
Book review

Editor: Janet McLean

PUBLIC LAW IN THE AGE OF STATUTES

Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce by Anthony J Connolly and Daniel Stewart (eds) (Federation Press, 2015) ISBN: 9781760020392; pages: 256 (hb).

This festschrift celebrates the very large contributions Emeritus Professor Dennis Pearce has made over many years to Australian public law, as government lawyer, academic and scholar, and public office holder. His early years as a government lawyer included time in the Commonwealth Crown Solicitor's Office in Adelaide and a period as a Parliamentary Drafter in the Commonwealth Attorney-General's Department. His long and distinguished academic career at the Australian National University (ANU), between 1968 and 1996, was interrupted by his appointment as Commonwealth and Defence Force Ombudsman from 1988 to 1990. His many important and scholarly contributions to Australian legal literature are widely known and admired. As the editors of this collection point out, in their introductory essay, Professor Pearce has been responsible "for two of the essential texts that every Australian public lawyer should own: *Statutory Interpretation* (now with Robert Geddes in its eighth edition) and *Delegated Legislation in Australia* (now in its fourth edition with Stephen Argument)".

The eight essays collected in this work are based on papers presented at a conference conducted in conjunction with the ANU Centre for Public and International Law's annual Public Law Weekend. Viewed against the background provided by Professor Pearce's career and contributions to public law, it is right, and unsurprising, that the essays traverse important issues in statutory construction, executive power and administrative review.

Essays contributed by Justice Gageler of the High Court and Professor Cheryl Saunders on the subject of statutory interpretation challenge the reader to think about fundamental questions. So, Justice Gageler asks how, if at all, it might be open to a court to determine that a law which limits the power of an administrative decision-maker leaves the meaning of a word or words in a statute to be determined by the decision-maker. In particular, accepting that the High Court has firmly rejected notions of deference associated with the United States doctrines deriving from *Chevron USA Inc v Natural Resources Defense Council Inc*,¹ may there yet be questions of construction of a statute which, if answered incorrectly, do not constitute a jurisdictional error? And Professor Saunders reflects upon the nature and depth of the effect which the Constitution of the Commonwealth has had on issues of statutory interpretation. Her reflections proceed by reference to a tripartite analysis of "mandate", "influence" and "catalyst". That is, she identifies those respects in which the Constitution drives or *mandates* exercises in statutory interpretation; those in which the Constitution operates "rather as an *influence*", informing the principles of statutory interpretation and the manner in which they are explained and understood; and those in which the Constitution may act "as a *catalyst* for ideas about legislation and the legislative process that by extension also affect statutory interpretation".

Professor Margaret Allars, now a silk at the New South Wales Bar, revisits one of Professor Pearce's important contributions to debate about public law: his article entitled "Executive versus Judiciary".² The issues considered then, and revisited nearly 25 years on, remain important despite, perhaps because of, intervening changes in law such as the diminished importance of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) brought about by the steps taken by successive governments to limit judicial review of migration decisions. Professor Allars' identification, and examination, of *Attorney-General (NSW) v Quin*³ as the source of a fundamental norm governing

¹ *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).

² Dennis Pearce, "Executive versus Judiciary" (1991) 2 PLR 179.

³ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

the relationship between the executive and the judiciary is illuminating. By contrast, her collection of examples where agencies have not implemented judicial decisions suggests cause for concern.

The remaining contributions to the collection are entitled, respectively, “Private Standards as Delegated Legislation”,⁴ “Enquiring Minds or Inquiring Minders? Towards Clearer Standards for the Appointment of Royal Commissioners and Inquiry Heads”,⁵ “The Administrative Review Council and Transformative Reform”,⁶ “The Vision Splendid: Australian Tribunals in the 21st Century”⁷ and “Administrative Law and Cultural Change”.⁸ Each comes to grips with changes in what might loosely be called the administration of public law.

Mr Stewart’s consideration of private standards as delegated legislation directs attention to important issues arising from the use of standards, codes or guidelines developed by bodies outside government being used to give content to norms of behaviour. As the author recognises, there may be cases where delegation of this kind might call for consideration of constitutional issues of the kind identified in *Victorian Stevedoring & General Contracting Co v Dignan*⁹ because there is “such a width or such an uncertainty of the subject matter” handed over that the enactment attempting it is not a law with respect to a head of legislative power. But, there may also be distinct questions about whether the provisions “lack that hallmark of the exercise of legislative power identified by Latham CJ in *Commonwealth v Grunseit*,¹⁰ namely, the determination of ‘the content of a law as a rule of conduct or a declaration as to power, right or duty’”.¹¹

Professor Pearce conducted many inquiries for government. It is fitting, then, that Professor Brown examines the place of royal commissions and ad hoc public inquiries in our modern systems of governance and public integrity. Professor Brown asks whether there are, or should be, clearer principles or standards governing the ways in which inquiries are established and who may be appointed to conduct them. He gives particular attention to standing anti-corruption commissions and concludes that the more natural and complete solution to problems of the kinds he identifies is “the establishment [by the Commonwealth] of a well-conceived, comprehensive ‘standing’ anti-corruption commission”. Events that occurred after the writing of the paper may be thought to show that standing commissions of the kind proposed can present their own particular issues about governance.

The modern system of Australian administrative law recommended by the Kerr Committee had several elements: judicial review under the *Administrative Decisions (Judicial Review) Act*, merits review by the Administrative Appeals Tribunal, review by the Ombudsman and the establishment of the Administrative Review Council (ARC) to advise about future developments with respect to administrative decision-making and the review of those decisions. In her essay, Justice Kenny traces the contributions made by the ARC and asks why it has been deprived of resources if, as she concludes, it has made very useful contributions to administrative law. In like vein, Commissioner Pearson, having traced the many structural changes that have been made at both State and federal level to tribunals, notes that Professor Pearce had asked,¹² in 1987, whether the “vision splendid” of the Kerr Committee had faded. Her answer, in respect of merits review by tribunals is a confident “No”. Not only does she conclude that tribunals are now regarded as “an integral component of the Australian administrative justice system ... there has been a professionalisation of tribunal membership and processes”.

⁴ By Daniel Stewart of the Australian National University.

⁵ By Professor A J Brown of Griffith University.

⁶ By Justice Kenny of the Federal Court of Australia.

⁷ By Linda Pearson, a Commissioner of the Land and Environment Court of New South Wales.

⁸ By Emeritus Professor John McMillan of the Australian National University.

⁹ *Victorian Stevedoring & General Contracting Co v Dignan* (1931) 46 CLR 73, 101.

¹⁰ *Commonwealth v Grunseit* (1943) 67 CLR 58, 82.

¹¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [101].

¹² Dennis Pearce, “The Fading of the Vision Splendid?” (1989) 58 *Canberra Bulletin of Public Administration* 15.

Professor McMillan, like Professor Pearce, served as Commonwealth Ombudsman. Professor McMillan reflects upon how the work of the Ombudsman can use errors in individual cases to “highlight larger or more systemic problems that an agency may need to address” and thus “trigger cultural change”. He draws particular attention to cases concerning migration and freedom of information, in which he contends that the work of the Ombudsman shifted administrative culture. But he concludes that cultural change is not necessarily permanent. Accordingly, he contends that it is necessary through what he calls “soft law and other techniques” to sustain pressure as well as periodic monitoring to ensure no backward slide.

This collection of essays pays proper tribute to the work of Professor Pearce in the many different fields he has ploughed to the profit of the Australian body politic. A critically important part of its success in paying that tribute is that it provokes the reader to consider again issues which lie at the heart of public law: statutory interpretation, the relationship between the executive and judicial branches of government, the structures by which public law is administered and that intangible, but all-important culture which informs how departments and administrators go about the daily administration of law and policy.

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