

THE ROLE OF A JUDGE IN A REPRESENTATIVE DEMOCRACY

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People who administer criminal and civil justice in a liberal, representative democracy of the 21st century are committed to traditional values, but they also need to come to terms with modern attitudes, including what has been described as the culture of justification¹. The present Chief Justice of Canada has referred to this as an expectation that any exercise of public power can be justified as rational and fair². The citizens of a modern democracy demand not only that judicial power be exercised independently and according to law, but also that judicial decision-making be demonstrably rational and fair. All authority must be willing and able to justify itself; an exercise of public power is always likely to be called in question.

My purpose is to examine some aspects of the way in which old and new demands bear upon the work of judges. There is a feature of the context that I should make clear. In the title of this paper I have referred to a "representative democracy". To confine the topic within

reasonable bounds, I shall deal with the kind of representative democracy, and judicial system, with which I am familiar. It is a common law system, in which judges are appointed, not elected, and in which there is, at least in general terms, a separation of legislative, executive and judicial powers.

In Australia, judges are appointed by the executive government; most, although not all, from the ranks of legal practitioners. In the case of superior courts, those appointed are usually of mature age. Subject to ages of compulsory retirement, they enjoy the familiar judicial security of tenure, being subject to removal only by the (Commonwealth) Governor-General or (State) Governor upon an address of Parliament for proved misbehaviour or incapacity. In our federal system, the separation of powers is more strict at the federal than at the State level, but the difference does not affect the points I want to make. All judges are unelected. Judicial decisions are open to criticism. It is not unusual for critics, especially members of the political class, and professional commentators, to speak of "unelected judges". They are not doing this to suggest that it would be better if we had a system of election of judges. There is no significant support for that idea in Australia. Their purpose is different: it is to make the point that judges do not have the political legitimacy that, in a representative democracy, comes from submission to the electoral process. It is true that judges do not have political legitimacy, and it is good that, occasionally, they are reminded of that. It should be added that they do not need it, and should not seek it.

That judges are unelected is consistent with the general scheme of separation of powers. It may be a valid point to make when a particular exercise of judicial power arguably has passed beyond the bounds of judicial legitimacy. Plainly, however, in a government structure such as that of Australia, nobody seriously suggests that the only legitimate power is that exercised by elected officials. I have never heard it said, for example, that the Commissioner of Taxation, or the Secretary of the Treasury, or the Governor of the Reserve Bank should be elected. In the case of many forms of public power, especially those that ought to be free from political influence and the pressures of party politics, it is desirable that they be exercised by people who do not need popularity.

A useful test of a proposal that any public official, from the Governor-General down, should be elected would be to compose a policy speech for a candidate for election to that office. At least in Australia, if a prospective judge participated in a serious electoral contest, the candidate would need to explain why he or she would make a good judge and, indeed, a better judge than the alternative candidates. That would involve some kind of representation as to how judicial power would be exercised once it was gained; and some kind of prediction about what opponents would be likely to do. Australians have not warmed to the idea of judges coming to office with a commitment to decide cases in accordance with any agenda, let alone one sufficiently specific to be the subject of an electoral campaign. Courts and judges

are not meant to have agendas, and judges are not meant to seek popularity. They are expected to administer justice according to law, regardless of the consequences for their approval ratings. A judicial decision that pleases one side or the other of a partisan conflict will always attract applause or blame from some of the partisans, but people expect judges to attend to the task of administering justice and to leave politics to politicians.

In Australia, we do not, or we do not yet, go in for parliamentary scrutiny of potential judges. Decisions of our courts, especially the High Court of Australia, often have political consequences. Under our federal Constitution, the High Court is regularly required to rule on the limits of the lawmaking powers of the federal and State Parliaments. Behind the legal issues that the Court must decide there often are intensely political concerns. Yet the Court is expected to resolve those issues according to law, and adhering to legal methodology. We expect judges to decide issues after hearing argument in specific cases. Most of the people considered for appointment to the High Court are already serving judges. All of the present members of the High Court were previously judges in other courts. To require judges to participate in examination for ideological soundness is not an idea that has taken on in Australia. It would be surprising if governments, in deciding whether to promote serving judges, did not take notice of their judicial records. The only way to eliminate that would be to do away with all forms of judicial promotion. Even so, it is one thing for a government to attempt to assess a person's suitability for office; it is another thing for the person under consideration

to be expected to make statements of policy or intention about future judicial action.

What is the proper business of judges? Judging, of course; but judging what? Some forms of governmental power are capable of being exercised either by legislation, or by administrative action, or by the judicial process. Others are properly regarded as the exclusive preserve of one branch of government. In Australia, the adjudication of criminal guilt is an exclusively judicial function; the imposition of tax is exclusively legislative; the conduct of national defence is committed to the executive. Subject to such cases, the basis upon which authority is allocated to one or other branch of government reflects constitutional arrangements, and public attitudes. The kinds of decision-making responsibility that are given to judges at any time reflect a community's sense of propriety and fitness. In general, judicial power is not self-defining: the jurisdictions of the various Australian courts are created or conferred by the Constitution and Acts of Parliament, federal or State. Subject to the Constitution, which grants a certain irreducible minimum of judicial power, Parliaments decide what matters will be committed to judicial authority. In practice, a large part of that choice already has been made by history. Public opinion, conditioned by history, creates an expectation as to the kind of work that judges will be given to do. Changes, sometimes large changes, occur over time, and as between societies that regard themselves as in the same tradition there are striking differences. Defining the field of proper judicial activity is a matter of public policy that is always under review.

In a rational society, one consideration that ought to be influential is the need for a reasonable match between the responsibilities given to judges and their capacities. Matching power to the capacity of the organisations or individuals on whom it is conferred is an abiding problem of public policy. To take an obvious example, a mis-match between the powers conferred upon police or security organisations and the personal or collective abilities of those who exercise such powers can cause grave harm, for which the people who confer the powers are politically accountable. There are certain things that courts do well; and certain things for which they are ill-equipped. The judicial method itself is not inflexible or invariable, but there are basic features of the common law process that govern its suitability for particular tasks. The adversarial trial procedure is well adapted to some kinds of dispute resolution, and ill-adapted to others. No system of criminal justice is free from the risk of miscarriage, but in my opinion the adversarial system is generally a better way of deciding criminal guilt than any other of which I am aware. Yet there are many forms of decision that are not best made by the adversarial process. A feature of that process, which often is in contrast with the administrative procedure, is its concentration on the individual case. This is not always inevitable; it may result from an inappropriate failure of a court to pay due regard to wider considerations. Often, however, it is part of the nature of the system. It is the parties, and their lawyers, who decide what evidence to lead, and what arguments to present. They define the issues, and their choices limit the factual knowledge of the court and its capacity to make decisions.

Considering the kinds of decision that are best made by judges requires a clear understanding of the strengths and the limitations of the judicial process.

In Australia, there has been substantial legislative intervention in matters once left to the common law, especially in relation to workplace and motor vehicle injuries, and tort law reform. Claims for damages for personal injuries, decided according to the common law of tort, historically made up a large part of the business of the ordinary courts. This is backed by extensive, and sometimes compulsory, insurance arrangements. In New Zealand, on the other hand, such litigation is largely unknown. Accident compensation is there dealt with administratively, as a matter of social security. Which is better is a question of public policy, but it is a question that has wide implications for the scope of judicial activity.

Judicial review of administrative action is an example of an area in which the role of the courts is expanding, and is still sometimes controversial. In the late 1970's and early 1980's, Commonwealth legislation set up an extensive (although not universal) scheme of judicial oversight, and separate administrative merits review, of many areas of executive decision-making³. In addition, both constitutional and common law cases have elaborated the scope for judicial review and the principles according to which it is undertaken. Inevitably, this has created tension between the executive and judicial branches; tension

that is sometimes resolved (and sometimes created) by legislative action.

Since deciding what courts ought to do is bound up with an opinion as to what they do well, and what they are unlikely to do well, the strengths and weaknesses of the judicial method are an obvious focus of examination. One area of debate concerns what is sometimes called policy. Judicial oversight of executive policy is a sensitive topic; but the role of the judiciary in formulating or applying policy is a matter that has implications extending beyond judicial review of administrative decisions.

Policy is a word with different shades of meaning. When formulation of policy is said to be part of the judicial function, it is necessary to be clear as to what is said to be going on, and how it is related to the judicial method, the judicial capacity, and the judicial role. In its broadest sense, the word covers any principle or plan of action thought to be wise or expedient. (It has a narrower meaning, referred to in the Oxford Dictionary as "a crafty device, a trick", but it is to be hoped that is presently irrelevant). As the common law develops, responding to changing needs, or appropriate pressure for rationalisation, the judges (usually of appellate courts) who have the responsibility for such development inevitably consider the wisdom or expediency of existing laws and proposed change. They do so, however, within the boundaries of their own discipline. This point is often overlooked by some who are enthusiasts for judicial policy-making, and by others who distrust it.

In Australia, the fairly strict separation of powers inherent in the Commonwealth Constitution has led to a deal of judicial effort to distinguish between judicial and administrative functions. Historically, much of this effort has taken place in litigation concerning the respective roles of courts and of arbitral tribunals operating in the industrial area. Requiring a tribunal to determine what is in the public interest has sometimes been seen as indication of a conferral of a non-judicial function. In a 1957 case⁴, Kitto J said:

"The possible effects of [an exercise of power] upon persons, situations and events may be such as to suggest the probability that decisions to exercise or to refrain from exercising the power were intended to be made upon considerations of general policy and expediency alien to the judicial method."

Yet judges are constantly required, in a variety of ways, to consider the public interest, and to take account of consequences of decisions extending beyond their effects on the parties to a case before them. Many statutes require courts to consider the public interest; often with little definition of the matters to be taken into account. The common law similarly may require judges to pay regard to a wide range of interests and public concerns. Deciding whether a contract is contrary to public policy, or whether a contractual provision is against the public interest may be a necessary judicial task. When an appellate court sets out to decide whether the law of tort should recognise a duty of care in certain circumstances it does so upon grounds that can be described, aptly, as including grounds of legal policy. There is no bright line between appropriate, even essential, legal policy, and considerations of

"expediency alien to the legal method". That does not mean that there is no difference. The difference arises partly from the judicial method.

The breadth of the word "policy" has given rise to confusion. It is generally acknowledged that some kinds of policy are extraneous to legitimate judicial activity. In Australia, one of the responsibilities of the High Court is to decide the constitutional validity of federal or State legislation. The public would be outraged if the Justices advanced, as a reason for holding legislation to be valid or invalid, their approval or disapproval of the policy of the legislation. Barristers do not argue constitutional cases as though it was their task to solicit such approval or disapproval. One example suffices to make the point. At the time of Federation, financial relations between the Commonwealth and the States were an extremely sensitive issue. Over the succeeding century, there was a major change in what is sometimes called the fiscal balance; a change strongly in favour of the Commonwealth. This had a number of causes, one of which was a Commonwealth takeover of the power to levy income tax. The legal details are beside the present point, but the issues were of great political sensitivity. In the first Uniform Tax Case⁵, the Chief Justice (Latham CJ) said:

"[T]he controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliaments and the people ... The Court must consider and deal with ... [the] legal contention. But the Court is not authorized to consider whether the Acts are fair and just as between States - whether some States are being forced, by a political combination against them, to pay an undue share of Commonwealth expenditure or to provide money which other States ought fairly to provide. These are arguments to

be used in Parliament and before the people. They raise questions of policy which it is not for the Court to determine or even to consider."

The next Chief Justice, Sir Owen Dixon, said that in constitutional cases, the Court's sole function is to interpret and apply the Constitution, and that "it has nothing whatever to do with the merits or demerits of the measure"⁶

At the same time, as I have acknowledged, the judicial function, especially that of developing and rationalising the common law, requires attention to the wisdom and expediency of that which may need change, and of the proposed change. The one word, policy, is used in different contexts to denote both legitimate and illegitimate activity. Clearly, that word will not provide the solution to the very problem it creates. The solution is to be found in the nature of judicial power, which is to be exercised independently and impartially, and the judicial method, which has its own inbuilt controls and limitations.

I referred earlier to the constraints of the judicial discipline. One is precedent. The force of this may vary according to the level of the judicial hierarchy in which a judge is operating. In the day to day work of a trial judge, and in a large part of the ordinary work of an intermediate court of appeal, the binding force of precedent is constantly reflected in a simple and practical fashion; a departure from precedent is likely to result in a reversal on appeal. Even in a court of final appeal, where the weight of precedent is less pressing, and where what is described as judicial lawmaking is most likely to occur, precedent is a powerful force for at least three reasons. First, the previous history of the law marks

out, and limits, the course of its future judicial development. Principles established by earlier generations of judges, which may have implications and consequences extending well beyond the particular issue which a modern court must decide, will limit the available choices when any change of course is contemplated. The word "incremental" is often used in this context. It is sometimes criticised as unnecessarily defensive, but it captures an important idea. Ronald Dworkin's image of the chain novel, with a different author for each new chapter, makes the point⁷. Judges of this generation may write a new chapter, but the scope for inventiveness is limited by the authors of the earlier chapters. Secondly, respect for precedent is essential to judicial authority. A court that does not respect precedent undermines its own authority, for it will produce nothing by which its successors will regard themselves as bound. Judicial disregard for precedent is self-destructive. Thirdly, the wisdom of the law is accumulated, not suddenly invented. Justice Holmes famously said that the life of the law is not logic, but experience.⁸ We rely heavily on the wisdom and experience of others.

Another constraint is the adversarial process. The function of courts, at any level, is to resolve issues on the available evidence. The issues in a case are chosen by the parties, within the limits of the relevant substantive and procedural law. Not only do the parties, by their pleadings and their conduct of the case, define the matter or matters for decision; they also in large part control, by the evidence they choose to present, the factual information upon which the decision will be made. The adversarial process inhibits judicial creativity. Courts are

not Law Reform Commissions. They do not select the questions they will decide; and in general they do not gather information extraneous to the evidence put before them. Courts do not have agendas. Generally speaking, judges must resolve the cases that come to them. They do not select the issues they decide; and they cannot avoid deciding issues that are necessary for decision.

A third constraint is collegiality. Appellate courts make decisions either unanimously or by majority. An individual opinion that wisdom or expediency requires a certain change in the law will not be reflected in a judicial decision unless it commands sufficient support among colleagues. This involves a culture of justification at a micro-level. An individual judge's views on a matter of legal policy only become effective if a sufficient number of others agree.

In considering the acceptability of judicial involvement in issues that may be described as policy, it is necessary to take account of the ability of Parliament, by legislation, to reverse the effect of a decision thought to be ill-founded. Legislative reversals, or modification of the effects of, judicial decisions may reflect a different and broader view of policy. Sometimes they reflect the ability of Parliament to take account of a wider range of considerations that are open to a court, or to examine a wider range of options for change. When courts change the law, the alternatives available to them may be limited. Parliament may have a greater choice. An example is the inability of courts to alter the law with prospective effect only. At least in Australia, the view is taken

that, when the High Court of Australia adopts a view of the common law different from that taken in earlier times, it does so in the basis that it is declaring what the law has always been, not changing it for the future only⁹. It does not overrule decisions prospectively. This can mean that reversing an earlier line of authority may be very unjust to people who have acted on the faith of the law as earlier stated. Parliament, on the other hand has the capacity to change the law for the future, but to leave it as it was for the past. In that respect, legislative law reform sometimes has a distinct advantage over judicial action. This is a reason why courts, even when recognising that the law ought to be changed, sometimes prefer to leave it to Parliament. Australian judges at all levels not infrequently draw the attention of Parliament to deficiencies in the law and recommend change.

That having been said, the common law is judge-made, and judges have a responsibility to keep it in good order, seeking to ensure its rationality and contemporary relevance. Great judicial developments of the law sometimes create the potential for future problems, and future judges cannot avoid the resolution of those problems. *Donoghue v Stevenson*¹⁰ was a decision of a three-two majority of the House of Lords. The dissenting judgments in the case foretold issues about damage to property that are still unresolved¹¹. The step that was taken in *Hedley Byrne & Co Ltd v Heller Partners Ltd*¹² opened up a number of issues for later contest. At least in Australia, the whole question of liability for negligently inflicted economic harm is still a work in progress¹³. The relentless march of the tort of negligence has taken

modern courts into issues that require constant re-examination of legal values. Judges created the tort of negligence, and continue to re-shape it. They do not do so, however, according to personal inclination. There are choices to be made, but the judge's field of choice is not that of a legislator.

An example of a legal value that influences modern judicial decisions in the law of tort is the need for coherence. The law of negligence, imposing legal liability for damage caused by a breach of a duty of care, exists alongside other principles of common law, and statutory provisions, that either grant or circumscribe freedom of action. To subject people to conflicting or inconsistent duties would be unjust. So, for example, it was held in Australia that officials with the responsibility of a certain kind of criminal investigation did not owe a duty of care to the people under investigation where the imposition of such a duty would be inconsistent with their statutory responsibilities¹⁴.

Certainty is another recognised legal value. In general, it is unjust that people should be uncertain about their legal rights and obligations. Reasonable predictability of legal consequences is of particular importance in commercial transactions. Thus, in the law of contract, there is pressure to favour certainty and predictability where it is consistent with justice.

The extent to which moral values influence judge-made law varies with the area of law. They are very influential in criminal law, including

sentencing, because criminal justice can never depart significantly from the moral sense of the community in which it operates. The law of contract is based on the moral principle that people should honour their promises. The law of tort, on the other hand, seeks to reconcile conflicting interests. In the case of some of those conflicts it may be doubted that there is a commonly accepted moral view that points the way to a satisfactory solution. When that occurs, the community is unlikely to accept justification for a decision in the form of a judge's application of a personal, but not generally shared, policy. In some areas of the law, judges refer to, and apply, what they call community values. Nobody doubts the legitimacy of this, provided the values they apply are in truth shared by the community and not merely attributed to the community for rhetorical purposes. Sometimes such values may be stated at a high level of generality, which makes them incontestable, but implausible as the true explanation for the decision, which is likely to be of a lower, and more contestable, order. When judges apply legal values, the level of abstraction at which those values are stated may be important is determining whether they reveal, or mask, the true ground for decision.

Because judges interpret, and sometimes make, the law, and because the law is value-laden, the need for judges to be seen as authentic expositors of accepted values is sometimes reflected in a demand that those who appoint judges ensure that the judiciary is adequately representative in its composition. The concept of representation, when used in relation to the judiciary has two meanings;

one valid and the other invalid. In its valid sense, a demand for a fairly representative judiciary is bound up with public acceptability of the legitimacy of its decisions. The invalid sense involves a notion that individual judges should be, and act as, representatives of some particular group. In that sense, the idea of an individual judge as representative of some interest or group is destructive of judicial legitimacy.

The role of the modern judge is strongly affected by the increased intervention of Parliaments, earlier mentioned, and the consequent increase in the importance of statutory interpretation. In practically every area of judicial activity, statutes have assumed an importance far beyond that of earlier times. As a result, a large part of the work of judges now involves the application of legislation. Furthermore, there is a symbiotic relationship between statute law and the common law. Parliaments and courts respond to the others' actions. In Australia, a topical example is the law of sentencing of criminal offenders. We still regard sentencing as fundamentally a matter of judicial discretion in response to the circumstances of individual cases, but there is a high level of legislative prescription binding judicial action. There is also a high level of public and political interest in sentencing decisions.

This heightened interaction between Parliaments and courts, and increased political interest in even quite mundane forms of judicial decision-making, has intensified the need for judges to be conscious of the difference between political and judicial legitimacy. Political

legitimacy depends upon responsiveness and accountability to popular opinion. I do not mean to suggest that politicians, in their decisions about public policy, respond only to popular clamour. They lead, as well as reflect, opinion, and sometimes they need to take a longer view inconsistent with the pressures of the electorate. Ultimately, however, the democratic process subjects them to the will of the people. Judges have a different responsibility, and are subject to a different form of accountability. The public expectation of judges is that they will not respond to political pressures.

In Australia, what people expect of judges is well indicated by the demands that are made, from time to time, for a judicial enquiry into some question that has aroused interest or controversy. Those demands rarely reflect a belief that judges (or former judges) are wiser, or more industrious, or more perceptive than people in other occupations. Often, it is true, they reflect a view that judicial experience is likely to give a person an ability to investigate facts, especially where they turn upon conflicting evidence. Above all, however, they arise from a belief that there is a high level of public confidence in the integrity, independence and impartiality of the judicial process. The essential elements of that process are that it is open, that all sides of an argument are heard, and that reasons are given for a decision. That fits in with the culture of justification to which I referred earlier. When people ask for a judicial enquiry, they have in mind one that will be held in public, adopt fair rules of procedure, listen to and weigh evidence, and result in a reasoned decision.

Parliaments themselves recognise these strengths of the judicial technique and seek, in various ways, to use them to advantage. This has resulted in occasional warnings about the risk of misuse of the judicial form of procedure for political ends. In a passage that has since been quoted in decisions of the High Court of Australia, the Supreme Court of the United States said, in *Mistretta v United States*¹⁵:

"The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action."

That the colours of judicial action are neutral, and that the judiciary's reputation for impartiality and nonpartisanship is essential to its legitimacy, are ideas that do not always sit well with commentary calling for a heightened level of judicial engagement with issues described as matters of policy. What was said in *Mistretta* was directed at the executive and the legislature, but there is in it a warning for judges. Nobody wants judges to cloak political work in the neutral colours of judicial action.

The public expectation that judicial action will be politically neutral has its clearest focus when courts interpret Acts of Parliament, and, above all, when they make decisions about the constitutional validity of Acts of Parliament. In statutory interpretation, legal values influence accepted rules of construction. Some of those legal values are bound up with what are, or in the past have been, great political issues. For example, in Australia it is accepted that, in the absence of a clear

expression of parliamentary intention, courts will interpret statutes in a manner that is consistent with basic human rights¹⁶. The corollary is that if Parliament desires to abrogate some fundamental right then, assuming it has the constitutional power to do so, (which may itself give rise to debate), it must do so expressly and clearly, and bear the political responsibility. An accepted common law principle of construction is one thing. It would be another thing entirely for a judge to misinterpret legislation, or to declare legislation invalid on the ground of disapproval of the policy of the legislation. That would be recognised immediately as grossly illegitimate. This is not some kind of fetter on judicial power. On the contrary, it is an important source of protection for judges; one that they would weaken at their own great cost. It is precisely because judicial decisions about the meaning or validity of legislation are not meant to reflect judicial approval or disapproval of legislative policy that judges are not held politically accountable for unpopular decisions. If it were the case that, in interpreting Acts of Parliament or deciding their constitutional validity, judges were entitled to reflect their opinions about the policy of the legislation, then they would be engaged in political action, and they would be obliged to accept the consequences.

This brings me back to the culture of justification. Judges are expected to give reasons for their decisions; and the way they present their reasons reflects their own view of their role. That, in turn, is conditioned strongly by the expectations of the society in which they work. What is regarded as a legitimate reason, or an illegitimate reason, for a decision is reflected in the way judges go about explaining their

decisions. It is one thing to say: "The meaning of this law is not clear; it could mean either X or Y; I interpret it to mean X because if it meant Y it would be inconsistent with a certain basic human right". To say that is to apply a well established principle of legal interpretation, which justifies what the judge has done. It is another thing to say: "This law as written means Y, but because I am opposed to the policy behind it I will interpret it to mean X." That is illegitimate. Equally, it would be illegitimate to say: "I agree (or disagree) with the policy of this law, therefore I will uphold its validity (or declare it invalid)". The best evidence of what judges consider their role to be is the way in which they seek to justify their decisions. Reasons for judicial decisions are directed at an audience which includes other judges, the legal profession, the parties to litigation, and the public. The kinds of argument advanced in support of such reasons reflect the judicial perception of the judicial function, and the judicial understanding of the public perception of that function. In a modern representative democracy, at least one of the kind with which I am familiar, the public would not accept, and judges know the public would not accept, that a judicial decision could be justified as political action. That is what fundamentally defines the judicial role.

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¹ See Dyzenhaus, Hunt and Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation", (2001) 1 Oxford University Commonwealth Law Journal 5.

² McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law", 12 Canadian Journal of Administrative Law and Practice 171 at 174.

³ *Administrative Appeals Tribunal Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Freedom of Information Act 1982* (Cth).

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- ⁴ *Reg v Spicer; ex parte Australian Builders' Labourers Federation* (1957) 100 CLR 277 at 305.
- ⁵ *South Australia v The Commonwealth* (1942) 65 CLR 373 at 408-9.
- ⁶ (1951-52) 85 CLR xi at xiii-xiv.
- ⁷ Dworkin, *Law's Empire*, (1986) at 228-229.
- ⁸ Holmes, *The Common Law* (1881) at 1.
- ⁹ *Ha v State of New South Wales* (1997) 189 CLR 465.
- ¹⁰ [1932] AC 562.
- ¹¹ See, for example, *Murphy v Brentwood District Council* [1991] 1 AC 398; *Bryan v Maloney* (1995) 182 CLR 609.
- ¹² [1964] AC 465.
- ¹³ See *Perre v Apand Pty Ltd* (1999) 198 CLR 180.
- ¹⁴ *Sullivan v Moody* (2000) 207 CLR 562.
- ¹⁵ (1989) 488 US 361 at 407 (1989).
- ¹⁶ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Al-Kateb v Godwin* (2004) 219 CLR 562.