

The Frontiers of Public Law

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Introduction: The Frontiers of Public Law

JASON NE VARUHAS AND SHONA WILSON STARK*

This collection originates from the third biennial Public Law Conference, entitled ‘The Frontiers of Public Law’, a major international conference held at Melbourne Law School in July 2018, co-organised by the University of Melbourne and the University of Cambridge. We acknowledge the Wurundjeri people of the Kulin Nation as the Traditional Owners of the land on which the Conference took place.

The 2018 Conference was the third in an ongoing biennial series of major international conferences, following on from the first two Public Law Conferences, both held in Cambridge, in 2014 and 2016 respectively. This collection is the third book in an ongoing series, following on from those collections derived from the first two Conferences: *Public Law Adjudication in Common Law Systems: Process and Substance*,¹ and *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*.²

The motivation for the conference series is to provide a leading international forum for public lawyers from a broad range of jurisdictions to discuss and debate the most important public law issues facing common law systems; and through this enterprise to foster a community of public lawyers drawn from multiple jurisdictions and from the academy, judiciary, legal practice and government. From the time of founding the series it was always the intention of the convenors that following the second Cambridge Conference the series would move to different parts of the common law world. The Melbourne Conference, from which this collection derives, was the first such conference to be held outside the United Kingdom (UK). Moving the conference carries forward the goals of the series, bringing in a wider range of perspectives and participants from different jurisdictions, and focusing attention on public law issues pertinent to different countries and regions. As is evident from the content of this collection, as well as addressing cutting-edge issues that arise across the common law world, the Melbourne Conference also focused attention on a set of public law issues that had not so far been a central focus of the conference series, and which are of particular significance in Australia. Specifically, it was of fundamental importance that public law issues relating to Indigenous peoples

* We are grateful to Kirsty Gover and Cheryl Saunders for comments on this chapter.

¹ J Bell, M Elliott, JNE Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford, Hart Publishing, 2016).

² M Elliott, JNE Varuhas and SW Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford, Hart Publishing, 2018).

should be a core concern of the Conference and collection, especially in the light of recent landmark developments in Australia, including the Uluru Statement from the Heart and moves towards a treaty with Indigenous peoples in the State of Victoria, and given the importance of these issues for other common law settler states, including New Zealand and Canada. The Conference included plenary and parallel sessions addressing this topic within single jurisdictions and from a comparative perspective. The topic will again be one of a number of important themes to be explored at the fourth biennial Public Law Conference, to take place in Ottawa in June 2020, co-organised by the Universities of Ottawa, Melbourne and Cambridge. The Ottawa Conference will be the first conference in the Public Law series to take place in North America.

The conference series, now established as the leading regular forum for the scholarly discussion of public law in the common law world, continues to grow and develop. The Melbourne Conference saw the largest number of attendees of any conference in the series, with 250 delegates in attendance from 125 institutions, drawn from 20 countries. It also saw the largest response to our general call for papers, and largest conference programme, with 80 papers presented in just over two days. It is particularly pleasing that the Melbourne Conference attracted the largest number of judges, officials and legal practitioners of any of the conferences in the series, with these groups accounting for approximately half of all delegates, which produced an exciting and stimulating environment for exchange of ideas between those within the academy and those working outside universities. All legal analysis can be enriched by engagement among academic public lawyers and those in practice, in government and on the bench, each group bringing different perspectives to bear in the light of their different experiences. The Conference opened with a panel comprising Kenneth Hayne, formerly of the High Court of Australia, and Lord Mance, then Deputy President of the UK Supreme Court, who considered the frontiers of judicial and executive power. The keynote plenary session featured Professor Cheryl Saunders, of Melbourne Law School, and Professor Benedict Kingsbury, of New York University School of Law, who considered the rise of global constitutional and administrative law.

In common with the previous collections, this book brings together leading academics and judges, as well as a stellar group of early career scholars, drawn from across the common law world, to discuss and debate issues at the cutting-edge of public law. The essays identify, analyse and provide solutions to a range of novel issues of great importance at the border of public law and other fields, many of these issues so far having been unrecognised or under-explored, despite their significance. The chapters will be an invaluable reference point for public lawyers seeking to understand these emergent issues at public law's frontiers, and are likely to lead thinking on these topics and set the parameters for future debate and discussion. Importantly, the issues addressed herein implicate not only public law but variously international law, the law relating to Indigenous peoples, private law, criminal law and the practice of public administration. As such, the essays will be of importance to those working in these fields. As is discussed in the next section, many of the most important legal issues arising within and across common law jurisdictions implicate more than one field, and therefore call for thinking across the traditional categories around which legal thought and legal practice have been organised.

I. The Frontiers of Public Law

The theme of this collection, which follows the theme of the Melbourne Conference, is ‘The Frontiers of Public Law’. The book builds on the intellectual foundations set by the previous collections. The first collection, published in 2016, interrogated a supposed boundary that runs through public law, between process and substance or, perhaps more accurately, multiple boundaries between process and substance within public law. If the first book focused on an important distinction within public law, the second book, published in 2018, examined the extent to which public law is or is not a unified field or discipline, considered from the perspectives of doctrine, theory and comparative law. This included consideration of multiple boundaries within public law, and consideration of public law across jurisdictional boundaries. This book, on the frontiers of public law, moves from looking at questions squarely *within* public law, to examining *intersections* between public law and other fields (albeit the essays have significant ramifications for public law itself, as discussed further below). The term ‘frontiers’ was preferred to ‘boundaries’ in order to encourage exploration not only of the constraints on or limits of public law, but also of the possibilities for legal development and legal thought at public law’s outer edges. The chapters address four frontiers: public law and international law; public law and the law relating to Indigenous peoples; public law and other fields of domestic law, including criminal law and private law; and public law and public administration.

One important prompt for the ‘frontiers’ theme is that public lawyers have tended to focus on matters at the perceived ‘centre’ of, or within the ‘mainstream’ of, public law, with the vast majority of scholarly writing preoccupied with a relatively small set of well-known topics, such as the legitimacy of judicial strike-down powers, dialogue under bills of rights, deference, statutory interpretation and so on, the terms of debate for each topic being well established, with scholarship in regard to each becoming increasingly specialised and detailed, concomitant with the increasing specialisation of the legal academy. The topics are no doubt important, thus why they have garnered such attention, but at a certain point the law of diminishing returns must invariably cut in. What has been far less explored is public law’s outer edges. Yet it is at the outer edges of a field or discipline that one often learns the most about the nature of that field or discipline. This is because at the outer edges certain matters, taken for granted at the (perceived) centre of the field, are brought squarely into focus and tested. These include the fundamental question of whether there is a distinct field of public law at all and, if so, in what way it differs materially from other fields. Often, as one explores the edges of public law, one identifies topics of such significance that they should be a core concern of public law inquiry and/or should not be considered distinct from the field of public law. For example, there must be a serious question whether any public law issue in a settler state can be examined in isolation from a consideration of how the issue impacts on Indigenous peoples. In other words, Indigenous laws, rights and culture should be at the very heart of public law thinking and scholarship, including in scholarship on those established public law topics considered above, such as dialogue and interpretation, as chapters in this collection demonstrate.

Certain matters of fundamental importance, including matters that are of increasing prominence, such as contracting by government, the rise of soft law techniques, the phenomena of global administrative and constitutional law, the role of the judge in

criminal law proceedings and the regulation of Indigenous property rights, simply cannot be addressed without the input of public lawyers, and equally cannot be addressed solely through the application of public law tools. These matters implicate international law, criminal law, private law, the law relating to Indigenous peoples, and the discipline of public administration. One aim of the collection is to draw out this complexity, and the multi-dimensional nature of emerging legal problems. A further aim is to encourage conversation on these topics among specialists in public law, specialists in the other fields and those with knowledge across fields. In turn the chapters provide an incisive and well-rounded set of insights into the selected topics, interrogating these topics in a way that recognises their complexity and multi-dimensional nature.

An important and interesting question raised by the chapters is the extent to which there are discernible boundaries or frontiers between public law and the other fields. It is difficult to provide a single answer to what is a 'big' question, and in a sense the question is one posed for readers, to draw their own conclusions, in light of the rich material presented in the chapters.

Nonetheless, there is at least one golden thread running through the contributions to this collection. As certain phenomena, which are the subject of legal regulation, tend to greater complexity – government, public administration, politics, social life, technology, economy, the international order and so on – there are significant ramifications for public law practice and thought. In particular, the law must of necessity adapt to comprehend and effectively regulate this changed reality, which in turn often has the consequence of challenging, and possibly breaking down, established legal categories or boundaries. In turn there is greater fluidity between fields previously considered distinct, such as public law/international law, public law/Indigenous law, public law/private law, public law/criminal law, and public law/public administration. Of course, the path of legal development may not necessarily be smooth. Indeed, legal change is likely to be messy, uneven and stuttering, as longstanding concepts and categories prove resilient to varying degrees. From a comparative perspective it is important to observe that new lines are likely to be drawn differently in different jurisdictions, depending on local contextual features.

Turning first to the division between domestic and international law, for a long time there has been much consideration of the influence of international law on the domestic order, but as the division between the two has worn thin, we increasingly see ideas drawn from the domestic sphere ebbing into the international domain, such as constitutionalism and administrative law, and indeed more generally there has been a reassertion of the domestic and the local, which in turn challenges the universalising tendencies of international law. Moreover, the international realm has itself become increasingly complex, making its intersection with an increasingly pluralistic domestic order far from uniform.

The increased recognition that the law ought to specifically protect the interests of Indigenous peoples, has contributed to the increased plurality of common law legal systems. This may be because Indigenous legal norms are read into or inform the general law of the state. It may be because a settler legal system creates new norms specifically to address the interests of Indigenous peoples, such as variants of fiduciary obligation, duties to consult, Indigenous legal rights or new institutional structures. Or it may be because the distinctiveness of claims seeking to protect Indigenous rights or interests adds a new dimension to existing fields, such as the law of judicial review. Furthermore, a normative concern to recognise and protect the interests and culture of Indigenous peoples cuts across established legal categories; it is a

concern relevant to public law, property, tort, equity, succession, contract and so on. Indeed, it is difficult to think of a legal field where the normative concern is not relevant. Because this normative concern cuts across established categories, it also operates to challenge and break down those categories. So, for example, 'private' ideas of personhood, property and rights are put to 'public' ends, such as safeguarding sites of cultural importance, and at the same time give legal recognition and effect to important aspects of Indigenous culture such as Indigenous conceptions of nature. Treaties with Indigenous peoples defy categorisations of purely public, private or international. Thus, as the normative concern to recognise and protect Indigenous interests gains force and momentum, it will likely operate to reshape or break down traditional modes of thought and categorisation.

Modes of government have become increasingly pluralistic and sophisticated, with governments mobilising new tools such as soft law (with corresponding developments in the international sphere). In the case of soft law, its legal regulation challenges existing public law categories, posing questions as to whether old categories should adapt or new ones be created, and draws public law and judges deeper into the domain of public administration (raising the question of whether judicial control is the best form of control). Indeed soft law tools such as policies, which are creatures of public administration, may be co-opted as judicial tools of legal regulation, collapsing any discernible division between law and administration.³ Another technique, government by contract, challenges intuitively familiar categories of public and private, administrative law and contract law. Indeed it is increasingly difficult to differentiate an autonomous public sphere from an autonomous private sphere in the world, the two being increasingly intermingled, with the consequence that any distinction between public law and private law will struggle to provide a workable basis for organising legal thought or the legal system. In turn, concepts are likely to float more freely between formerly distinct fields, and satisfactory and workable solutions to contemporary problems are unlikely to be found by applying the lens of solely public law or private law, administrative law or contract law, and so on.

II. Structure and Chapters

The book is in four Parts. The chapters in each Part address a particular frontier of public law: public law and international law (Part 1); public law and the law relating to Indigenous peoples (Part 2); public law and other domestic fields of law, specifically criminal law and private law (Part 3); and public law and public administration (Part 4). While this structure has been adopted for organisational purposes, there are multifarious interconnections between the chapters in different Parts, so that the divisions are porous rather than impermeable. The different Parts should be read as being in conversation with one another.

Part 1: Public Law and International Law

Part 1 considers new and emergent issues at the intersection of public law and international law. A common thread is the influence of the domestic on the international. The following

³ See M Elliott and JNE Varuhas, *Administrative Law*, 5th edn (Oxford, Oxford University Press, 2017) 181–85.

are a particular focus: (i) ideas and concepts associated with domestic public law, such as constitutionalism and administrative law, gaining traction in the global sphere, and also the resilience of domestic law and politics in the face of globalisation; (ii) new governmental techniques prevalent in domestic public administration, such as soft law, being increasingly mobilised in the context of international law and relations; and (iii) the impact of domestic politics on the supranational or international stage, and the ‘feedback effects’ this has on domestic public law.

In regard to (i), Cheryl Saunders (chapter 2) explores the phenomenon of global constitutionalism, examining from the perspective of domestic constitutions the apparent gap between certain claims made in relation to global constitutionalism and realities on the ground. The chapter scopes the field, disaggregating different strands of global constitutionalism. The heart of the chapter is a detailed consideration of two foundational dimensions of constitutional law, constitution-making and change, and constitutional adjudication, in order to gauge the effects of globalising forces domestically. The studies reveal a mixed picture, including the considerable resilience of domestic constitutional law and theory, despite the global context in which they operate, but also scope for better responses to issues raised by that global context within the domestic public law order.

Moving from constitutional to administrative law, Benedict Kingsbury (chapter 3), a founder of the field of global administrative law (GAL), considers the field’s frontiers as it moves into the 2020s. The chapter offers an account of GAL as a set of mechanisms, principles and practices that promote or otherwise affect the accountability of global administrative bodies. It charts the piecemeal and incremental development of GAL within a plurality of contexts in the global space, and with variable normative content. Kingsbury considers concepts and methods central to understanding of the field, including ‘law’, ‘administration’, ‘distributed administration’ and ‘private governance’. Importantly, the chapter explains the interdependence of GAL and changes in global political, economic and social orders, examining reasons for the rise of GAL and its prospects going forward in a context of shifting responses to globalisation that increasingly strain, negate and remake international ordering.

In regard to (ii), Laura Dickinson (chapter 4) identifies and analyses the United States’ (US) use of ‘legalised’ policy to govern its approach globally to counter-terror operations outside traditional theatres of war. Such policies cut across multiple boundaries, including law and policy, domestic and international law, and different areas of both domestic and international law. Dickinson explains the different and overlapping international legal paradigms that might govern counter-terror operations. In contrast to many of its allies, the US has, as a matter of international law, adopted the international humanitarian law approach, which imposes less onerous constraints than alternative paradigms, such as international human rights law. However, by adoption of legalised policy, the US has imposed additional restrictions on its operations beyond the legal baseline set by international humanitarian law. Dickinson considers the advantages and disadvantages of such use of policy from the perspectives of the US Executive Branch and the Human Rights Community.

In regard to (iii), Jack Beatson and Emma Foubister (chapter 5) consider the potential impact of Brexit on the future trajectory of UK public law. How will the UK’s decision to leave the EU feed back into UK constitutional and administrative law? The authors focus on two issues. First, how will Brexit affect the scope and grounds of judicial review? Despite the obvious influence on the UK system of EU legal norms and methods such as

proportionality, the authors argue that the ebbing out of EU law will not halt the rise of a jurisprudence of fundamental rights and proportionality, as proportionality is a ‘common law construct’ and there is a ‘sound doctrinal basis’ for the common law to recognise rights in appropriate cases. Second, how will Brexit affect relationships between different branches of government, particularly in the wake of the *Miller* case?⁴ The authors consider the broader ramifications of that decision are not yet clear, but the courts will continue to play an ‘important and legitimate role’ in dealing with difficult constitutional questions, including in connection with the concept of ‘constitutional’ statutes.

Part 2: Public Law and Indigenous Peoples

Part 2 considers the interface between public law and the law relating to Indigenous peoples, principally within the settler states of Australia, Canada and New Zealand. A commonality among the chapters is that they consider different *modes* of recognising and protecting Indigenous rights, interests, law and culture, while also emphasising the importance of recognising and responding to the distinctiveness of the Indigenous context in which law and legal institutions exist and operate. The first three chapters are focused principally on judicial protection within public law proceedings, in which context statute can play an important framing role. The next two chapters consider political and institutional mechanisms for protecting Indigenous rights, and affording Indigenous peoples a voice in matters that affect them. The final chapter considers a novel mode of protection of places of cultural significance to Indigenous peoples.

The first three chapters, focused on judicial protection, demonstrate that it is not possible within settler states to have a complete understanding of fields of public law, such as administrative law, without an appreciation of the emerging and dynamic strand of authorities relating to Indigenous rights and decision-making, which render established public law fields increasingly pluralistic and have the potential to recalibrate those fields in significant ways.

Matthew Palmer’s chapter (chapter 6) asks how the judicial branch contributes to protection of Indigenous rights in New Zealand, a constitutional system in which rights are protected principally through politics. Palmer examines the answer in two ways. First, even in such a constitutional system, constitutional dialogue provides a role for the judiciary in shaping constitutional protection of Indigenous rights, a role that only requires the judiciary to perform its conventional function of using reason to apply law to specific facts. Through performance of this role, and dynamic interactions between the judicial and political branches, courts have contributed significantly to the meaning and legal status of the Treaty of Waitangi. Second, Palmer offers a comprehensive account of judicial review cases that have invoked the Treaty, including where the Treaty is referred to in statute, as a primary case study of the judiciary developing law and engaging in dialogue in relation to Indigenous claims. He finds review to be a significant vehicle for protection of Indigenous rights, and that the case law exhibits a blurring of review grounds and indicates Treaty principles have been developed to mirror the substantive law of judicial review.

⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

Debbie Mortimer's chapter (chapter 7) examines a set of complex and fundamental, yet so far under-explored, issues that have arisen within judicial review claims concerning statutory provision for communal decision-making by Aboriginal and Torres Strait Island Peoples in relation to land. In relation to certain dealings with or decisions that affect Indigenous rights and interests in land, legislation imposes certain requirements. These include the requirement of a group decision, such as the giving of consent or authorisation, which is the product of a communal decision-making process by Indigenous people in accordance with traditional law or customs, or a process agreed by the group. Through detailed examination of two legislative examples, both recently the subject of significant judgments, Mortimer identifies and analyses several important issues for the courts raised by these decision-making requirements. These include recognition that public law principles are here being applied in a distinctive context, and the need for courts to come to terms with these differences, including the importance, reflected in the statutory schemes, of empowering Indigenous peoples; questions over whether majority decision-making is an appropriate 'default' position in this context; and questions over how courts receive evidence as to decisions reached by Indigenous peoples.

Whereas public law issues relating to Indigenous peoples have generally been considered through the prism of constitutional law in Canada, Mary Liston's chapter (chapter 8) shifts the conversation to administrative law, shedding light on an under-explored yet significant emergent body of 'Aboriginal administrative law'. In a case study of administrative law and Indigenous 'local governance law', Liston considers case law on judicial review of both electoral processes to appoint Indigenous decision-makers and those decision-makers' subsequent decisions. She examines the proper definition of 'jurisdictions' in various contexts – the jurisdiction of the Indigenous authority, the reviewing court and the Canadian state itself. This study raises questions over whether certain jurisprudential boundaries are useful to 'protect Indigenous legal orders', or are 'unhelpful barriers' that 'obstruct proper recognition of Indigenous decision-makers'. Ultimately, Liston argues for the 'decolonisation' of administrative law. The *sui generis* nature of Indigenous decision-makers must be recognised, with implications for deference, statutory interpretation, procedural fairness, substantive review and remedies.

The next two chapters move from a principal focus on judicial modes of protection to consider the design of political and legal institutions, underpinned by a concern to ensure recognition and voice for Indigenous peoples. These are matters of great moment for all jurisdictions with Indigenous populations, and these issues are currently at the forefront of legal, political and popular consciousness in Australia in light of the Uluru Statement from the Heart.

Kirsty Gover's chapter (chapter 9) addresses the 2017 Uluru Statement from the Heart, an expression of Indigenous sovereignty and charter for constitutional reform to empower Aboriginal peoples, which has permeated legal and political discourse in Australia. Gover examines the potential for the Uluru proposals for 'Voice, Treaty, Truth' to transform Australian public law and augment its democratic processes. She compares the proposals to developments in New Zealand and Canada, finding them modest, reasonable and vitally necessary given the deficiencies of the Australian constitutional order with respect to Indigenous peoples. In contrast to those jurisdictions, Australia lacks recognition of a distinctive constitutional relationship between settler peoples and Indigenous peoples, and between their respective representatives and governments. In turn, the identification in Australian

law of Indigenous peoples as primarily members of a given race leaves them peculiarly vulnerable to discriminatory measures. Lacking recognition of a distinctive relationship, Australian public law has not developed the tools that other jurisdictions have to require governments to consult Indigenous peoples about decisions affecting them. The Uluru proposals would go some way to remedying these significant deficits.

Harry Hobbs (chapter 10) examines the tensions involved in designing Indigenous decision-making institutions connected to or embedded within the public law apparatus of the state. While such institutions are increasingly prevalent and proposals for such institutions increasingly gain traction across settler states, there is an inherent tension between the concerns of Indigenous peoples that such institutions reflect their own ontologies and values, and concerns of the dominant community, who may wish to accommodate these institutions within pre-existing public law frameworks, with the result that Indigenous claims may be subordinated beneath state rationality. Hobbs seeks, by reference to the notion of legitimacy, to identify indicia of institutional design likely to ensure public law remains flexible and substantively accommodative of diverse normative orders. He presents a case study to demonstrate the opportunities and challenges inherent in accommodating Indigenous institutions within state structures. He applies his analytical framework to the now-abolished Aboriginal and Torres Strait Islander Commission, an Indigenous representative body, with a view to distilling insights for the future, given coalescence of Indigenous aspirations behind the Uluru proposals, which include a proposal for a national representative body.

The final chapter in Part 2, by Andrew Geddis and Jacinta Ruru (chapter 11), explores a novel and innovative set of legal developments in New Zealand that defy any neat categorisation. Through legislation, two places of cultural significance to Māori – Te Urewera National Park and the 300-kilometre Whanganui River – have been conferred with legal personhood, while future legislation is envisaged in relation to a third place, Mount Taranaki. By these reforms places gain independent legal existence and are possessed of rights that may be asserted in legal proceedings. As Geddis and Ruru observe, they are no longer ‘things’ over which human beings exercise dominion, but rather ‘persons’ with which humans have a relationship. Importantly, these developments afford recognition to the way in which Māori conceive of and relate to the places in issue, which involves a cosmological view of people as part of nature, not separate from it. Geddis and Ruru explain the reasons why the New Zealand Parliament adopted the ‘legal personhood’ model, and go on to explore the two existing legislative regimes, including the commonalities and differences between them, concluding that the developments are ‘constitutional’ in nature, and also raise significant constitutional questions, including how and where these new legal persons sit within constitutional structures.

Part 3: Public Law, Criminal Law and Private Law

The chapters in Part 3 consider issues at the intersection of public law and other doctrinal fields of municipal law, specifically criminal law and private law. The chapters identify and analyse a series of legal issues that are of fundamental importance today and which are not capable of full and complete understanding without thinking across traditional doctrinal boundaries. Divisions such as criminal law/public law and private law/public law may be

unhelpful distractions and unduly constrain the legal imagination. Rather than invoking a binary division between fields, workable and principled solutions are more likely to arise from a legal approach that acknowledges and endogenises the complexity and multi-dimensional nature of contemporary legal issues.

Turning first to criminal law, David Feldman (chapter 12) charts how public law principles have ‘flowed’ into criminal justice, examining legal issues relating to the police, prosecutorial discretion and prisons. He highlights the 1960s–1970s as the crucial turning point at which deference towards such institutions began to wane. Politicians, academics, inquiries, pressure groups and other phenomena contributed to increased scrutiny of authority, and several scandals led to a view that the police were ‘out of control’. Increased access to justice through legal aid, combined with an increase in solicitors, barristers and judges concerned with such issues, enabled greater scrutiny of criminal justice issues. Such developments can be situated alongside the judicial review revolution of the 1960s. But legislative interventions increased accountability in a way which ‘[l]itigation could not have achieved’. Ultimately, ‘[c]onstitutionalising criminal justice’ required collaboration between the legal and political worlds – a collaboration Feldman worries is not as close today.

Chris Maxwell (chapter 13) addresses the consistency of sentencing decisions. He critiques the apparent ‘special character’ of sentencing discretion in Australia, and the prevailing notion of ‘individualised justice’ in Australian criminal law. According to orthodoxy, Australian judges ought to enjoy maximal freedom when making sentencing decisions, unaided by ‘inappropriate intrusions’ such as sentencing guidelines. By contrast, Maxwell argues that sentencing decisions ‘as a species of public power’ should instead enjoy the ‘full rigour’ of the public law principle of equal treatment. Rather than sentencing guidelines being viewed with suspicion, they should instead be seen as ‘indispensable’ aids to achieving consistency – the value of which Maxwell expounds in his chapter. Crucially, the chapter reminds us that a ‘structured discretion is not a fettered discretion’. This holds for sentencing decisions as it does more generally, including in relation to discretions regulated by administrative law – consistency in administrative law being a focus of several chapters in Part 4.

Turning from criminal to private law, the final three chapters in this Part, as well as addressing the public law–private law division, have synergies with and lead naturally into the chapters in the next Part, in that they directly address legal responses to new and increasingly prevalent modes of government, including the use of contract, digital decision-making and non-statutory powers.

Carol Harlow’s chapter (chapter 14) revisits the topic of her seminal 1980 article, “‘Public’ Law and ‘Private’ Law: Definition without Distinction.”⁵ The sequel examines the public–private division in the light of those developments, including fundamental shifts in government, economy and society, that have occurred in the 40 years since. Harlow’s argument is not that the distinction should never be drawn. Rather, where the boundary falls in given cases is contestable: the boundary should fluctuate, and any distinction should be based on functional and substantive reasoning. The chapter (i) identifies doctrinal pressure points where questions over the divide have played out; (ii) considers developments that have threatened public law, and public law’s response, including the rise of the ‘hands

⁵ C Harlow, “‘Public’ Law and ‘Private’ Law: Definition without Distinction’ (1980) 43 MLR 241.

off' state and subsequently, the 'new regulatory state'; and (iii) charts the emergence of the global and digital era in which public law must now function, arguing that public law, rather than having no further role, has to extend its frontiers so that its control functions can be exercised in the global space in which the parameters of public and private are fluid and constantly changing.

Anne Davies's chapter (chapter 15) records that while governments have always used contract to purchase goods and services, over the latter part of the twentieth century there was a marked quantitative and qualitative increase in this activity in many countries, including the UK. The phenomenon has been analysed by mainstream public lawyers principally through the lens of the 'public/private divide'. From this perspective, the central question was whether private contractors performing public services were subject to judicial review and, later, human rights review. In turn, this discussion contributed to a deeper enquiry about the extent and nature of any differences between public and private law, because the significance of the boundary question is much reduced if the two bodies of law are not that dissimilar. Davies's chapter is dedicated to arguing that while this set of issues is undoubtedly important, it has been something of a distraction from the real problem in this area, which is that public law does not have the right tools to ensure that the government and its contractors are accountable for the proper use of public funds and the effective delivery of public services.

Margaret Allars' chapter (chapter 16) offers a comprehensive doctrinal account of the scope of application of administrative law principles, which demonstrates that the terrain of administrative law extends beyond the boundary of judicial review. The chapter examines the scope of judicial review, considering whether it is settled that exercises of statutory power are invariably justiciable, and the extent to which non-statutory power is justiciable, reflecting on the concept of a 'public law element' as a potential marker of the limits of review, but ultimately considering it an unhelpful distraction. The chapter goes on to consider the potential for judicial review of 'common law capacities' of the executive branch, including the power to enter contracts, as well as the possibility of reviewing a non-statutory decision-maker, possibly with regulatory functions pursuant to a contract with government. The chapter then considers the scope for applying administrative law standards, outside of judicial review, specifically to domestic bodies established under contract, and – pursuant to a fast-developing body of law – to other types of contractual decision-makers.

Part 4: Public Law and Public Administration

The chapters in this Part examine various intersections between public law and public administration. Following on from the previous Part, a number of chapters examine issues raised by and legal responses to the increasing array of techniques utilised by government and public agencies, including use of contract, exercise of non-statutory executive power, executive rule-making, use of soft law instruments such as policy guidance, and reliance on convention. The last two chapters utilise empirical methods to examine intersections between public law and public administration viewed from within administrative agencies; the results are valuable for what they reveal of administrative engagement with legal norms, but also because they ought to inform the approach to legal regulation of public administration, including through judicial review. Ultimately, the chapters in this Part

reinforce the deep interconnectedness and inherent interdependence of public law and public administration, to the point that it may, on occasion, be difficult to distinguish the two phenomena.

Kenneth Hayne's chapter (chapter 17) considers whether public law doctrines have kept pace with changes in the ways executive power is used, focusing on the political branches' looking to the market economy as the model for providing public services, principally through contracting with private entities for provision of such services. Hayne first considers how these sorts of dealings intersect with accepted notions of government structures and the law of judicial review. The chapter then goes on to directly address the nature and extent of executive power, interrogating the basis of executive powers to contract, and examining the political and financial consequences of government contracting. He ends with reflections on whether lawyers have too often examined these arrangements solely through the lens of contract, and whether, when viewed through a public law lens, legal norms have kept up with change or been too confined by pre-existing habits of thought.

Anne Twomey's chapter (chapter 18) examines constitutional conventions pertaining to prerogative powers, with a specific focus on the 'tension between secrecy and transparency'. Public access to archival documents and via freedom of information legislation is revealed to be patchy through case studies such as the saga surrounding Prince Charles's so-called 'black spider letters'. The rise of Cabinet Manuals is examined, and useful comparisons are drawn between the UK, Canada, Australia and New Zealand. Cabinet Manuals' utility as tools of transparency is, however, questioned. Their partisan recording of conventions threatens to 'distort' rather than clarify, and hence must be supplemented by access to underlying documents, so that the Manuals themselves may be scrutinised. Twomey explains how a balance must be struck between the advantages of convention's flexibility and the resulting lack of clarity as to its scope. Her work importantly aims to crack open the 'black box of secrecy' in order to maximise clarity and minimise constitutional crises caused by misunderstandings.

Kathryn Kovacs (chapter 19) writes on the topical issue of presidential power in the US. Her chapter offers a useful history of the Administrative Procedure Act (APA) and outlines how agency rulemaking in the US 'has become increasingly difficult' through a mixture of Congressional, Presidential and judicial requirements. Such difficulties, combined with the atrophying of Congressional policymaking, have led to the President filling the 'power vacuum'. Kovacs outlines the problems with this increased Presidential function, such as insulation from judicial review. She argues that the judicially-created 'rules about rulemaking' are particularly problematic for various reasons, including their conflict with both precedent and the ethos of the APA. She emphasises that fidelity to the APA is particularly important given its 'deep deliberation' during 'an epic legislative battle'. The eventual compromise embodied by the APA 'mandates respect from the courts', which is not currently being shown.

Shona Wilson Stark's chapter (chapter 20) addresses the increasing need to find the right combination of flexibility and consistency in administrative law. In order to address this issue, she considers the relationships between the different grounds of judicial review of non-fettering, legitimate expectations and consistency of policy. She argues that the emergent consistency ground of review is of a piece with 'a long history of consistency' in English administrative law, and that its emergence may clarify the proper limits of the hitherto messy legitimate expectations doctrine. Contrary to suggestions elsewhere that these two relatively new grounds of review are in tension with the well-established non-fettering principle, Stark

argues that all three grounds of review are needed for clear jurisprudence, as well as to send a clearer message to decision-makers. In so doing, we can strike the right balance between flexibility and consistency in order to have ‘the best of both worlds’.

The consistency thread continues to run through chapter 21. Jennifer Raso shifts our focus from the usual perspective of legislative and judicial constraints on administrative action, to the structuring of discretion within administrative agencies themselves. Her empirical research into the behaviour of caseworkers in the ‘Ontario Works’ social assistance programme is particularly important because few caseworker decisions are judicially reviewed. Their interpretations of the programme are therefore ‘practically, if not formally, “the law”’. Building on Jerry Mashaw’s ‘internal’ theory of administrative justice, Raso found that Ontario Works caseworkers mapped – in almost equal numbers – onto a ‘professional identity spectrum’ between ‘pro-client social workers’ and ‘black and white efficiency engineers’. Caseworkers therefore differ between responding to an individual’s ‘unique needs’ or attempting to ensure consistency ‘en masse’, as well as to whether they are more likely to bend or adhere to the rules. The two categories, however, were not as rigidly observed as previous studies may have suggested, because all caseworkers engaged in a process of balancing competing programme norms that in fact may allow for closer internal regulation than judicial review would provide.

Richard Martin’s chapter (chapter 22) presents the results of his study of the Police Service of Northern Ireland’s (PSNI’s) interpretation and application of the Human Rights Act 1998 (HRA 1998). He helps us to ‘extend our gaze’ beyond judges as the ‘interpreters and applicers of the HRA 1998’, reminding us that the ‘culture of justification’ the 1998 Act attempts to foster can only be achieved by other administrators performing an interpretive function too. His research ‘shines a rare light’ on the PSNI’s approach to policing public order in Northern Ireland. Revealing that approach is extremely useful in considering the question of how deferential the courts should be when checking the Convention-compatibility of police exercises of powers. Particularly interesting is the role of the PSNI’s in-house lawyer, whose advice the police declare ‘takes precedence’ over the case law. Given that lawyers who become ‘embedded’ in such positions may ‘use their legal expertise to secure, rather than challenge, organisational goals’, such observations are potentially alarming. More positively, Martin concludes that the PSNI commanders use human rights ‘to reason their way to a decision, not merely to rationalise it to appeal to oversight bodies’.

III. Acknowledgements

In organising the conference on which this collection is based, and preparing this volume for publication, we have received assistance and support from a number of people and institutions.

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We owe a special debt of gratitude to Phapit Triratpan, who was the conference assistant for the 2018 Public Law Conference. She provided significant administrative support for the year and a half leading up to the Conference, led the team of student assistants during the Conference and provided editorial assistance with the preparation of this book. We have greatly valued working with her, and appreciate the hard work she put into this endeavour. During her involvement in the conference she was a JD student at Melbourne Law School, and she is now working as a practising lawyer at a leading firm in Melbourne.

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We are grateful to Hart Publishing, the exclusive sponsor of the 2018 Public Law Conference, and of the Public Law series of conferences, for its ongoing commitment to, and support of, the conference series. The conference series is very much a collaboration with Hart Publishing, which has been heavily involved with the series since its inception, having been the exclusive sponsor of each conference in the series and having published each of the edited collections associated with the series. We have greatly benefited from the more general support and advice of those at Hart in planning the conference series and preparing this volume. In particular we have greatly appreciated the support of Hart's Editorial Director and General Manager, Sinead Maloney. We were delighted that Sinead was able to attend the Melbourne Conference and address the delegates on the first morning of the Conference. We also wish to thank the production team at Hart who worked on this book, including Kate Whetter, Linda Staniford and Richard Cox, and Catherine Minahan, for her characteristically meticulous copy-editing of the book manuscript.

The Public Law series continues to maintain its strong commitment to supporting and promoting the work of early career scholars. The 2018 Conference included dedicated doctoral panels, an innovation first introduced at the 2016 Conference, and the panels were once again a tremendous success and a highlight of the Conference. More generally, we were delighted to receive an overwhelming response from doctoral students from across the world to our call for papers. The Richard Hart Prize for the best paper delivered by

an early career scholar was first established and awarded at the 2016 Conference, and was offered again at the 2018 Conference. We are very grateful to Richard Hart, founder of Hart Publishing, who had a significant role in establishing the conference series, for his continued support of the Prize. The 2018 winner was Anna Dziedzic, a doctoral student at Melbourne Law School, for her paper entitled, 'Constitutional Adjudication by Foreign Judges and the Boundaries of the Judicial Role in Pacific Constitutional Systems.' We are very grateful to the members of the judging panel: Richard Hart, Carol Harlow (LSE), Lord Mance (former Deputy President of the UK Supreme Court) and Cheryl Saunders (Melbourne Law School). The Prize will be offered again in 2020.

Lastly, we wish to thank artist Ande K Terare. We are delighted that his Aboriginal artwork *River Bed* appears on the cover of this book, and we acknowledge his generosity in asking that the licence fee be donated to The Royal Children's Hospital Melbourne. The original artwork is displayed in the foyer of Melbourne Law School.

More information on the 2018 Public Law Conference, including video-recordings of the plenary sessions at the 2018 Conference, can be found at the conference website: <https://law.unimelb.edu.au/public-law-conference>.