation of schemes proposed by the executive arm of government.

The separation of powers doctrine provides a system of 'checks and balances on the exercise of power by the respective organs of government in which the powers are reposed'.[28] Although the courts have accepted an intermingling of legislative and executive powers, they have nevertheless insisted on a strict separation of the judicial function from the other functions of government in order to advance

two main objectives – 'the guarantee of liberty and to that end the independence of Chapter III judges'.[29]

The evolution of the separation of judicial power doctrine stemming from the 'seminal' judgment of Isaacs J in the *Wheat* case[30] to the decision in *Alexander*[31] and to *Boilermakers* case resulted in the formulation of a two limb proposition: (i) that federal judicial can be vested in only a Chapter III court, and (ii) that only federal judicial power, apart from a power which is ancillary or incidental to the exercise of judicial powers, can be invested in a Chapter III court.

An important consequence of the separation of judicial power doctrine is that it becomes crucial for the true nature of a particular power to be identified as a judicial power or a non-judicial power. In this connection, the 'classic' definition of judicial power formulated by Griffith CJ in *Huddart Parker and Co. Pty Ltd v Moorehead*[32] is often invoked:

> The words 'judicial power' as used in s71 of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[33]

It is universally acknowledged that the definition of judicial power lacks precision.[34] Despite the fact that judicial power is an elusive concept, it is crucial that the true nature of a power be identified for that identification is pivotal in determining the validity of legislation which is alleged to violate the separation of judicial powers doctrine. This difficult task has been recognised by the High Court in *Brandy v Human Rights and Equal Opportunity Commission*.[35] The court explained:

> Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic.[36]

Over the course of time, the High Court has tempered the rigidity of the *Boilermakers* doctrine by giving judicial recognition to a number of 'exceptions' to the doctrine. Thus, a parliament's power to cite contempt of itself, while undoubtedly a judicial power, is valid. Similarly, the High Court has also acknowledged the constitutionality of courts martial and defence service tribunals. Historical considerations provide the justification for these 'exceptions' to the separation of judicial power doctrine. An exception of especial significance in the administrative law arena relates to what is often described as the *persona designata* doctrine.

The *persona designata* doctrine enables the courts to uphold legislation which seeks to confer administrative functions not incidental to the exercise of judicial functions upon a federal judge acting in a 'personal capacity' rather than as a judge of a court. In 1979, the Federal Court rejected a challenge to the competency of

a federal judge (Davies J) to be appointed to the position of Deputy President of the Administrative Appeals Tribunal to hear and determine an application for review.[37] Bowen CJ and Deane J said:

> There is nothing in the Constitution which precludes a justice of the High Court or a judge of this or any other court created by the Parliament under Ch III of the Constitution from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi judicial in their nature.[38]

The *persona designata* doctrine was applied by the High Court in *Hilton v Wells*[39] in which the validity of s20 of the *Telecommunications (Interception) Act 1979* (Cth) was challenged. The impugned section required judges of the Federal Court to entertain and determine applications for the issue of warrants authorising persons to intercept communications made to or from a telecommunication service. It was contended that this amounted to a conferral of a non-judicial power on the Federal Court in violation of the *Boilermakers* doctrine. The majority justices (Gibbs CJ, Wilson and Dawson JJ) said:

> Although the Parliament cannot confer non-judicial powers on a federal court, or invest a State court with a non-judicial power, there is no necessary constitutional impediment which prevents it from conferring non-judicial power on a particular individual who happens to be a member of a court.[40]

On the construction of s20, they found that s20 designated the judges as individuals who were particularly well qualified to fulfil the sensitive role envisaged by the section. Mason and Deane JJ dissented on the construction of s20. They demanded 'a clear expression of legislative intention' before it could be concluded that the functions entrusted to a judge of the Federal Court were to be exercised by the judge 'personally'.[41]

The High Court, ten years down the track, was called upon in *Grollo v Palmer*[42] to deal with the *persona designata* issue again in the context of an amended *Telecommunications (Interception) Act 1979* (Cth). The amendments to the Act took into account some of the criticisms in the joint dissent of Mason and Deane JJ in *Hilton v Wells*. There was now a requirement that the federal judge had to consent to be nominated as an 'eligible' judge in order to perform the functions under the Act and to be so declared by the minister.

In *Grollo v Palmer*,[43] it was submitted to the High Court that 'the conception of *persona designata* should be abolished to maintain the integrity of the *Boilermakers* principle'. In rejecting this submission, Brennan CJ, Deane, Dawson and Toohey JJ prescribed the following two conditions which should be attached to the power to confer non-judicial functions on judges as designated persons:

> First, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent; and, second, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with

> the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power ('the incompatibility condition').[44]

They explained that the incompatibility condition:

> . . . may arise in a number of different ways. Incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished. Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth. So much is implied from the separation of powers mandated by Chs I, II and III of the Constitution and from the conditions necessary for the valid and effective exercise of judicial power.[45]

In *Grollo v Palmer*, a majority of the Court held that the power to issue warrants under the Act was not incompatible with the performance of judicial functions by the federal judges. The incompatibility test was applied a year later in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.[46] In that case, a Federal Court judge (Matthews J) accepted nomination as a 'reporter' under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The Court found that there was incompatibility between Matthews J's performance of her non-judicial and judicial functions. Matthews J was appointed as a judicial officer of the Commonwealth and, therefore, could not accept an administrative position in an inquiry. The *Wilson* decision affirmed that the separation of powers doctrine prohibits judges appointed under Chapter III of the federal Constitution from exercising non-judicial functions, but the principles can also apply in the reverse to prevent a non-judicial officer or body from exercising judicial power.

That restriction and the problems it can present to administrative tribunals were highlighted in *Brandy v HREOC*.[47] In that case, the High Court held parts of the *Racial Discrimination Act 1975* (Cth) invalid because they invested the Human Rights and Equal Opportunity Commission (HREOC) with judicial power. HREOC was an administrative body granted power to receive and determine complaints about discrimination. It was not empowered to enforce its determinations, no doubt because the enforcement of orders is a hallmark of judicial power. The Act instead provided that HREOC determinations enforceable when registered in the Federal Court. The High Court held this regime unconstitutional on the ground that it did not involve an independent exercise of judicial power by the Federal Court. On this view, the Act impermissibly attempted to extend the enforcement powers of a judicial body to the decisions of an administrative body.[48]

The requirements of the separation of powers doctrine do not generally apply at the state level. The High Court has clearly held that here is no separation of powers doctrine in the state constitutional systems. Until 1996, it was not possible to challenge successfully the vesting of a non-judicial function in a state judge. A decision of the High Court in that year has led to a limitation on the legislative capacity of state parliaments. The '*Kable* principle' enunciated in *Kable v Director of Public Prosecutions (NSW)*[49] led to the invalidation of the *Community Protection Act 1994* (NSW) which empowered the Supreme Court of New South Wales to make an order for detention of Kable in prison for a specified period if it was satisfied on reasonable grounds that Kable was 'more likely than not to commit a serious act of violence', and that it was appropriate 'for the protection of a particular person or the community generally' that he be held in custody.[50]

Invoking notions of incompatibility, the High Court held that the Act was invalid because it purported to vest functions in the Supreme Court of New South Wales that were incompatible with the Court being a receptacle of the judicial power of the Commonwealth. Section 71 of the Commonwealth Constitution provides expressly for the vesting of federal judicial power in, inter alia, 'such other courts as it invests with federal jurisdiction', which embraces the state courts. Underpinning the *Kable* principle was the concern to protect public confidence in the judicial system and to negate the perception 'that the Supreme Court was an instrument of executive government policy'.[51] The subsequent case of *Fardon v Attorney-General (Qld)*[52] has undermined the importance of the *Kable* principle and has largely restricted its application to future cases involving legislation which would be identical to the legislation in *Kable*.[53]

The limits on the judicial role imposed by the separation of powers doctrine

The separation of powers doctrine imposes limitations on the judicial function which are crucial to the shape of judicial review. According to the separation of powers doctrine, the role of the judiciary is to declare and apply the law.[54] It follows that the role of the judiciary is to pronounce on the scope and limits of discretionary powers, but not assume control of those powers. The classic modern statement of this principle was made by Brennan J in *Attorney (NSW) v Quin*,[55] where his Honour explained:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids injustice, so be it; but the court has nor jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant and, subject to political control, for the repository alone.
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> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.[56]