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(articles and jeff shaw memorial lecture 2022 included in this part are linked to the LexisNexis platform)

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Articles

[Administrative law within the common law tradition](#)

— *Stephen Gageler*

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I set out to uncover and describe some of the values which influence the judicial review of administrative action within the common law tradition. Articulation of these values by academics has contributed to our present day understanding of them, from Albert Venn Dicey in the 19th century through to Joanna Bell and Paul Daly in this decade. With the benefit of their contributions, I identify four values which I see as fundamental to judicial review of administrative action in Australia. I explain how they might be conceived of as a single composite value, not necessarily peculiar to administrative law, existing within the institutional structures and normative practices of the common law tradition which shape them.

[The selection of a defective major premise](#)

— *Hon William Gummow AC and Aryan Mohseni*

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In a common law system of reasoning, there is no definitive method to identify the correct legal rule, or major premise, from which there proceeds the reasoning to the result. At a more fundamental level, there are also no a priori rules to determine the correct level of generality at which to pitch the scope of that premise. Both remain selective processes which may lead to unsatisfactory outcomes. This is illustrated by our consideration of three recent decisions of courts of final appeal.

[Royal commissions, social policy and multi-skilling: Where does counsel assisting fit?](#)

— *Ronald Sackville AO KC*

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Australian governments have steadfastly maintained their longstanding enthusiasm for establishing royal commissions.

This makes the role of counsel assisting a royal commission especially important. The literature on the subject is rather sparse. In general, commentators assume that counsel assisting's responsibilities centre upon preparing for and conducting public hearings. That assumption is not necessarily correct.

The role and responsibilities of counsel assisting vary depending on the characteristics of the royal commission. If, as is now commonly the case, a royal commission is required to investigate broad questions of social policy, counsel assisting's responsibilities are likely to go well beyond preparing for and conducting forensic hearings.

Counsel therefore have to demonstrate a range of attributes additional to those required to conduct conventional litigation. This can be exceptionally challenging, but also exceptionally rewarding.

'A rare jewel' — But is knowledge property?

— *Amrit MacIntyre*

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The legal character of knowledge and information as something other than property is well established at law. However, certain qualifications may need to be made to the general position. First of all, equity through acting on the conscience of the defendant without the need for any pre-existing proprietary interest, has long allowed remedies to the holder of confidential information that normally attach to property. They include the creation of a trust and allowing a charge over confidential information in certain cases. Secondly, the acceptance of goodwill as a species of personal property may indirectly protect secret knowledge and other types of information from which the goodwill is sourced. General principles of valuation of land and other property may also offer indirect protection to valuable information, to the extent that the information is taken into account in valuing the property. However, the partial protection that information may be afforded in these ways falls short of the protections valuable information would have, if accepted in its own right as a category of property generally. The needs to a contemporary knowledge-based economy may require a greater degree of protection for valuable information than that currently afforded by common law and equity. Against this background, the Law Commission of the United Kingdom has recently recommended the creation through law reform of a new category of personal property, that would include certain types of information that exist in digital format. The courts however may also have a role to play in further developing the protections allowed to information, based on established principles as to what constitutes property.

Constitutional freedoms: Relevance to statutory discretions?

— *Bruce Chen*

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This article re-examines the relevance of constitutional freedoms to statutory discretions. It has been unclear how statutory discretions are constrained by express and implied freedoms under the Australian Constitution. The recent High Court cases of *Comcare v Banerji* and *Palmer v Western Australia* revisited this complex issue, which the article describes as the 'Miller/Wotton doctrine'. Based on existing literature, there are three potential ways that doctrine could be characterised — 'constitutional review', 'administrative ultra vires review', and 'administrative relevant considerations review'. This article critiques the High Court's recent adoption of constitutional ultra vires review and rejection of the other characterisations. It argues that the High Court's rationales for dismissing administrative ultra vires review were insufficient and unconvincing. It contemplates that administrative ultra vires review might still have a future depending on potential broader developments in administrative law, particularly the incorporation of proportionality into Australian administrative law.

Jeff Shaw Memorial Lecture 2022

Jeff Shaw: Advocate, parliamentarian, Attorney-General, judge
& proud alumnus of public education

— *The Hon Michael Kirby AC CMG*

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