

STANDARDS OF REVIEW OF ADMINISTRATIVE DECISION-MAKING AND THE ROLE OF DEFERENCE IN AUSTRALIAN PUBLIC LAW

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INTRODUCTION

1. The concept of democracy has two key elements: the notion of the supremacy of Parliament, and that of the rule of law. The notion of the supremacy of Parliament involves an apprehension that the laws providing the framework for social, economic and other forms of interaction should be made by the people, through their representatives in Parliament. The notion of the rule of law, on the other hand, embodies the principle that the people shall be governed by laws rather than men; and provides a corrective to the potential risks posed by “majority rule” to the interests of individuals and minorities, while, in addition, acting as a safeguard with respect to the other essential components of a modern democracy, such as the right of access to the courts, freedom of expression, freedom from slavery and torture, and racial and sexual equality.
2. The question of the standard of review which it is appropriate for the Courts to apply to decision-making by public bodies, and, relatedly, of the degree of so-called “deference” (if any) which the Courts should exhibit with respect to such decisions, both raise the issue of how the relationship between the principles of Parliamentary supremacy and the rule of law should be defined, and issues, therefore, directly concerning the nature of the Constitution.
3. In this talk I aim to explore the Australian position in this regard, which is markedly different from that in England in a number of respects. I begin by briefly describing the Australian Constitutional context from, as it were, a

black-letter law point of view. I then examine certain key aspects of Australian public law, including the position as regards human rights, which stand in contrast with the law in England.

THE CONSTITUTIONAL CONTEXT

4. Australia has a written Constitution, set out in the Australia Constitution Act 1900 (an Act of the UK Parliament), which can be amended only by referendum. The Constitution confers express enumerated powers upon the Federal authorities, while undefined residual powers are held by the States. In some areas the Constitution gives the Federal Government exclusive power to legislate, but, generally speaking, the State and Federal Governments have concurrent powers, subject to section 109 of the Constitution, which provides that, in case of conflict, the Commonwealth legislation shall prevail.
5. In the early twentieth century, the High Court of Australia took the view that, given the federalist tenet that each level of government is sovereign, it followed that no government at either State or Federal level could be told by any other Parliament what to do. According to this “implied immunity of instrumentalities” doctrine, both States and the Commonwealth were normally immune from one another’s laws.¹ The Court also developed a doctrine of “reserved State powers”, whereby Commonwealth grants of power were to be interpreted in a restrictive fashion, so as to ensure that the Commonwealth did not encroach unduly upon the residual powers of the States.²
6. The Court overthrew both of the above doctrines, however, in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case).³ In the Court’s view, the combined effect of the principle of the “common sovereignty of all parts of the British Empire” and

¹ D’Emden v Pedder (1904) 1 CLR 91.

² R v Barger (1908) 6 CLR 41.

³ (1920) 28 CLR 129.

that of responsible Government was that “the expression ‘State’ and the expression ‘Commonwealth’ comprehend both the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism”. On this basis, the Court held that, contrary to previous authority, Commonwealth powers should be given a broad construction, such that State legislation must give way to Commonwealth in any case of conflict and such that the Commonwealth could specifically legislate for the nation as a whole. Australia was, arguably, constituted as a nation, in the eyes of the law, as a result, with power centralised in the Commonwealth.

7. The executive power of the Commonwealth Government is conferred upon it by section 61 of the Constitution, and legislative power by section 51. The High Court of Australia – the nation’s supreme court – was created by the Judiciary Act 1903, but obtains jurisdiction from the Constitution. Thus, section 75 of the Constitution confers an original jurisdiction upon the High Court in, inter alia, all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party and in any matter in which a writ of mandamus or prohibition, or an injunction, is sought against an officer of the Commonwealth. Section 76 of the Constitution goes on to provide that Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation, or arising under any laws made by Parliament. Section 73, finally, confers a broad appellate jurisdiction upon the High Court.⁴
8. The principal importance of judicial review under section 75(v) of the Commonwealth is that Parliament cannot exclude the power of the High Court under that provision by making the actions or decisions of Commonwealth officers “final”, or immune from review.

⁴ Since 1983 the Federal Court of Australia, which was created in 1976 and vested with jurisdiction over a limited range of civil law matters, has had concurrent jurisdiction with the High Court under section 75(v) of the Constitution to adjudicate with respect to the abovementioned “constitutional writs”. The grounds upon which executive action may be reviewed in the Federal Court are, however, restricted in various ways, such that litigants tend to prefer to pursue their claims in the High Court.

JUDICIAL REVIEW AT THE CONSTITUTIONAL LEVEL

9. The High Court and Federal Court of Australia have the power to strike down a statute on the ground that it is unconstitutional. This form of judicial review involves an exercise of statutory interpretation, according to which the Court will first interpret the express provisions of the law under review in order to ascertain their meaning and effect, and then check to determine whether the law can be matched with an appropriate power in the Constitution. If it cannot, then the law will be held invalid.
10. The manner in which the Courts have performed this task has been driven by two considerations: first, that of giving the Constitution a broad, purposive interpretation, so as to enable it to function as an effective instrument of Government;⁵ and second, the consideration that the High Court, in particular, is the ultimate custodian of the Constitution.⁶ Thus, while the Courts are prepared to “defer” to Parliament insofar as they seek to give effect to the latter’s aim and intention in enacting a particular statute, at the same time, their place in the Australian Constitution is one which accords them the role of reaching a final determination as to whether or not the Acts of Parliament are lawful.

HUMAN RIGHTS

11. One area of particular interest to have arisen in connection with the High Court’s interpretative functions with respect to the Constitution concerns that of human rights. Australia lacks a Bill of Rights,⁷ and the question of

⁵ Junbunna Coal Mine, No Liability v Victorian Coal Miners’ Association (1908) 6 CLR 309; Bank of New South Wales v Commonwealth (1948) 76 CLR 1.

⁶ Australian Communist Party v The Commonwealth (1951) 83 CLR 1.

⁷ The Australian Capital Territory has its own Bill of Rights: Human Rights Act 2004 (ACT). This follows the English model whereby legislation may not be struck down for incompatibility with a right, but must be interpreted in a way that is consistent with the rights protected so far as it is possible to do so. The Government of Victoria has also announced that it intends to enact a “Charter of Human Rights and Responsibilities”.

whether it should enact one is currently a source of considerable controversy.

12. A large number of Australian judges and commentators are of the view that to do so would be undemocratic, in that taking this step would give “a small coterie of politically unaccountable judges the power to override the policy preferences of the people’s representatives”.⁸ In this regard, critics of a Bill of Rights draw a distinction between judicial enforcement of the “Federal balance”, on the one hand, and rights-based judicial review, on the other, on the basis that the former does not involve the imposition by a minority of judges of restrictions upon what the majority may do, but merely empowers the Courts to rule upon the question of whether the majority, through their representatives in Parliament, has power over a particular subject-matter.
13. In the meantime, however, the role of the High Court in exercising its powers of Constitutional judicial review has come under scrutiny, even absent a bill of rights.
14. The Constitution itself contains a limited number of express rights, including, the right of acquisition of property on just terms,⁹ the right to trial by jury on indictment,¹⁰ freedom of religion¹¹ and the right to be free from discrimination on the basis of interstate residence.¹² Traditionally, the Court has given these a narrow interpretation, in contrast to the broad approach which it takes towards affirmative grants of power under the Constitution. More recently, however, the Court changed its approach, not only by interpreting the express rights contained in the Constitution as relatively broad in scope,¹³ but also by showing itself willing to recognise

⁸ “Rights, ‘Dialogue’ and Democratic Objections to Judicial Review” [2004] FLR 1 (Leighton McDonald).

⁹ Section 51(xxxi).

¹⁰ Section 80.

¹¹ Section 116.

¹² Section 117.

¹³ Street v Queensland Bar Association (1989) 168 CLR 461.

implied rights in the Constitution, by reference to which incompatible legislation could be struck down.

15. Thus, for example, in Nationwide News Pty Ltd v Wills,¹⁴ the High Court recognised as a right implied into the Constitution one of free political communication, and held invalid a provision of the Industrial Relations Act 1988 which provided that “A person shall not ... by writing or speech use words calculated to bring a member of the [Industrial Relations] Commission into disrepute”. According to the Court, in protecting the Commission against any criticism without the defences of justification or fair comment, the impugned provision went beyond anything which might be thought to be proportionate or appropriate and adapted to the legitimate purpose to which the provision in question was intended to give effect.¹⁵

16. In this case, therefore, the High Court adopted an approach to judicial review – of legislation – which reflected that taken by the English Courts when the rights guaranteed by the European Convention on Human Rights are at stake, namely, by assessing the objective of the measure complained of (as legitimate or not) and the proportionality of the interference with the right concerned to which it gave effect. Similarly, in the last decade, several Australian judges evinced a strongly progressive approach to the Constitution itself, treating it as a “living force”, and again reflecting the perception in Europe of the ECHR as a “living instrument”.¹⁶

17. Events in Australia show, however, the fragility of the protection which the Courts alone can lend to human rights, absent a domestic document defining them clearly, and guaranteeing the populace their benefit. In Australia, to begin with, only a very limited number of fundamental rights are recognised as such, and the scope for implying such rights into the

¹⁴ (1992) 177 CLR 1.

¹⁵ See also Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, in which the High Court struck down the entire regime regulating the broadcasting of political advertisements on radio and television during election campaigns on the basis that it was incompatible with the newly discovered implied right to freedom of political communication.

¹⁶ Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104, per Deane J; and see also McGinty v Western Australia (1996) 186 CLR 140 per Toohey J).

Constitution is also limited. Secondly, the High Court came under considerable criticism in the wake of its decisions in Wills and similar cases, and the trend whereby the High Court showed a readiness to imply rights into the Constitution appears to have stalled.¹⁷

18. Moreover, the jurisprudential debate in Australia continues to be dominated by a conception of democracy which gives precedence to Parliamentary sovereignty and majoritarian rule, and according to which, concomitantly, the suggestion that the Courts might have a role to play in upholding fundamental values, in the face of Government policy, is regarded as fundamentally undemocratic. The Report of the NSW Parliamentary Standing Committee concerning a possible NSW Bill of Rights, for example, recorded the Committee's view as follows:¹⁸

“... Despite these arguments in favour of a Bill of Rights [ie those presented to the Committee], the Committee does not support the solution proposed. A statutory Bill could lead to some improvement in human rights protections in some instances. However the cost of this uncertain marginal improvement is a fundamental change in the relationship between representative democracy, through an elected Parliament, and the judicial system. The independence of the judiciary and the supremacy of Parliament are the foundations of the current system; both begin to alter under a Bill of Rights. A Bill of Rights would increase the responsibility of the Judiciary to protect human rights, giving it a role that should primarily be the responsibility of Parliament.

... [T]he Committee believes it is ultimately against the public interest for Parliament to hand over such decisions to an unelected Judiciary who are not directly accountable to the community for the consequences of their decisions. The Committee believes an increased politicisation of the Judiciary is an inevitable consequence of the introduction of a Bill of Rights”.

19. For all of the above reasons, the Committee concluded that introducing a Bill of Rights into law would raise “more problems than it resolves”, and that “It is preferable that Parliament become a more effective guardian of human rights rather than handing this role over to an unelected judiciary”.

¹⁷ “Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights” [2002] MULR 17 (Julie Debeljak).

¹⁸ Cited in Australian Constitutional Law and Theory, Blackshield and Williams (4th ed, 2006), Federation Press, p 1410.

STANDARDS OF JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

20. The Australian Courts' approach to devising the standards of review that should be applied to administrative decisions generally, outside the Constitutional context, reflects a similar conception of their role as limited to that of assessing of the legality of such decisions under existing legislation as they have hitherto evinced in connection with the issue of whether they may legitimately adjudicate upon the substantive ground of review consisting in a claimed interference with human rights.
21. As I noted above, jurisdiction to determine public law complaints is conferred on the High Court of Australia by the Constitution. The Federal Court of Australia (and also the Federal Magistrates' Court) derives its jurisdiction to review the administrative decisions of Commonwealth officers from an Act of Parliament, namely the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR").
22. Sections 5 and 6 of the ADJR make detailed provision with respect to the grounds upon which the decisions of relevant kinds of officers, and conduct engaged in for the purpose of making a decision, may be challenged, in effect spelling out the grounds for judicial review recognised, in England, by the common law, albeit with some notable exceptions. Thus, for example, under section 5(1), a decision may be challenged on the grounds that a breach of natural justice occurred in its making; that procedures required to be observed by law in the making of the decision were not observed; that the decision was made by a person who lacked jurisdiction to make it; that the decision was made by way of an improper exercise of power; involved an error of law; was induced or affected by fraud; or that there was no evidence or other material to justify making the decision; or that the decision was "otherwise contrary to law".
23. Section 5(2) then makes further provision with respect to the ground for review consisting in the "improper exercise of a power", stating that this

shall be construed as including, inter alia, a reference to taking an irrelevant consideration into account; failing to take a relevant consideration into account; an exercise of a power which is so unreasonable that no reasonable person could have so exercised the power; and any other exercise of the power in a way that constitutes an abuse of power.

24. I do not propose to discuss the Australian position as regards these “standard” grounds for judicial review, since the principles laid down by the Courts are not dissimilar to those applied in England.

25. The Australian Courts are, however, markedly more conservative than the English Courts when it comes to extending the boundaries of judicial review. The High Court has expressly rejected the proposition, for example, that there exists a general common law duty to give reasons for decisions,¹⁹ and the Courts in Australia do not show any enthusiasm for enlarging the scope of this duty to cases in which a duty to give reasons is not expressly imposed by statute.

26. The Australian Courts are equally unenthusiastic about the doctrine of substantive legitimate expectation. In Minister for Immigration and Ethnic Affairs v Teoh,²⁰ the High Court held that the ratification by the Government of an international Convention amounted to a positive statement on the part of the Executive that the Government would act in accordance with that Convention, which is capable of founding a legitimate expectation, such that a decision-maker who proposes to act inconsistently with that expectation must first give notice to persons affected and hear representations from them.

27. In Re Minister for Immigration and Multicultural Affairs, ex parte Lam,²¹ however, McHugh and Gummow JJ subjected the doctrine of legitimate

¹⁹ Public Service Board v Osmond (1986) 159 CLR 656.

²⁰ (1995) 183 CLR 273.

²¹ (2003) 214 CLR 1.

expectation to sustained criticism, Gummow J having protested, during the course of argument, that “I cannot go on writing judgments about things I do not understand”.²² These judges considered that the “attempted assimilation of doctrines derived from European civilian systems” that had been attempted by the Administrative Court in R v North and East Devon Health Authority, ex parte Coughlan²³ was inappropriate in Australia because “a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs both from the English and other European systems referred to above”.

28. In the view of the Australian Courts, the doctrine of substantive legitimate expectation is positively misguided, while that of procedural legitimate expectation is superfluous, given the requirements of procedural fairness (under the heading of natural justice and so on) which the Courts are prepared to enforce.²⁴

29. Consistently with this position, the Courts have also been unsupportive of the view that substantive fairness might constitute a ground of review in its own right. From the Australian perspective, such a principle, along with the doctrine of legitimate expectation and indeed the recognition by the law of fundamental or human rights, necessarily involves the Courts in an illegitimate process of merits-review and, therefore, offends against the key Constitutional precept of the separation of powers.

30. So far as proportionality is concerned, Australian law has acknowledged for some time a role for this concept in determining whether legislation is in breach of the Constitution²⁵ and whether subordinate legislation is in breach of the parent Act.²⁶ While, however, the question of whether proportionality should be recognised generally as an independent ground for judicial review has been the subject of debate, the present position is

²² Australian Constitutional Law and Theory, Blackshield and Williams (4th ed, 2006), Federation Press, p 890.

²³ [2001] QB 213.

²⁴ See ex parte Lam, and Attorney-General (NSW) v Quinn (1990) 170 CLR 1.

²⁵ See Davis v Commonwealth (1988) 166 CLR 79.

²⁶ See eg Qiu v Minister for Immigration and Ethnic Affairs (1994) 55 FCR 489.

that the latter concept lacks any such status, and is instead one lying only “at the boundaries of accepted administrative law”.²⁷

CONCLUSION

31. In the Australian context, the emphasis, in public law, is on statutory authority, procedural fairness and rationality as forming the criteria by reference to which the lawfulness or unlawfulness of decisions made by public bodies should be assessed. As I have indicated, the Courts have demonstrated themselves to be unwilling to countenance what might be described as “thick” standards of judicial review, such as those comprised by the concepts of proportionality, substantive fairness, and substantive legitimate expectation.

32. So far as the notion of “deference” is concerned, the Australian Courts are conscious, as are the English, of the requirement that they should not stray into an adjudication of the merits of administrative decisions and should instead confine themselves to a review of their legality. The role of the High Court there, however, differs significantly from that of the English Courts, including the House of Lords, in that, as I have stated, the High Court has the power to strike down legislation. It by no means follows from the fact that they have such a power, however, that they conceive themselves as having a proactive role to play in the judicial review context in general.

33. On the contrary, public law in Australia is dominated by a pre-eminent emphasis upon the supremacy of Parliament, and comparatively little weight is placed upon the rule of law as a corrective, or potential corrective, to the exercise of power by the voting majority. The position in Australia stands in marked contrast, therefore, to that which is in the process of developing in England, according to which it is recognised by

²⁷ Bruce v Cole (1998) 45 NSWLR 163 per Spigelman CJ at 185.

the Courts that they themselves have a role to play “in defining the limits of Parliament’s legislative sovereignty” in the name of the rule of law.²⁸

34. The question that arises, therefore, is whether the view accepted in Australia that the Courts must not be granted power to adjudicate on matters which reflect disputes about values (such as those concerning human rights), and should not be permitted to curtail, in the light of those values, the will of the majority, for democratic reasons, is a sound one.

35. The weakness of this position, in my view, is reflected in the conception that it is not for the Courts to play this role, but one for which, rather, Parliament itself is responsible. Such a position rests on the proposition that the task of curbing the will of the majority, in the form of the elected Government, is vested in the Government itself. This proposition fails to pay heed, however, to the system of checks and balances which gives legitimacy both to legislative and judicial authority and which ultimately protects those rights and freedoms which Lord Hoffmann, sitting in the Privy Council, aptly described as the “building block of democracy which necessarily permeate any democratic constitution”.²⁹

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²⁸ Jackson v Attorney-General [2005] UKHL 56; [2006] 1 AC 262, per Lord Hope .

²⁹ Matadeen v Pointu and the Minister of Education and Science [1998] 3 WLR 18 (PC) at para 9; my emphasis.