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Deference – *Stephen Gageler*

Standard definitions of “deference” include two alternative meanings. One meaning is respectful regard for the judgment or opinion of another. Another meaning is respectful acknowledgment of the authority of another. Australian constitutional adjudication has long recognised both forms of deference. In Australian administrative law adjudication, while the first form of deference has often been applied, the second has been seen to be more problematic. This article explores the second form of deference, drawing parallels between the Australian doctrine associated with *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, and the United States doctrine associated with *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).

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Judicial review of administrative decisions: Should there be a 21st-century rethink? – *Steven Rares*

This article considers the foundations and development of judicial review of administrative decisions, in the context of our present system of government. The current principles of judicial review, which require determination of whether a reasonable decision-maker could have arrived at the same conclusion as the repository, were developed at a time when decision-makers were not required to give reasons, unlike the position today in respect of most Commonwealth decision-makers. The article questions whether such

reasons should be evidence as to whether the decision-maker exercised executive power unreasonably. It asks whether the Wednesbury rationale for deciding whether a decision for which no reasons were given was unreasonable, should continue to be used when reasons are given. The article questions whether it is time to rethink this aspect of judicial review as an aspect of the rule of law. 157

How statutory interpretation sustains administrative law – Jeffrey Barnes

This article explores the connection between statutory interpretation and administrative law, in particular judicial review of administrative action. It identifies three main ways in which statutory interpretation sustains administrative law. There is, first, the interpreter’s gatekeeper role: when a court determines whether a general criterion for lawful decision-making is to apply to a statute which confers power on a primary decision-maker. Then there is the interpreter’s substantive role: when a court enlists statutory interpretation to determine the content of an administrative law criterion which is to be applied to a particular primary decision-making statute. And finally there is the interpreter’s clarifying role: when a court uses statutory interpretation to determine the legal meaning of provisions in administrative law statutes such as the Administrative Decisions (Judicial Review) Act 1977 (Cth). In this article each role is analysed through cases serving as a model of the role in question. 163

Falling asleep at its master’s feet? The Kable principle and Royal Commissions – Brian Mason

Royal Commissions are an entrenched feature of Australian public life. Despite their reputation for independence and investigatory zeal, establishing Royal Commissions and their investigatory process can produce tensions between the executive and legislative branches of government, on the one hand, and the judiciary on the other. This article demonstrates how the Kable principle may release this tension by protecting the institutional integrity and independence of State Supreme Courts as bodies vested with federal judicial power in three situations: where privative clauses preclude State courts from judicially reviewing the actions of Royal Commissions; where statutes authorise conduct by Royal Commissions otherwise constituting a contempt of a State court; and, where serving Supreme Court judges are appointed as Royal Commissioners. In doing so, it demonstrates that this principle must evolve to be engaged by factors which exogenously impair a Supreme Court’s institutional integrity, and not merely by those factors which endogenously arise when a statute alters a Supreme Court’s powers or procedures. This development will permit the Kable principle to restrain the excessive application of State executive and legislative power when establishing Royal Commissions and as they conduct their investigations, thereby preventing this “constitutional guard-dog” from falling asleep at its master’s feet. 177

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