



# Government Accountability

Sources and Materials

**Australian Administrative Law**

Second edition

Judith Bannister

Anna Olijnyk

Stephen McDonald

CAMBRIDGE



# GOVERNMENT ACCOUNTABILITY SOURCES AND MATERIALS

AUSTRALIAN ADMINISTRATIVE LAW

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SECOND EDITION

*Government Accountability Sources and Materials: Australian Administrative Law* is designed to accompany the third edition of the textbook *Government Accountability: Australian Administrative Law*.

Following the accessible structure of *Government Accountability*, this book guides students through the real-world operation of administrative law and demonstrates how multiple doctrines and mechanisms can interact in a single situation. Extracts from primary materials – including cases and legislation – provide a clear account of the facts, issues and statutory provisions considered by the courts, and are accompanied by relevant commentary.

This edition has been thoroughly updated to include recent significant cases such as *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021), *Hocking v Director-General of the National Archives of Australia* (2020) and *MZAPC v Minister for Immigration and Border Protection* (2021).

Written by a team of experts in the field, *Government Accountability Sources and Materials: Australian Administrative Law* is a fundamental and student-friendly introduction to administrative law in practice.

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Judith Bannister  
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# PREFACE

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.

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# INTRODUCTION

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## 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*, third edition ('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.

## Why accountability?

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

The work of the famous English legal scholar, AV 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.

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.

... **\*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 law of the realm and amenable to the jurisdiction of the ordinary tribunals.

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.

...

**\*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 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 ...

## 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. ...

[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.

**\*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.

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:

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 *Royal Commission on Australia's Security and Intelligence Agencies: Report on the Sheraton Hotel Incident* (Report, 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.

## Accountability for what? Administrative law values

**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 officeholders (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; ie 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]

## 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 is power, it might be said. Yet there is something super-added, something meaningful, sometimes something menacing in the presence of state authority. By way of example only, this can be seen in the distinction between torture and private brutality. In the former, a special repugnance to the brutality (worthy of raising the status of the law prohibiting it towards a *ius cogens*) is brought by its infliction in the name of a polity, a political system, a people. The distinction between public and private law is real, if not linear in its boundaries, if not logical in its form and content, if not always consistent in its application. For these reasons, the distinction is worth making.

...

**\*120\*** A little more should be said at this point about power and law. It is a mistake to view law and legitimate power as based on command alone. Law is comprised not only of command from a legitimate source, but it is also the expression and recognition of natural human and societal bonds of conduct. Ultimately, a legal system, to be just and to work effectively, must be derived from the consent or acceptance of the governed. By consent, I do not mean the individual willingness in each case to accept the particular exercise of power, rather I mean the underlying acceptance of the legitimacy of the organs and mode of the exercise of societal authority. This may involve, but does not require, central command; it rests, ultimately, upon reciprocal acceptance and shared values. An examination of the lucid analysis by Finn J of the laws and customs of the Torres Strait Islander peoples in [*Akiba v Queensland (No 2)* (2010) 204 FCR 1, 58–79 [177]–[264]] reveals law as social bonds steeped in reciprocity, and consent.

But power is real. It and its exercise are often based on compulsion, and may be of such a character as to change the lives and fortunes of those subject to it, for the worse. Governmental power is given to those in different branches of government by the operation of an organised political process, being our system of national and state responsible and representative government, resting on the sovereignty of the Australian people ...

**\*121\*** An organised political system with a foundation of the sovereignty of the governed provides the constitutional framework in which to view power as reciprocal, consensual and as serving the people. It also provides the framework for the values of the governed, of the people, to inform how governmental power is wielded (on their behalf).

Let us, in that context, examine then the values that inform the understanding and exercise of public law. Drawing together the above general remarks, at least five values or groups of values can be posited. They are not meant to be crisp in definition. I would begin with a value or feature that may be seen as prosaic, but it is the product of

other features, and is essential to any system of government or organisation of power: *reasonable certainty*, so power can be understood, known and exercised, and branches of government take responsibility for its exercise, in a workably efficient and fair way. Secondly: *honesty and fidelity to the Constitution*, and to the freedoms and free society that it assumes, reflecting the constant of a principle of legality. Thirdly: *a rejection of unfairness, unreasonableness and arbitrariness*. Fourthly: *equality*. Fifthly: *humanity, and the dignity and autonomy of the individual*, as the recognition of, and respect for, the reciprocal human context of the exercise of power and the necessary humanity of the process; in many contexts this translates as the recognition of mercy. ...

Power is not only to be appreciated or understood by debates about who is to wield it: Parliament, Minister, civil servant, judge or private individual, or about who has the last say in approving (or not) how power has been wielded; it is about people – how people should be treated in the exercise of power in a just and decent society. This is not about being nice. Rather, it is about how those who are the subject of the exercise of power in a free democracy, should be entitled to expect that the lawful exercise of power involves attributes or characteristics that recognise and reinforce human dignity and decency, and that reflect the high trust that society has placed in those with public power to exercise it lawfully and for the common good.

[Citations omitted]

## Administrative law and statutory interpretation

### *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362

In this case, High Court judges explain the contemporary Australian approach to statutory interpretation.

#### **Kiefel CJ, Nettle and Gordon JJ**

**\*368\*** [14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

**Gageler J**

**\*374\*** [37] ... The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.

**\*375\*** [38] The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.

[39] Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, 'the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation' [*Acts Interpretation Act 1091* (Cth) s 15AA] 'is in that respect a particular statutory reflection of a general systemic principle'.

[Citations omitted]

## Modern accountability: some challenges

### Janina Boughey, 'Executive Power in Emergencies: Where is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168

In this article, Boughey considers how traditional accountability mechanisms have fared in the COVID-19 pandemic.

**\*169\* What powers have been exercised by Australian governments in response to COVID-19?**

The Commonwealth, state and territory governments have each exercised a wide range of emergency powers which were granted to them by their respective parliaments. For the most part, the Commonwealth government has exercised powers in relation to migration, customs, the economy (including social security payments), and medical services and pharmaceuticals, while state and territory governments have made orders restricting people's movement and activities, requiring people to isolate and maintain 'social distance', and closing businesses, schools, public spaces and community facilities. This reflects the division of powers between the Commonwealth and states under the *Constitution* although, of course, there are overlaps, as the blame shifting over the handling of the Ruby Princess has demonstrated.

The rules, orders and decisions that governments have made in response to COVID-19 have taken a number of legal forms. The new National Cabinet – a body comprised of the first ministers of the Commonwealth, state and territory governments and advised by a Committee of chief medical officers from those jurisdictions – has made many of the major decisions restricting the movement and activities of Australians and determining when those restrictions should be eased. For example, on 12 June 2020, National Cabinet agreed to replace the 100-person limit on non-essential indoor gatherings with a 4-square-metre rule. Many of these National Cabinet decisions have required legislation or delegated legislation in order to be implemented. The easing of restrictions on indoor gatherings, for instance, required states and territories to issue new orders reflecting the new rules. A large portion of the new emergency laws have been implemented via delegated legislation, including those with significant impacts on the rights and freedoms of Australians. Commonwealth Ministers and health officials have made delegated legislation banning travel, banning cruise ships, taking over hotels to quarantine returning travellers, making it illegal to ‘price gouge’ when selling personal protective equipment and regulating the use of data collected from the COVID tracing app, among many other things. The form that other rules have taken is not clear ... or take the form of ‘soft law’. Responsibility for enforcing many of these rules has been given to police forces, who have been given discretionary powers to issue fines and, in extreme cases, arrest and charge people with breaching public health orders. There are accountability challenges arising from the ways in which each of these types of power have been used during COVID.

### **(Avoiding) parliamentary oversight**

One of the major strengths of the Australian government response to COVID-19 has been the level of cooperation between governments, which has been achieved via the establishment of the National Cabinet. The National Cabinet has been described as a ‘peacetime war cabinet’ and has allowed Australian governments to share information and coordinate an effective national response to the emergency.

However, the National Cabinet is not accountable in the same way that federal, state and territory cabinets are. As an intergovernmental body, it is not responsible to a single parliament, but to nine separate parliaments. This complicates the way responsible government functions in practice. Leaders will be able to answer any questions of their respective parliaments and parliamentary committees by simply explaining that the jurisdiction is committed to a particular course of action through the intergovernmental agreement. This tends to curtail any opportunity for parliamentary input or debate.

The Prime Minister has also declared that National Cabinet meetings have ‘the status of a cabinet meeting’ **\*170\*** with respect to confidentiality protocols and exemptions from Freedom of Information legislation. Without access to information, there is no accountability through any means: political, legal or administrative.

...

A second way in which ordinary parliamentary oversight processes have been limited is via the use of non-disallowable delegated legislation. As noted above, a

significant portion of the new rules needed to respond effectively to the pandemic have been implemented via delegated legislation, which is usually subject to parliamentary oversight. There are different rules about how parliaments oversee delegated legislation, and what powers they have in each Australian jurisdiction and in relation to different types of instruments. The Commonwealth Parliament has the power to disallow most delegated legislation; state and territory parliaments can all disallow regulations and usually some other forms of delegated legislation; and there are parliamentary committees in each jurisdiction which scrutinise and report to their respective parliament on whether delegated legislation is lawful, appropriate and proportionate.

Not all delegated legislation is subject to these parliamentary oversight mechanisms. ...

A large proportion of the COVID-19 powers which have been exercised via delegated legislation are ... exempt from parliamentary disallowance. So while a parliamentary committee might read them, investigate them and report on them to parliament, there is nothing parliament can do if it thinks that the determinations go beyond the scope of what the Minister is authorised to do or that rules are disproportionate or unsuitable.

...

**\*172\* Are the rules binding and enforceable?**

... [A]nother difficulty with many of the state orders is how difficult they are to find, and how frequently they have changed. Ordinary people (ie, people who are not law academics!) are unlikely to spend hours searching government gazettes for the most recent COVID rules in order to figure out what their rights and obligations are. This means that the public is heavily reliant on the governments' explanations as to the meaning and content of its rules.

Indeed, some of the rules that governments have told us we must follow do not seem to be sourced in law at all. In NSW, for example, physical distancing rules in public places appear largely to take the form of government advice or guidelines, rather than enforceable orders. ...

Government guidelines, advice and interpretations of the law which do not have legally binding force are often called 'soft law'. The term conveys the fact that, despite their lack of force, these informal instruments are commonly 'treated like law' and are 'immensely effective as a means of regulating conduct'. This is a great benefit of soft law; people believe it is law so tend to comply with it, without the need for heavy-handed government enforcement.

But, in Australia, there are significant accountability gaps in relation to governments' use of soft law. ...

In practical terms, this means that a person might rely on government advice about what the law is and conduct their business accordingly. But if that government advice turns out to be wrong, the person may still be able to be penalised for having breached the law ... and will not usually have any remedy for losses they have suffered in following what they thought were the rules.

### Police discretion

Police have been given a range of new, extraordinary powers to enforce many of the COVID-19 rules. In many cases, this involves police exercising discretion in deciding whether a person's conduct is 'reasonable' (eg, whether their excuse for leaving the house is reasonable), and if it is not, exercising discretion as to whether or not to issue a penalty (usually a fine). There have been numerous reports of these powers being used in ways that are discriminatory, inconsistent, disproportionate and potentially exceed police powers.

**\*173\*** The big problem with discretions to issue fines, from an accountability perspective, is the lack of cheap, independent, merits review of the decision to issue the fine. While there are internal review processes through which fines can be challenged without going to court, the grounds on which a fine can be challenged tend to be extremely limited. ... Police can withdraw fines, but this is a non-reviewable discretionary power. The only other option for challenging an infringement notice is to go to court. Thus, there is a strong incentive to pay fines, even if they have been issued unlawfully or unfairly.

...

### Judicial review

... Courts are able to review the lawfulness of delegated legislation and administrative decisions made by governments in response to COVID-19. ... However, there are several limitations which mean that the courts alone are not an adequate accountability mechanism.

First, courts are limited to reviewing the lawfulness of government actions. Unlike parliaments and executive oversight agencies, they have no power to assess whether the actions of governments were proportionate or well directed.

Second, court proceedings tend to be expensive and time-consuming. ...

Third, courts only have jurisdiction where a party with standing brings the matter before them. This usually requires a person to have been directly affected by government action (eg, a fine having been issued, or a decision made about their circumstances). Australian courts cannot rule on the general validity of government action or delegated legislation. ...

Fourth, there are limits on what courts can and will review when it comes to government action, and courts have rightly tended to be particularly cautious, or deferential, in their review of government actions taken during emergencies.

Finally, even where they do have jurisdiction, and are willing to decide a matter, courts are limited in the remedies they can issue. ...

**\*174\*** Different forms of government accountability are appropriate in different circumstances. Emergencies probably necessitate a decrease in certain formal accountability mechanisms, particularly those that delay or diminish a government's ability to effectively respond to the emergency. However, there must be alternative ways through which governments explain themselves, and in which they can ultimately be judged for their handling of the emergency. Any limits on formal accountability should be justifiable, and it is not clear whether the exclusion of parliamentary

disallowance or use of soft law is necessary. And limits to government accountability must not become permanent features of the way governments make rules. We should retain the good features of the governments' approach to this emergency – like their willingness to explain their decisions and answer media questions. But we should be careful to ensure that ordinary accountability measures resume as quickly as possible.

[Citations omitted]

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PART

I



**ADMINISTRATIVE  
DECISION-MAKING**



# ORGANISATION AND STRUCTURE OF GOVERNMENT

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## Introduction

This chapter complements Chapter 2 of *Government Accountability: Australian Administrative Law*, third edition. It contains a cross-section of material relating to the entities that make up the executive, including relevant constitutional provisions, values and terminology. The complex contemporary question of outsourcing and privatisation is explored in-depth through two High Court cases and a 1998 Administrative Review Council report that foreshadows issues that continue to present challenges for administrative law principles and mechanisms.

## The Crown and the executive: terminology and constitutional framework

### *Constitution*

#### **Chapter II—The Executive Government**

##### **61 Executive Power**

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

##### **62 Federal Executive Council**

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

##### **63 Provisions referring to Governor-General**

The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

##### **64 Ministers of State**

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

## *Sue v Hill* (1999) 199 CLR 462

### Facts

Heather Hill was elected to the Senate in the 1998 federal election. She was a dual citizen of Australia and the United Kingdom. Section 44 of the *Constitution* prevents a person from being a senator if the person is a 'citizen of a foreign power'. The major issue in this case was whether the United Kingdom is a 'foreign power' within the meaning of s 44. The High Court held that the United Kingdom was a 'foreign power' and, therefore, Ms Hill had not been properly elected to the Senate. In the course of their reasoning, Gleeson CJ, Gummow and Hayne JJ reflected on the various meanings of the term 'the Crown'.

### Gleeson CJ, Gummow and Hayne JJ

#### The meaning of 'the Crown' in constitutional theory

**\*497\*** [83] [I]t is necessary to say a little as to the senses in which the expression 'the Crown' is used in constitutional theory derived from the United Kingdom. In its oldest and most specific meaning, 'the Crown' is part of the regalia which is 'necessary to support the splendour and dignity of the Sovereign for the time being', is not devisable and descends from one sovereign to the next. The writings of constitutional lawyers at the time show that it was well understood in 1900, at the time of the adoption of the Constitution, **\*498\*** that the term 'the Crown' was used in several metaphorical senses.

...

[84] The first use of the expression 'the Crown' was to identify the body politic. ... The Constitution, in identifying the new body politic which it established, did not use the term 'the Crown' in this way ...

[85] The second usage of 'the Crown' is related to the first and identifies that office, the holder of which for the time being is the incarnation of the international personality of a body politic, by whom and to whom diplomatic representatives are accredited and by whom and with whom treaties are concluded. The Commonwealth of Australia, as such, had assumed international personality at some date well before the enactment of the *Australia Act* [in 1986] ...

...

**\*499\*** [87] Thirdly, the term 'the Crown' identifies what Lord Penzance in *Dixon* called 'the Government' [*Dixon v London Small Arms Co* (1876) 1 App Cas 632, 651], being the executive as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy which attends to its business. As has been indicated, under the Constitution the executive functions bestowed upon 'the Queen' are exercised upon Australian advice.

[88] The fourth use of the term 'the Crown' arose during the course of colonial development in the nineteenth century. It identified the paramount powers of the United Kingdom, the parent state, in relation to its dependencies.

**\*500\*** [89] [T]he 'Home Government' ceased before 1850 to contribute to the expenses of the colonial government of New South Wales. On the grant of responsible government, certain prerogatives of the Crown in the colony, even those of a

proprietary nature, became vested 'in the Crown in right of the colony', as Jacobs J put it in *New South Wales v The Commonwealth* [(1975) 135 CLR 337, 494]. Debts might be payable to the exchequer of one government but not to that of another and questions of disputed priority could arise. ...

**\*501\*** [90] The expression 'the Crown in right of ...' the government in question was used to identify these newly created and evolving political units. With the formation of federations in Canada and Australia it became more difficult to continue to press 'the Crown' into service to describe complex political structures. Harrison Moore identified 'the doctrine of unity and indivisibility of the Crown' as something 'not persisted in to the extent of ignoring that the several parts of the Empire are distinct entities' [*The Crown as Corporation*' (1904) 20 *Law Quarterly Review* 351, 358]. He pointed to the 'inconvenience and mischief' which would follow from rigid adherence to any such doctrine where there were federal structures ...

[91] Whilst formally they may not be juristic persons, [the States and the Commonwealth] are conceived as politically organised bodies having mutual legal relations and are amenable to the **\*502\*** jurisdiction of courts exercising federal jurisdiction. The employment of the term 'the Crown' to describe the relationships inter se between the United Kingdom, the Commonwealth and the States was described by Latham CJ in 1944 [*Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350-1] as involving 'verbally impressive mysticism' ...

[Citations omitted]

## Executive entities

### *Public Service Act 1999* (Cth)

[As at 1 December 2022]

The *Public Service Act 1999* (Cth) regulates the Australian Public Service ('APS'), which carries out many of the functions of the Australian Government. The APS's *Values and Code of Conduct* are one mechanism for internalising a culture of accountability, integrity, impartiality and other desirable values.

#### **Part 3—The Australian Public Service**

##### **9 Constitution of the APS**

The Australian Public Service consists of Agency Heads and APS employees.

##### **10 APS Values**

###### ***Committed to service***

- (1) The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.