



THE ROLE OF COURTS AND TRIBUNALS

**The Hon. Justice Garry Downes AM
President of the Australian Administrative Appeals Tribunal
Judge of the Federal Court of Australia**

**University of Sydney
Foundations of Law Lecture**

**Sydney
27 March 2006**

Society and Conflict

Nearly all animal interaction, human included, leads to differences or disputes. Human society depends, for its very existence, on the presence of some mechanism to resolve these disputes.

For the earliest emerging bands of humans, the brutality of physical conflict must have been the mechanism. The champions became the leaders. Historically, for Australia, over a long period of history the champions of leaders became lords and the champions of lords became kings.

Kings exercised authority. Physical conflict continued, at least with respect to the selection of kings; but the exercise of authority by kings came largely to replace the brutality of physical conflict as the mechanism for dispute resolution. Order replaced chaos. For the Western tradition from which Australia's system of government is derived, civilisation began.

Nowadays the source of government authority is the people. We can trace the system of government we call democracy to times and places in classical

Greece. However, democracy came much later to England which is the source of our polity.

Characteristics of Ordered Society

An ordered society requires at least two characteristics. First, a set of principles or rules regulating members of the society. Secondly, a means of resolving the disputes which still arise. The regulations are necessary to order the society and to provide a reference point which will reduce the number of disputes. The mechanism for resolving disputes will be employed to deal with the conflicts which remain.

In England both powers came to reside in the monarch. The crown was the source of both regulation and dispute resolution. An inescapable consequence of the development of ordered society is the erosion of the power of a single monarch. Peace permits more time for education and discussion. Both lead to a questioning of the right of kings to rule. The process tends to lead gradually towards democracy.

Regulation and Dispute Resolution

For us, the process began with inroads occurring in the King's authority to regulate and resolve disputes. At the same time as the King's power to regulate was being eroded so was his power to resolve disputes. First, the King was required to surrender regulatory power to his nobles. Secondly, courts were created to exercise the power to resolve disputes. The courts of England, and to an extent, Australia, are still notionally courts of the King or Queen. The principle division of the English High Court of Justice which hears trials is still called the Queen's Bench Division or the King's Bench Division. The Royal Coat of Arms is still displayed on the wall behind the bench where the judges of the Supreme Court of New South Wales sit.

Legislation and Executive Action

What I have been calling regulatory control can be divided into two facets. The first we call legislation. Legislation is the laws or Acts of the parliaments which lay down the rules governing society. The second, we call executive government or administration. This is the arm of government which implements the rules. Both, of course, are to be contrasted with the third arm of government which is the courts or the judiciary.

Historically, legislation was more concerned with prescriptive types of regulation. It was concerned with the Crown's exercise of power. Revenue raising is a good example. Taxes were raised by the King. The power and control he could exercise enabled him to do it. In due course this power devolved to the parliament and gradually to an elected parliament, although the upper house in the United Kingdom is even today not elected.

If legislation for raising tax came from the parliament, the implementation of the tax laws was a matter for the executive or the administration. At first this role was in the hands of trusted advisers of the monarch. Now it is in the hands of bureaucrats. The Department of the Treasury and the Australian Taxation Office are responsible for the implementation of the taxation laws of Australia and the actual raising of taxes.

Courts

At the same time as the monarch and parliament were legislating with respect to prescriptive aspects of regulatory society, the courts, in the name of the Crown, were regulating disputes between citizens. The monarch was less concerned with the matters which troubled ordinary subjects than with raising armies and collecting taxes to provide for them. Staying on the throne was a difficult job. Accordingly, the courts began to develop their own rules to assist in the resolving of common disputes. Faced with disputes about broken promises they began to develop the law of contract. Faced with disputes about injury and damage to persons and property they began to develop the law of torts or injury. The rules established by courts formed the backbone of the common law. They were not established like acts of parliament establish rules. They were not created as rules. They simply emerged from a pattern

of decision-making by the courts. So, a doctrine of consideration emerged in the law of contract. Contracts cannot be voluntary. Both parties must contribute something in money or moneys worth. No judge has ever sat down and promulgated such a rule. It simply emerges from reading a series of cases. Once it had emerged, subsequent decisions noted the rule and recorded it. We know this process as the doctrine of precedent. The resulting body of law is the common law.

Parliament

Generally speaking, the parliament has supremacy over the courts. Although it cannot reverse the results in particular court decisions, it can vary the common law through legislation.

Accordingly the parliament came, gradually, to modify the common law. For example, legislation was passed to require certain contracts to be in writing before they could be enforced. Over the course of time, parliaments have intruded more and more into the development of the common law. There are now hundreds of acts of parliament which modify it. For some topics the entirety of the common law has been displaced by legislation. A good example is the criminal law.

There once were common law crimes of murder, robbery and larceny or theft. However, for a very long time, these common law crimes and most other crimes have mostly been replaced by statutory crimes or crimes created by legislation. The Commonwealth, Queensland and Western Australia have criminal codes. The whole of the criminal law is found in legislation.

Some Acts of parliaments relate to topics which are wholly covered by statute and have never been the province of courts, such as the raising of income tax. Other Acts vary or amend the common law established over the years by the courts.

To summarise, we have the legislature which creates laws, the executive which implements laws requiring government action and the judiciary which

resolves disputes. The judiciary is also responsible for developing the common law on a case by case or incremental basis, although the supremacy of parliament gives that body ultimate control over the content of the law.

The Executive

So far I have neglected the Executive. In Australia, the Executive conjures up thoughts of the Governor-General or the state Governors and the Governments or Cabinets which advise them. High questions of government policy such as the deployment of our defence forces are executive acts. But the Executive is much more than that. Imposing taxation laws is a legislative act; assessing the amount of tax owed is an executive act. So is a determination by the Australian Prudential Regulation Authority pursuant to the *Insurance Act*¹ that a director of an insurance company should be disqualified from being a director. Likewise, a decision made under the *Environment, Protection and Biodiversity Conservation Act*² that Asian elephants should be permitted to be imported into Australia.

Australian Constitution

In 1901, the former colonies of the United Kingdom in Australia joined together in a federation known as the Commonwealth of Australia. The federation was established and regulated by the Constitution. On topics it covers, the Constitution is final. The Parliament cannot alter it without a referendum of the people. They have proved to be difficult to pass.

One topic which the Constitution covers is the federal or Commonwealth government. The Constitution is divided into chapters. Speaking of the Commonwealth government, the first three chapters are headed respectively: the Parliament, the Executive Government and the Judicature or Judiciary. Early in its history, the High Court of Australia, which is the supreme court in Australia and is so described in the Constitution, determined that these provisions required a so-called separation of powers in Australia. Legislative

¹ 1973 (Cth).

² 1999 (Cth)

power was conferred on the Parliament. Executive power was “vested in the Queen and is exercisable by the Governor-General as the Queen’s representative ...”.³ In practice, the power vests in the Executive Council which advises the Governor-General. The power is ultimately sourced to the Prime Minister and Cabinet. It remains true, however, that your taxation assessment is a function of executive government. Finally, judicial power is conferred on courts.

The result of a series of High Court decisions is that only the parliament can legislate, only the executive government can exercise administrative power and only the courts can exercise judicial power. As with all rules, exceptions have appeared but I will not trouble you with these.

The most important consideration for present purposes is that the principle affects only the Commonwealth government. It does not affect the state governments. Accordingly, for present purposes, parts of the executive government of the states can exercise judicial power.

Courts in Australia

Now, where does all this lead in terms of the functions of courts and tribunals in Australia. If we return to my opening observations it can be seen that the primary role of courts is to resolve disputes. That is the essence of the judicial role. A dispute may relate solely to the common law, such as whether a contract has been made or breached, or to a matter raising legislation or statute law, such as the meaning of an act of parliament affecting a dispute, or it may relate to a hybrid, such as when a contract has been satisfactorily reduced to writing so that it complies with relevant legislation. The potential subject matter for court proceedings is very wide. What is essential, however, is a dispute about a matter involving legal rights and obligations.

Administrative Law

³ *Australian Constitution*, s 61.

In common law countries such as the United Kingdom, Canada, New Zealand, Australia and Malaysia, courts determine legal disputes about executive or administrative acts. They also determine disputes as to the lawfulness of those acts. If an administrative act is lawful the court will not interfere even if they consider the act to be unwise. Administrative decision-makers are entitled, so far as the courts are concerned, to make wrong decisions provided they are lawful. If an administrative decision-maker has acted on a consideration that should not have been acted on, the decision will be unlawful. If the decision is simply a bad one it will not.

This situation is not universally the case. You will notice that it involves the judiciary ruling on an administrative act. Might that not offend the separation of powers between the executive and judiciary? The common law answer is that such determinations are matters for courts because they involve disputes about matters involving legal rights and obligations.

The position in France and most continental countries, which we call civil law or civil code (to be contrasted with common law) countries, is quite different. Most civil law countries have a completely separate system of administrative courts to determine the lawfulness of administrative decisions. Civil courts do not determine disputes involving government action.

Administrative Review Tribunals

A facet of modern government is the ever increasing influence of government action on private interests: your income tax assessment when you earn income; your HECS for the moment; any claim you may have in the future for social security. All these matters involve administrative decision-making by public servants. They are all part of the executive actions of government. Judicial review permits the correction of legal errors in these actions but does not permit them to be corrected if they are just plain wrong.

In response to the ever increasing relevance of executive decisions to private interests and over time, governments came to set up bodies authorised to reconsider the merits of administrative decisions not just their lawfulness.

These bodies could be provided with more information, could receive submissions from persons affected and generally had more time for deliberation. Commonwealth Taxation Boards of Review are early examples of these bodies. The Boards of Review could reconsider all aspects of taxation assessments. These bodies are now generally called tribunals. At the Commonwealth level they include Migration Tribunals, the Social Security Appeals Tribunal and the Veterans Review Board.

In the mid 1970's, the Commonwealth Parliament set about making important reforms to the Commonwealth system. These included the establishment of the Federal Court of Australia and the Administrative Appeals Tribunal.

Administrative Appeals Tribunal

The Administrative Appeals Tribunal was and is a unique institution. It reconsiders or reviews on their merits, administrative decisions made under more than 400 Acts of the Commonwealth Parliament. When I say it reviews the decisions on their merits I mean it considers them afresh from every aspect. It does not just consider their legal correctness. The Tribunal stands in the shoes of the original decision-maker and makes the decision all over again uninfluenced by the original decision.

Illustrations of the Work of the Administrative Appeals Tribunal

Let me give you three illustrations from the work of the Administrative Appeals Tribunal to show you what merits review is. Last year I decided that a brand of swimming pool chemicals should be permitted to continue to be sold under strict conditions. In doing so I was reversing the decision of a Government agency. The issue was not a legal issue. It was simply whether the best decision was to permit their sale. Recently I decided, with two other members of the Tribunal, that Taronga Zoo and Melbourne Zoo should be permitted to import Asian elephants. Although the decision had to be justified in law the ultimate question was simply whether permitting importation was better than not permitting it. In dealing with this case the Tribunal was reviewing the decision of a cabinet member, the Commonwealth Minister for the

Environment. In two weeks time I will be hearing a case relating to the names to be given to wine growing areas in Victoria. The French call it “appellation contrôlée”. I will be reviewing the decision of a government committee. Again I will simply be deciding what is the best way to identify the boundaries of the areas.

This work of the Administrative Appeals Tribunal is to be contrasted with the work of courts. Courts are primarily concerned with law. The focus is on breaches of the law or private rights and their consequences. Courts play a role in administrative decision-making. We call it judicial review. The question is whether an administrative decision is lawful. If a decision-maker has misunderstood the nature of the power conferred the decision will be unlawful. For example, taking the pool chemical illustration if the legislative power required a decision-maker only to base its decision on safety and the decision-maker took into account the price of the product it would have misunderstood the power and made an error of law. The Federal Court could have set aside its decision and required it to reconsider the matter. However, the Federal Court would not have reconsidered the merits of the matter. If the Administrative Appeals Tribunal made the same error there could be an appeal to the Federal Court. Again, it could have set aside the decision as unlawful but it could not have changed it.

The work of the Administrative Appeals Tribunal is not all as esoteric as I have described. The bulk of its work is now tax cases, employees' compensation cases and social security cases; but the principles are the same.

The role of the courts of Australia is accordingly to determine disputes about matters concerning legal rights and obligations. A major role for Tribunals is to make or remake administrative decisions. However, as with all rules, there are exceptions to which I will come

Commonwealth tribunals provide merits review of administrative decisions. They simply make administrative decisions. They exercise administrative power not judicial power. If they did exercise judicial power they would be

unconstitutional. This is not to say they do not make decisions on questions of law. If they make wrong decisions on questions of law their decisions will be wrong. However, the essence of what they do is to make administrative decisions. The reason for this limitation is the separation of powers doctrine.

The States

The States are not bound by any separation of powers doctrine. Provided the parliaments authorise, it bodies which are not courts can exercise judicial power in the States. The position is the same in the United Kingdom. Indeed, in the United Kingdom tribunals which are not courts are still considered to be part of the judiciary.

Accordingly, in the states of Australia there are hybrid tribunals. Part of their work is reviewing administrative decisions; but another part of their work is exercising pure judicial power. Tribunals exercising judicial power in the States are usually confined to dealing with smaller disputes. A prominent example is tenancy disputes.

The largest tribunal in Australia is the Victorian Civil and Administrative Tribunal. Its name recognises the dual nature of its function. It reviews certain Victorian administrative decisions, but also deals with conventional legal disputes when it is empowered to do so. There are similar tribunals in most of the States.

Criminal Law

It is time to say a word about the criminal law. A major role of the courts, to which I have not so far referred, is their criminal jurisdiction. The sanctions of the criminal law can be seen as an enforcement role arising out of the rules bringing order to society. In their civil role the courts are resolving disputes relating to conduct which is not particularly challenging to the order. Breaching a contract is not likely to affect anything other than individual financial interests. Redress is left to civil proceedings brought by those affected.

However, some conduct is of sufficient seriousness that it requires the state itself to provide the means of redress. This is achieved by legislation creating criminal offences; by an administration including police and a public prosecutions service to detect crime, identify the criminals and prosecute them; and by the courts to determine guilt or innocence and impose punishment.

One consequence of our Federal system is that there are both Commonwealth and state and territory courts in Australia.

The Courts of Australia

In each state and territory of Australia there is a superior court called the Supreme Court. They have this title because when most of them were created, before federation, they were the supreme courts in Australia for each colony. Below them are district or country courts and below them are courts of petty sessions or magistrates' courts. Each of these courts exercise both criminal and civil jurisdiction, usually in separate divisions. The more serious the crime is, the more senior is the court in which the proceedings will take place.

The Supreme Courts of the states and territories hear both civil and criminal trials as well as appeals both from within the court and from the lower courts. Most of the Supreme Courts have separate appeals divisions with specialised distinguished appeal judges.

Whereas there are three levels of courts in the states and territories, there are only two levels of courts exercising Commonwealth jurisdiction. They are the Federal Court of Australia and the Federal Magistrates Court. The Federal Court of Australia hears appeals from single judges of that court but does not have a separate appeals division. A panel of three judges rotate in the hearing of appeals. The state and territory courts deal with nearly all criminal cases, including criminal offences under Commonwealth legislation, although that is about to change. In their civil jurisdiction they hear most of the claims

arising under the common law such as contract and tort cases. They have an inherent jurisdiction to do this.

The federal courts do not have any inherent jurisdiction. Their jurisdiction is derived wholly from statutes of the Commonwealth Parliament. They do have an accrued jurisdiction which enables them to deal with common law claims associated with a jurisdiction conferred by statute. State and territory courts also have jurisdiction conferred by statute as well as their common law jurisdiction.

Ultimate Judicial Review

To this point it has emerged that judicial power or the power of courts involves resolving disputes about matters involving legal rights and obligations. Such disputes include disputes about the lawfulness of executive action.

There is, however, a further, one might say ultimate power, exercised by the judiciary. The power of the judiciary to determine the lawfulness of government action is not confined to determining the lawfulness of administrative action. It extends to determining the lawfulness of legislation.

Courts, even lower courts, are from time to time called upon to determine the lawfulness of legislation. Because parliaments are supreme, subject only to the Constitution, it is rare for issues of lawfulness of legislation to arise outside of questions of constitutional validity. This is because only the Constitution itself has supremacy over the acts of the Commonwealth and the states. It is for the courts of Australia to rule on issues as to the constitutional validity of laws. This task generally is assumed by the highest court in Australia, the High Court of Australia, although there are cases in which such determinations have been made by magistrates' courts, usually followed by appeals to the High Court. The forthcoming proceedings before the High Court relating to the new industrial relations legislation of the Commonwealth is an example.

Conclusion

I began this talk with reference to order. Can some order be injected into the elements of the talk?

1. Courts determine disputes about matters involving legal rights and obligations.
2. These disputes include disputes concerning:
 - a) the validity of legislation
 - b) the lawfulness of executive action
 - c) the meaning of legislation
 - d) the application of legislation and the lawfulness of conduct in accordance with the legislation including legislation imposing criminal sanctions
 - e) private rights flowing from the common law and amendments to the common law made by parliaments
 - f) development of the common law as an incident of determining disputes
3. Commonwealth tribunals review on the merits executive decisions where the Parliament has conferred power to do so.
4. State tribunals undertake this role when it is conferred upon them by parliaments and also exercise judicial power when this different power is also conferred upon them by parliaments.