Foreword

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The title to this book reveals the highly ambitious project of its authors and editors to explain how courts interpret the scope of executive power. To do so requires an explanation of executive power, its operation, and the manner in which courts constrain that power. The very starting point illustrates the minefield of theory that the authors encounter. Executive power is not the same as power of the executive. One reason for this is that the executive also exercises legislative power. Sir Owen Dixon once suggested that Australian courts, so steeped in the practice and theory of Westminster, had misunderstood our constitutional separation of powers by permitting the executive to make laws by regulation.[1] But the price of theoretical disorder might be said to have been worth the practical benefits.

The validity of executive power depends upon its source. One source is express powers in the Constitution. A second source is implied constitutional powers such as nationhood. A third is common law powers including prerogative power. In contrast with the correct approach taken in the chapter in this book by Stephenson, on this point Dicey nodded. He treated executive power as prerogative even where it is the same power as that possessed by ordinary citizens.[2] As Sir William Wade once said, 'one essential of "prerogative", if I may be forgiven for saying so, is that it should be prerogative'.[3] Stephenson questions the 'presumption' in Australia against statutory displacement of important prerogative powers. In so far as that 'presumption' might be thought to immunise the exercise of prerogative power from judicial scrutiny there is powerful, and contrary, old[4] and recent[5] authority from England and Scotland. A fourth, and the focus of many of the chapters in this book, is legislation. Not only is legislation the most commonly litigated source of executive power, its exclusive dominion has expanded. An example of this, the solutions to which are explored in Seddon's chapter, is a decision which caused significant disruption by insistence upon legislative authorisation of some executive spending on Commonwealth contracts and funding programs.[6]

Where executive power arises from legislation, Australian law recognises that the scope of that power and the judicial review to enforce those boundaries must also arise

1 O Dixon, "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590, 605-606; O Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book Co, 1965) p 52. See now S Crennan and W Gummow (eds), *Jesting Pilate* (3rd ed, Federation Press, 2019) p 181.

2 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) pp 423–425.

3 HWR Wade, *Constitutional Fundamentals* (Stevens & Sons, revised ed, 1989) p 59.

4 *Case of Proclamations* (1611) 12 Co Rep 74, 76; 77 ER 1352, 1354.

5 *R (on the application of Miller) v Prime Minister* [2019] UKSC 41.

6 *Williams v Commonwealth* (2012) 248 CLR 156.

from the statute, by expression or by implication. Like all language, it is impossible to express every assumption and application. Much must be implied. Some implications are based upon the natural justice of the common law which will supply 'the omission of the legislature'.[7] The potential content of the natural justice that a statute requires is almost infinitely variable. But it will be shaped by the structural and superstructural principles and conceptions of the legal system in which the principles were enacted. The principles include those which Basten, in a penetrating chapter, describes as public law values: fairness, lack of arbitrariness, and reasonableness. Indeed, as Sapienza perspicaciously observes, there is no reason why the same principles and conceptions that inform these implications cannot also inform the boundaries of non-statutory executive power. There is every reason why they should.

Basten rightly observes that the reliance upon public law values in the process of implication is in tension with occasional suggestions by past members of the High Court of Australia that statutory interpretation is only textual. Such extreme literalism is an erroneous approach to understanding any speech act. Indeed, one reason why I could not accept the approach of the majority in *BVD17 v Minister for Immigration and Border Protection*[8] was the enormity of understanding Parliament to have assumed, without any apparently clear reason, that its legislation should be interpreted as though it were not part of a system which included these fundamental structural and superstructural principles. Nevertheless, in a chapter which was written before that decision, Pillai and Smith presciently describe the complexity that has emerged by the use of drafting devices in amendments to the *Migration Act 1958* (Cth) to circumvent the interpretive role of the courts. This history might provide further justification for the interpretation adopted by the majority in *BVD17*.

A current issue, upon which the High Court of Australia is presently divided, concerns the suggestion that a common implication in legislation will be that Parliament does not intend that an exercise of executive power without authority will be invalidated if the lack of power did not concern a fundamental matter and if it could not possibly have made a difference. In other words, and in the language of the criminal law, Parliament will generally be understood not to have intended that an executive act lead to invalidity where there has been no 'substantial miscarriage of justice'. As Crawford notes, in a chapter of stunning depth, this means that the public cannot always form a view of 'where they stand' simply by reading the statutory words. Crawford says that these limits of executive power might thus be described as ambulatory. The same ambulatory operation can readily be seen in the express terms of open-textured conferrals of power subject to conditions such as 'appropriate', 'reasonable', 'proper', 'fair' or 'just'.

A very common heuristic tool of courts in the process of interpretation is expressions like 'the rule of law' or 'the principle of legality'. These phrases hint that opposing conclusions are based upon anarchy or illegality. But unless they are unpacked, they serve only to conceal reasoning and invite questions. To the extent that they are truly concerned with legality there is a question whether legality involves only the ultimate decision or if it is also concerned with the legality of the process by which the

7 *Kioa v West* (1985) 159 CLR 550, 609 citing *Cooper v Wandsworth Board of Works* (1863) 14 CB(NS) 180, 194; 143 ER 414, 420 (Byles J).

8 [2019] HCA 34.

decision is reached. For instance, an error of law on the face of the record might involve only an unlawfulness in the process of making the decision rather than unlawfulness of the decision itself which remains within authority. The same is true if there is a ground of judicial review concerning illogical or unreasonable findings of fact in the process of making a decision that might not itself be unreasonable.

More commonly, however, the principle of legality is used to describe a common interpretative technique. A constraint upon the scope of executive power concerns interpreting statutory words in the same way that we would interpret words spoken by any responsible person, namely to treat a meaning as increasingly less likely to have been intended to erode claim rights, liberties, or privileges the more that (i) the meaning would impair those rights and (ii) the more fundamental that they are. Interpretation with regard to these dimensions is said to involve the application of the principle of legality. Alternatively, it might be described as coherent interpretation since, as Lim observes in his powerful chapter, both of these dimensions are important aspects of interpretation. Interpretation thus coheres with the ordinary operation of speech acts and the structural foundations of the legal system that inform expectations of intended meaning. Lim argues that the principle of legality, properly described, is only really one which is concerned with 'legality' if it is operating as a constraint upon illegality and executive power. Chen also focuses upon coherent interpretation by reference to s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Chen's principal concern is to show that the 'rights-based interpretation' mandated by that section should apply also to the interpretation and validity of delegated legislation as is the case with the two dimensions of coherent interpretation or the principle of legality.

Another constraint upon the boundaries of executive power, particularly important for widely expressed, open-textured powers, is the purposes for which the power was given. Purposes must both inform and constrain meaning. Even the most open-textured provision cannot not be applied at a level of abstraction independent of its purpose. Nevertheless, as Dalla-Pozza and Weeks observe, a broad grant of discretion to the executive can often be much more effective in expanding the power of the executive than an attempt to exclude the courts by a privative clause. Legislation, in what Groves suggests might be the 'new unchartered discretion of our age', can impliedly permit a decision-maker to decline to consider a matter, thus removing the possibility of review. Groves observes that the High Court has even upheld such legislation that also effectively grants the Minister a power 'to overturn unfavourable rulings by courts and tribunals'.[9] Legislation can also impose standards which are essentially political rather than legal. But it has been said that Parliament cannot substantially curtail the ability of a court exercising jurisdiction under s 75(v) of the Constitution to discern and declare whether the legal limits of an executive power have been exceeded.

It is particularly in relation to these open-textured powers that questions can arise concerning whether courts should defer to the approach taken by the executive in the application of these powers. The chapters by Crawford, McMillan and Boughey present a powerful case for a limited form of 'judicial deference'. As they note, the language of deference is used to mean different things. Sometimes it is used, in a strong sense, to support a judicial approach that gives weight to the view of the executive about the

9 Referring to *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

essential meaning of statutory language. In my view, there is no place for that type of deference in Australian law. The authoritative determination of the essential meaning of statutory language, by interpretation, is the role of the judiciary alone. But when provisions are open-textured, the essential meaning falls to be applied in many different ways, including ways that were never contemplated at the time of legislative enactment. Some commentators describe this process of application as 'construction' to distinguish the exercise from interpretation of essential meaning. McMillan effectively makes the point that courts, which rarely have the same degree of experience in application, could learn from the approach of experts in the application of statutory essential meaning. Boughey points out that the context in which legislation is enacted might suggest that Parliament intended that courts take into account the views of expert administrators in the application of the provisions. Indeed, a common implication in legislation, which might be described as judicial restraint, is that the executive can validly make decisions that might be thought by the court to be unreasonable but not greatly so. Boughey bolsters her argument with normative considerations of the democratic accountability of the executive and the fairness of consistent and predictable executive application. It seems that the theory of 'deference' that is developed in these chapters is implicitly a theory of deference to human decision-making. In contrast, Huggins observes that '[a]t least 11 federal government agencies explicitly authorise certain decisions to be made by computers' and points to 'a risk that incorrectly coded automated processes will result in systemic departures from such expectations of administrators' statutory interpretation'.

It should be clear from this brief conspectus of the issues in this book that the authors have met the highly ambitious goal that the work sets for itself to understand and explain how courts interpret the scope of executive power. Without doubt, the range and depth of thought contained in the uniformly outstanding chapters in this work will serve greatly to advance the coherent development of what is commonly described as Australian administrative law. The authors and editors have done a great service to the law.

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