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INTRODUCTION

An introduction to this book

The cases and materials in this book complement the introduction to administrative law provided in *Government Accountability – Australian Administrative Law* ('the textbook'). It is assumed that readers of this book will also have access to the textbook. The chapters in this book mirror those in the textbook. We envisage that readers will begin their study of a topic by reading the relevant section of the textbook and will turn to this book to study key cases and concepts in greater depth. For this reason, this book contains very limited commentary on the cases and materials.

There are two primary reasons for supplementing the textbook with a book of cases and materials. First, as every student and practitioner of law knows, cases and legislation are authoritative sources of law; a textbook can only provide the authors' non-authoritative description of that law. Therefore, any serious student of administrative law will be sure to read the leading cases and relevant legislation for themselves. This book makes that task easier by presenting key extracts from those primary materials in a relatively accessible format.

Second, we use this book to explore topics beyond the explanation provided in the textbook. For selected topics, we provide case studies demonstrating how administrative law principles and mechanisms work in practice and interact with one another. Where space permits, we have included materials that reveal multiple dimensions of a single issue. Dissenting judgments and contrasting opinions are presented in order to encourage critical thinking about the status quo.

In selecting and editing the extracts in this book, we seek to balance these objectives: providing an accessible collection of leading cases and key statutory provisions while also embracing the complexities of administrative law principles and practice. (Of course, readers who wish to understand an area of law in depth must go further than reading the extracts in this book; they must read the cases and statutes in their entirety and undertake further research.) Where possible, we have included not only those portions of judgments that lay down authoritative statements of principle, but also those portions that explain how those principles apply to the facts of the case. This provides the reader with the tools to develop a thorough understanding of how the legal rules and principles operate.

Statutory interpretation is a central element of contemporary administrative law (and, indeed, of most areas of Australian law). Accordingly, many of the case extracts in this book are structured in a way that emphasises statutory interpretation. The statutory provisions that are key to the reasoning in the case are set out in full at the beginning of the extract (as they stood at the relevant time; subsequent amendments have not been incorporated). Space permitting, judicial engagement with the application of the rules of statutory interpretation to those provisions is included. Not only does this approach present an accurate picture of what was decided in each case, it also gives the reader opportunities to examine the interplay between the rules of statutory interpretation and the common law in specific fact situations.

It has not been possible to include every important case, nor to provide the extensive extracts we might have if accessibility had not been a high priority. We hope this book

provides the reader with a sophisticated introduction to Australian administrative law, and with the interest and ability to further develop their understanding.

This introductory chapter provides a range of perspectives on the relationship between administrative law and the rule of law, and introduces the overarching concept that we use to explain administrative law principles and mechanisms: the idea of accountability.

Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans, G Bell and Sons, 1914) (first published 1748)

The concept of the separation of powers, which is central to administrative law, is strongly associated with the work of the French political philosopher, Montesquieu. In the extract below, Montesquieu explains the link between the separation of powers and individual liberty.

Book XI: Of the laws which establish political liberty with regard to the constitution

162 In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he ***163*** makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

The political liberty of the subject is a tranquillity [sic] of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. …

A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1915) (first published 1885)

The work of the famous English legal scholar, A V Dicey, has been hugely influential in the development of common law legal systems and legal thinking. In this extract, Dicey provides a seminal description of the concept of the rule of law.

> ***183*** When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.
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> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts ***184*** of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.
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> … ***189*** We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary realm and amenable to the jurisdiction of the ordinary tribunals.
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> In England the ideal of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen …
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> ***191*** There remains yet a third and a different sense in which the 'rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.
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> …
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> ***198*** That 'rule of law,' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.
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> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.
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> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (*droit administratif*)

or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The 'rule of law,' lastly, may be used as a ***199*** formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants …

[Citations omitted]

Dawn Oliver, 'Accountability and the Foundations of British Democracy – the Public Interest and Public Service Principles' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 289

In the following extract, Emeritus Professor Dawn Oliver, University College London, discusses the purposes of public accountability mechanisms as they operate in the United Kingdom, and broader principles that are relevant throughout western democracies.

289 Discussion of accountability commonly revolves around ways in which public office-holders (including Members of the two Houses of Parliament and of the government, and other elected people – for instance in the devolved bodies and in local authorities, civil servants, local authority officers, police officers and others exercising public functions) are answerable to public bodies of various kinds or to the electorate: officials to the courts; ministers to Parliament and the electorate; civil servants to ministers; public authorities to ombudsmen; local authorities to their electorates. I take accountability to entail, in this context, a legal, political, social or moral duty on the part of an accountor to explain and justify his or her action or inaction to particular bodies demanding explanations – accountees – according to standards set by or associated with the role of the accountee. If the courts are involved, the standards will be legal; if the ombudsman, the standard will be whether there has been maladministration resulting in injustice, and so on. If the accountee considers that mistakes or errors have been made, the accountor may be required – whether by law or other social norms – to put matters right by meeting the requirements of the accountee, for instance by apologizing, making amends, ensuring that similar errors are not made in future, resigning or submitting to punishment.

We do not often ask exactly why a web of accountability mechanisms exists in a democracy such as the UK; what good the mechanisms are supposed to achieve;

290 what evils they are supposed to avoid; or whether the wide range of established and approved accountability mechanisms have anything in common.

We know that election of members of the legislature and the executive is not enough to produce and maintain a well-functioning democratic system in which the rule of law is observed, human rights and civil and political liberties are respected, and it is accepted that no party or government has a monopoly of wisdom; i.e. that authority is not enough and justifications for action may be expected – these being the essential elements of a liberal democracy, in my view. Without appropriate (and appropriateness is crucial) accountability mechanisms, election alone could produce imprudent, partisan, sectarian, discriminatory, illegitimate, corrupt government that would be inconsistent with the very concepts of democracy and the rule of law. And access to the courts alone cannot protect us from bad government. Further mechanisms of accountability are required. I shall suggest that what most accountability arrangements in the UK have in common is recognition of the need to uphold two important constitutional principles: public bodies should seek to promote the general or public interest and not sectional or partisan interests (the public interest principle); thus, they should serve, altruistically, the public and not their own interests (the public service principle). … While I am focusing on the UK system … in fact these principles are commonly included in the constitutional texts of western democracies.

Some concepts need to be clarified before we can proceed. First: accountability. I have sketched the meaning of accountability in the first paragraph … In exploring the workings of accountability mechanisms in the context of the British constitution and the public service and public interests principles, we need to be aware that 'accountees' vary widely: many of them are expected, and consider their role to be, to promote public interests rather than sectional or sectoral interests. Ministers are 'responsible' – nowadays 'accountable' is a better term – to the two Houses of Parliament: they are supposed to be concerned about public interest in, among other things, the competence and integrity of ministers. Ministers are required to explain and justify their own or their officials' actions to Parliament in terms of public interest standards and not, for instance, in terms of partisan standards that they know conflict with public interests.

Of course, politicians are liable to focus on short-term rather than long-term problems and their solutions, or on winning or retaining votes in the next election. They may lack expertise where it is needed and they may panic in emergencies or when faced by heavy public pressure. The system in the UK therefore involves many non-party political or expert bodies – executive agencies and quasi-autonomous non-governmental organisations (Quangos) – which work under mandates (framework documents in ***291*** the case of executive agencies, statutory or other legal mandates in the case of many Quangos) which spell out the public interests and how they should be weighed against one another, or against sectional interests. Given the inevitability of differences of opinion as to how conflicting public interests are to be weighed in particular instances, safeguards are to be found in the public servant's duties … and their 'enforcement' via, for instance, rights of access to information under the *Freedom of Information Act 2000*, the possibility of judicial review …, and a whole range of other accountability mechanisms. …

The votes of the electorate at election time respond to the record of the incumbent government: elections are accountability moments. Individuals may exercise their votes in accordance with their own interests, but the assumption is that the aggregate of individuals'

votes will reflect or promote the general interest and the public service principle. And – very importantly – sections of the public to whom information about the work of officials is disclosed, whether by the press or on freedom of information requests or in other ways – will articulate the standards they expect of public bodies: criticisms may well result in resignations.

[Citations omitted]

Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224

In this extract, Paul Finn (then a legal academic and later a Federal Court judge) considers the relationship between public power and the people.

227 I begin with three simple, but very controversial, propositions. The first merely echoes Sir Anthony Mason's observation in the political broadcasting case [*Australian Capital Television v Commonwealth* (No. 2) (1992) 108 ALR 577 at 593]. It is that: Sovereign power resides in the people.

228 The second, which grows out of the first, is that: Where the public's power is entrusted to others for the purposes of civil governance, the institutions and officials who are the repositories of that power hold it of the people to be exercised for the people. They are trustees.

The third, which links the second back to the first, is that: Those entrusted with public power are accountable to the public for the exercise of their trust.

… I should … make [some] general observations at the outset. The first is that it is only the third of these propositions – accountability – which has any significant resonance in public discussion in this country, although the concept of public trusteeship is now finding its way into both legislation and official reports. It seems to be very much left to individual judges of the High Court to awaken our appreciation of the first – that 'the powers of government belong to, and are derived from, the people.' ***229*** Secondly, and lest I be misunderstood, the three propositions do not themselves ordain what are the appropriate institutional arrangements through which constitutional government is to be conducted. But at every point they affect – or should affect – the architecture of our institutions of government and the practice of public government.

[Citations omitted]

Church of Scientology Inc v Woodward (1982) 154 CLR 25

Facts

The Church of Scientology was concerned that the Australian Security Intelligence Organisation (ASIO) had collected intelligence about the Church and had continued to do so even after establishing that the Church was not a security risk. The Church and one of its members

commenced proceedings in the High Court, seeking declarations that ASIO's investigations into the Church were unlawful and prohibiting it from continuing those investigations. ASIO applied to have the statement of claim struck out on the ground that the legislation establishing ASIO shielded its conduct from judicial review.

The High Court granted ASIO's application to strike out the statement of claim, albeit because of the particular form in which the Church framed its action rather than any general immunity of ASIO from judicial review. Brennan J, who dissented, made some observations that are now recognized as classic statements on the relationship between the executive, the courts, legislation, and the rule of law in Australia.

Brennan J (dissenting)

> ***70*** The jurisdiction of this Court to give relief compelling compliance with the Act is not in question. It was conceded that the activities of the Organization [(ASIO)] were subject to judicial review, and the concession was rightly made. As the law which sustains the Organization in existence limits its functions, it would mock the will of Parliament to deny that the functions which it has defined may be exceeded without restraint by the courts. Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly …
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> ***71*** It is submitted, however, that the Act commits to the Organization the determination of what activities it will undertake within its charter, and that a decision to engage in a particular activity is not open to review merely because a mistake is made as to whether that activity is within its charter. Bad faith apart, it is said, mistakes in making decisions are necessarily incidental to or part of the Organization's function of deciding whether to undertake a particular activity and mistaken decisions, honestly made, are not amenable to judicial review.
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> The submission cannot be accepted. The Organization's functions are not defined in terms of what the Organization believes them to be. The provisions of the Act, not the Organization's opinion, furnish the measure of its legitimate functions. No doubt it is necessary for the Organization to decide whether a particular activity is within its functions but such a decision is merely the ***72*** administrative step taken to ensure compliance with the Act. What Fullagar J said with respect to the constitutional validity of administrative acts in *Australian Communist Party v The Commonwealth* [(1951) 83 CLR 1, 258] applies equally to the statutory validity of an executive act undertaken in reliance upon a statutory power:
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> > The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity.

[Citations omitted]

A v Hayden (No 2) (1984) 156 CLR 532

Facts

On 30 November 1983, a group of people employed by various Commonwealth agencies took part in a training exercise organised by the Australian Secret Intelligence Service ('ASIS'). The objective of the exercise was to rescue a 'hostage' being held by 'captors' on the tenth floor of the Sheraton Hotel in Melbourne. ASIS did not seek the hotel's permission to carry out the exercise; nor did it inform hotel staff or patrons that the exercise would take place. The exercise went awry (Mason J described it as having 'the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart': *A v Hayden (No 2)* (1984) 156 CLR 532, 550). It began with participants battering in a hotel room door using sledgehammers, and culminated in them making a hasty exit through the hotel lobby, wearing masks and brandishing pistols and submachine guns (for further details, see Commonwealth, Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Sheraton Hotel Incident* (1984)).

The Chief Commissioner of Police for Victoria requested that the Commonwealth provide the names of the individuals involved in the exercise, so that Victorian police could make inquiries with a view to commencing prosecutions for offences committed in the course of the training exercise. The participants sought to prevent the Commonwealth from disclosing their identities, arguing that they were protected by a confidentiality clause in their employment contracts with the Commonwealth, and that disclosing their identities would be a national security risk. For its part, the Commonwealth had reached an agreement with the Victorian Government under which both governments passed legislation that would permit Victorian courts to sit in private if and when hearing any criminal charges arising from the Sheraton Hotel incident.

The procedural history of the proceedings is complex. For present purposes, the judgments are significant for their invocation of rule of law principles to explain the limits on executive power.

Gibbs CJ

> ***540*** The fact that this foolish exercise was carried out under the authority of the Commonwealth would in itself provide no reason in law why the Commonwealth should not disclose the identities of the plaintiffs to the Chief Commissioner. It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.

Mason J

> ***550*** The Commonwealth has a legitimate concern with the administration of the criminal law in its application to the events recorded in the stated case. However, the emphasis which the Commonwealth seeks to give to this responsibility should not be allowed to obscure its responsibility for what occurred. It is possible that the promise [of confidentiality]

was given, and the arrangements for the training exercise made, in the belief that executive orders would provide sufficient legal authority or justification for what was done. It is very difficult to believe that this was the Commonwealth's view – superior orders are not and never have been a defence in our law – though it is conceivable that the plaintiffs may have had some such belief. I mention these aspects of the case lest concentration on the legal questions presented by the stated case should divert attention away from the primary role played by the Commonwealth in this enterprise, a primary role which should be kept steadily in mind if the criminal law ever comes to be set in motion against the plaintiffs. For the future, the point needs to be made loudly and clearly, that if counterespionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law.

Murphy J

562 The executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth. The Governor-General, the federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land. If necessary, constitutional and other writs are available to restrain apprehended violations and to remedy past violations. I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of the executive government that it is not beyond the executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws. It is, in other countries, the justification for death squads.

Chief Justice James Allsop, 'Values in Public Law' (2017) 91 *Australian Law Journal* 118

This is the published version of Chief Justice Allsop's 2015 James Spigelman Oration, delivered in Sydney on 27 October 2015.

118 [T]he values about which I wish to speak inhere in the fabric of our law and have done for centuries. This is not best understood by the process of tracing the course of the words of charters and bills of rights, or the course of precedent or by comparing the terms of statutes of different eras, alone. It is to be understood, first, by recognising that public law is concerned with power – state power: its organisation, distribution, exercise and control; and secondly, by identifying the public values that inhere in those complex relationships of organisation, distribution, exercise and control. It is this identification of the values that assists in understanding the features of our legal system that are timeless.

Power, and its control, is not only the domain of public law; private law sees the control of power, and the protection of the vulnerable, as central themes. This is reason for questioning any strictness, or clarity of division, in the public/private taxonomy. Power