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JUDICIAL REVIEW

FOREWORD

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Functionally, there are many ways by which a society can make sure that officials keep within the rules, act fairly and avoid conduct that is oppressive, irrational or disproportionate.

In the days when England was ruled by an absolute monarch, petitions could be brought to the sovereign and he (or occasionally she) would dispense justice personally, like the pharaohs of Egypt or the emperors of Rome had done before. Eventually government became too large and complex for the personal rule of the sovereign. It was then that a trusted group of relatives, friends and clerks of the monarch were assembled who administered the presumed royal will in the form of a *curia regis.* It was King Henry II who first established the royal courts in England and designated a number of officials as judges. They would travel on circuit to bring justice to the land in a generally consistent way and with asserted professionalism, demonstrated by the recording of their judgments. Whilst still acting in the name of the monarch, these officials came to enjoy a high degree of independence. Their orders were enforced and obeyed.

By the 17th and 18th Centuries in England, the independence and learning of these judges came to be admired and seen as part of the settled constitutional arrangements of the kingdom. When these arrangements were not faithfully applied in the American settlements, this caused such outrage that a revolution broke out, resulting in independence and a written constitution for the United States of America. This established strong federal courts to do more perfectly what, it was believed, was part of the birthright of English subjects.

Shaken by this experience, the British Empire from the 19th Century created independent courts, usually bound together by decisions of the Judicial Committee of the Privy Council. A strong and growing principle of the rule of law became a distinctive feature of that Empire. This was the way that the law arrived in Australia, along with the early convicts and settlers. They brought with them legal rules, in the form of statutes and common law principles that were upheld by judges, most of whom were principled, rational and uncorrupted. In this way, judicial supervision of governmental power arrived. It is now a core feature of Australian constitutionalism.

Of course, there were other means of imposing discipline upon officials. In the 19th Century, the British administrators introduced competitive examinations for appointment to at least senior positions, both in the United Kingdom and in its colonies. A service of high status, also uncorrupted, was established. It was educated in the basic principles of law and fairness that, for default, the courts would enforce. Senior officials generally set a good example of just and sensible administration. They introduced discipline for those officials who lapsed. Most public complaints against officials were dealt with by internal means; and still are. In the 20th Century, a Swedish idea, of appointing an ombudsman, supplemented these purely internal reviews. So did the creation, after the 1930s, of many informal non-court tribunals, designed to enforce the law, often under detailed delegated legislation.

Internal rules, discipline, good example, public examinations and improved professional education helped to ensure that the action of the growing number of administrators were substantively and procedurally lawful. As well, the expansion of the franchise and greater assertiveness on the part of citizens and civil society, sometimes procured in parliament an enhanced insistence on lawful and fair administration. Eventually, in Australia, following a series of innovative reports, new remedies were provided, after the 1970s. In federal jurisdiction these new laws included the *Administrative Appeals Tribunal Act* 1975 (Cth); the *Federal Court of Australia Act* 1976 (Cth); the *Ombudsman Act 1976 (Cth);* the *Administrative Decisions* (*Judicial Review Act 1977 (Cth)*; the *Freedom of Information Act 1982 (Cth)*; and the *Privacy Act 1988 (Cth)*. Important for these reforms was the provision in the *Administrative Decisions (Judicial Review) Act 1977* of a statutory right to

reason for defined "decisions of an administrative character". This entitlement significantly enhanced the effectiveness of judicial review when addressed to federal administrative decisions.

Whilst professional, administrative, educative and electoral innovations were important in assuring good administration to the people, the ultimate recourse to an independent judge, to decide issues such as the lawfulness, fairness and proportionality of administrative decisions has proved of the greatest importance in securing accountability, and thereby preventing the burgeoning bureaucracy from being a law unto itself.

Of course, problems remained. The availability of reasons in jurisdictions where that right was not enacted[1] was one; disputes also arose concerning whether a decision was reviewable as made "under an enactment"[2]; the availability of relief against public powers that were outsourced[3] presented problems; and sometimes a complainant could not afford the costs and risks of bringing proceedings for judicial review. Sometimes also opinionated officials would simply re-exercise their powers, reaching the same conclusions without repeating their earlier procedural mistakes. Yet, where constitutional and judicial review applied, an independent judicial office holder could intervene, with a perspective derived from outside the administrative culture and values. Functionally, this has been a most useful interaction between separate sources of power in the land, whose decisions potentially affect the lives of millions of citizens.

The facility of judicial review in Australia has been crucial to the attainment of the rule of law in the country: a value for the modern age stated in the preamble to the *Universal Declaration of Human Rights* of 1948. In *Australian Communist Party v the Commonwealth*[4] Justice Dixon explained that the *Australian Constitution*:

> "… is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other

[1] *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.
[2] *Griffith University v Tang* (2005) 221 CLR 99;
[3] *NEAT Domestic Trading Pty Ltd v AWB Limited* (2003) 216 CLR 277 .
[4] (1951) 83 CLR 1 at 193.

> functions of government, others of which are simply assumed. Among these I think that it many fairly be said that the rule of law forms an assumption."

Expanding and elaborating this explanation of the vital importance of judicial review, five Justices of the High Court of Australia in *Plaintiff S157/2002 v The Commonwealth*[5] said:

> "In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. In the end, pursuant to s75 of the *Constitution*, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review."

These strong words have more recently been held to apply to legislative attempts to confine the availability of judicial review in the State Supreme Courts of Australia[6]. This line of authority does not reflect merely a technicality of the law concerning the availability and ambit of remedies in particular cases. To the contrary, it expresses a core constitutional provision of the law applicable in Australia. It also enshrines a concept of the kind of society, living under the law, that Australia is, and should be.

Relevantly, the law in question is not merely the written rules of substantive law. It extends to the fairness of the procedures by which decisions are made and the rationality/proportionality of the decisions once made, viewed in context.

It is because judicial review enjoys such a central role under the *Constitution* and laws of Australia that this volume is so important and welcome. In it, hundreds of cases and countless rules are cited, classified, examined and explained. But the reader must never forget that the individual cases and other authorities come together in a mosaic that stamps a special character on the law of Australia. It is a character that must be maintained through each successive generation, by lawyers and citizens alike. Where necessary, it must be expanded to apply to new developments and to meet fresh civic expectations. This is why this volume should

[5] (2001) 211 CLR 476 at 513 [104].
[6] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100].

have pride of place in the library of any Australian lawyer. Rendering great power subject to the law is a daily preoccupation of the law. Not for itself. But for the good government of the citizens.

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