ADMINISTRATIVE REGULATION-MAKING: CONTRASTING PARLIAMENTARY AND DELIBERATIVE LEGITIMACY

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While it is clear that administrative regulations can control matters that are morally or politically controversial, the processes by which they are made in Australia do not generally require transparency or public participation, the primary features of deliberative democracy. This aspect of Australian law is similar to other Westminster-based parliamentary systems. This article compares regulation-making processes in Australia with regulation-making in the United States, a system that is recognised by administrative law scholars to be focused on deliberative democracy. The purpose of the comparison is to highlight the distance between Australian regulation-making systems and a system based on deliberative democracy principles, and to develop an understanding of the regulatory contexts in which such deliberative systems could be established in Australia.

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I Introduction: Deliberative Democracy and Administrative Law

Australian governments make laws on matters involving moral disagreement. Some examples include religious welfare services in public schools,[1] prevention of cruelty to animals,[2] and regulation of abortion-inducing drugs.[3] Governments also make laws on matters involving social and economic issues whereby business practices are controlled in order to achieve public benefits. Common examples of this form of regulation include controls on land uses for environmental and public health purposes,[4] limiting fishing entitlements to protect species that are at risk,[5] and controlling the sale of products for consumer health and safety purposes.[6]

Most people would expect that in the Australian constitutional system, decisions involving such moral and political judgements would be made by Parliaments and by way of public debate. However, all of these examples concern laws in the form of regulations — a form of law that generally can be made in Australia and comparable Commonwealth countries without transparency or public participation. If no public consultation is carried out by government officials, members of the public are unlikely to know that a regulation is being made until it is operative. If, at this point, they disagree with it, they will need to seek out a Member of Parliament to engage parliamentary processes to disallow the regulation or start lobbying for it to be repealed or amended.

Public debate is a fundamental characteristic of parliamentary law-making but it is not recognised in law as an essential feature of administrative regulation-making — a form of law-making referred to by Professor Jerry L Mashaw as involving '[m]icropolitics'.[7] The lack of enforceable transparency and public participation laws for administrative decision-making conflicts with developments in political theory in the last 30 or so years that focus on

[1] See, eg, *Williams v Commonwealth* (2014) 252 CLR 416.

[2] See, eg, *Prevention of Cruelty to Animals Regulation 2012* (NSW).

[3] See, eg, *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50.

[4] See, eg, *Paull v Munday* (1976) 9 ALR 245; *South Australia v Tanner* (1989) 166 CLR 161.

[5] See, eg, *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.

[6] See, eg, *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

[7] Jerry L Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (Yale University Press, 2012) 294.

transparency, public debate, and reasons — that is, processes that facilitate deliberative decision-making — as necessary conditions for the legitimacy of laws. While legal and political theorists (liberals,[8] pragmatists,[9] neo-realists[10] and legal positivists)[11] are engaged in ongoing debate regarding deliberative democracy's philosophical basis, scope and content, its procedural framework is generally accepted.[12]

The question for this article concerns the extent to which deliberative forms of legitimacy have been adopted in administrative law doctrine in regard to regulation-making. To answer this question I will compare an overtly deliberative administrative law system of regulation-making, the system in the United States ('US') (to be referred to as the 'US deliberative model'), with the primary features of Australian regulation-making systems (to be referred to as the 'Westminster parliamentary model'). Both models accept that legislatures can delegate authority to administrators to make regulations and that courts in judicial review proceedings can ensure that particular regulations are consistent with the provisions of the empowering Act. However, the two models differ in regard to additional controls. These differences are significant for their contrasting assumptions regarding the legitimacy of regulations.

Australian regulation-making systems focus on parliamentary control of regulations. They enable review of particular regulations by parliamentary committees and disallowance by Parliament. There is, therefore, the possibility of parliamentary debate regarding the social and economic issues inherent in regulations. However, it must be recognised at the outset that parliamentary supervision of regulation-making is limited in practice. It has long been

[8] See, eg, Joshua Cohen, 'Deliberation and Democratic Legitimacy' in Robert E Goodin and Philip Pettit (eds), *Contemporary Political Philosophy: An Anthology* (Blackwell Publishers, 1997) 143, 143–5.

[9] See, eg, Elizabeth Anderson, 'The Epistemology of Democracy' (2006) 3 *Episteme: A Journal of Individual and Social Epistemology* 8, 13–15; James Johnson, 'Arguing for Deliberation: Some Skeptical Considerations' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press, 1998) 161, 173–7; Cheryl Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* (Routledge, 2000).

[10] Jerry L Mashaw, 'Public Reason and Administrative Legitimacy' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 11.

[11] Tom Campbell, 'Legal Positivism and Deliberative Democracy' (1998) 51 *Current Legal Problems* 65.

[12] See, eg, ibid; Misak, above n 9, 153–4; Mashaw, 'Public Reason', above n 10, 13–18.

recognised that parliamentarians have little time or energy for such review,[13] and parliamentary regulation review committees focus on technical matters rather than the policy-based issues that arise in disagreement on social and economic grounds.[14] Nevertheless, parliamentary control of regulations provides the essential additional criterion for the legitimacy of regulations in Australia.

The US deliberative model, on the other hand, focuses on transparency, public participation and reasons that add up to a system recognised by leading scholars as being consistent with the fundamentals of deliberative democracy.[15] As will be examined in the various parts of this article, deliberative processes for making regulations are recognised in US constitutional law and play a prominent role in legislation that controls regulation-making processes and judicial review principles. Accordingly, the US deliberative model makes deliberative processes an essential additional criterion of legitimacy along with legislative authorisation.

The important point of difference between the two systems is that while the Australian parliamentary model includes methods for holding administrators accountable for their regulations to Parliament and the courts, there is nothing in the model that requires open deliberation by regulation-makers. It is not required by general regulation-making legislation or judicial review standards. Judicial review standards are focused instead on ensuring that administrators stay within the scope of power granted to them by the Parliament. Regulation-making legislation in the US does require open deliberation and the courts have administered these laws in a manner that ensures the elements of deliberative decision-making are carried out.

My focus in this article is to draw out the connections between public consultation processes and conceptions of legitimacy inherent in two different, but related, public law systems. This is intended to highlight the distance

[13] See, eg, Andrew Edgar, 'Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts' (2016) 27 *Public Law Review* 18, 22–4; Senate Select Committee, Parliament of Australia, *The Advisability or Otherwise of Establishing Standing Committees of the Senate upon Statutory Rules and Ordinances, International Relations, Finance, Private Members' Bills* (1930) ix [14]–[15]; Jack Beatson, 'Legislative Control of Administrative Rulemaking: Lessons from the British Experience?' (1979) 12 *Cornell International Law Journal* 199, 211–12.

[14] See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 64 [3.10].

[15] Mashaw, 'Public Reason', above n 10, 13–18; Cass R Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Review* 29, 61–3, 85; Richard B Stewart, 'US Administrative Law: A Model For Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63, 73–5.

between Australian regulation-making systems and a system based on principles of deliberative democracy, and to better understand the organising principles of Australian regulation-making systems. It focuses on the different ways in which the two systems allocate sites for political debate and deliberation.

The article starts with an overview in Part II of aspects of Australian public law in order to contrast regulation-making systems with other features of constitutional law and administrative law that enable and require transparency and public participation in government decision-making. It then compares in Parts III to VI the primary features of the general regulation-making systems in Australia and the US — the constitutional principles, the general regulation-making legislation, judicial review standards, and principles regarding access to judicial review. The purpose is to highlight how these features have evolved in Australia to reflect Westminster parliamentary principles and how the US deliberative system differs from it.

There are, however, exceptions in Australia that are examined in Part VII. Parliaments can establish the basic features of a deliberative regulation-making system under specific statutes; for example by legislation that empowers administrators to make regulations such as environmental plans.[16] In Part VII, I briefly examine examples of such mandatory public consultation provisions and identify some common characteristics.

II Regulation-Making in Australia: Between Constitutional and Administrative Law

While Australian administrative law regarding regulations is not directed towards enhancing deliberation, other aspects of Australian public law do play such a role. The High Court has developed the implied freedom of political communication to ensure openness, participation and accountability of government to the people.[17] This has been understood to safeguard debate about political matters and thereby facilitate the basic elements of deliberative

[16] See, eg, *Environmental Planning and Assessment Act 1979* (NSW) ss 35, 57, 123.

[17] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–9 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47–50 (Brennan J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 551–2 [28]–[30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 571 [104] (Keane J); *McCloy v New South Wales* (2015) 325 ALR 15, 28 [45] (French CJ, Kiefel, Bell and Keane JJ). See also Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 13, 21–2, 27.

democracy in regard to parliamentary processes and decision-making.[18] Accordingly, constitutional law plays an important role in establishing the conditions for deliberative decision-making.

Australian administrative law has also developed a set of procedural requirements directed to deliberative decision-making. Procedural fairness is judge-made law that imposes procedural requirements for decision-making by administrative officials. It requires administrators to disclose adverse information and give the affected person a reasonable opportunity to be heard in relation to such information.[19] More recently, the High Court has developed a requirement for the decision-maker to respond in their reasons to the specific argument made by the person affected.[20] This form of responsiveness rounds out the dialogue between the decision-maker and the person affected. The decision-maker is required to disclose crucial information, give the person an opportunity to make arguments, and also respond to such arguments in their reasons for the decision. It makes administrative decision-making a two-way exercise by which the affected member of the public contributes to the particular decision. Accordingly, it is specifically directed towards ensuring deliberative decision-making.

However, procedural fairness has limits that result in it not being applicable to political decisions — the decisions with which deliberative democracy is primarily concerned. Procedural fairness applies to administrative decisions that affect a person directly and individually, and not to political or policy decisions that affect the public generally,[21] as is the case for administrative regulations.[22]

The form of procedure that would enable administrative regulations to be made in a deliberative manner is referred to as public consultation.[23] It

[18] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571. See also Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) 59–60; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 609.

[19] See, eg, *Kioa v West* (1985) 159 CLR 550; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161–2 [29]; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591–2.

[20] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, 1092 [24] (Gummow and Callinan JJ).

[21] *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J), 619–21 (Brennan J), 632–3 (Deane J).

[22] *Re Gosling* (1943) 43 SR (NSW) 312, 318 (Jordan CJ).

[23] See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 17–18; Scott Stephenson, 'Federalism and Rights Deliberation' (2014) 38 *Melbourne University Law Review* 709, 722, citing John Uhr, *Deliberative Democracy in*

involves public notice of a proposed regulation, an opportunity for members of the public to lodge a submission, and requires submissions to be considered and preferably responded to in the administrator's reasons for decision. In Australia, the Commonwealth and state legislation that controls administrative regulation-making generally includes *unenforceable* public consultation provisions.[24] This means that there is no legal significance if administrators fail to carry out a public consultation process or conduct a poor quality public consultation process. This is similar to the laws in comparable Commonwealth countries where process requirements for administrative regulations are not included in general regulation-making legislation but are included instead in unenforceable, policy documents.[25] On the other hand, there is a highly developed system of legal requirements for public consultation for administrative regulations in the US (referred to there as 'notice and comment'). Accordingly, while US administrative law provides enforceable process requirements for the making of administrative regulations, in Commonwealth countries comparable to Australia the generally-applicable legislation that controls regulation-making does not.

When Parliaments in Australia have included mandatory public consultation provisions in specific regulatory contexts as an exception to the general regulation-making legislation, the courts have had to accept the role of supervising deliberative process. The case law on enforcement of mandatory public consultation provisions makes clear that courts can ensure that information in a public notice is accurate and detailed enough for a member of the public to decide whether to participate,[26] ensure that submissions

Australia: The Changing Place of Parliament (Cambridge University Press, 1998) ch 1; Cynthia Farina et al, 'Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project' (2014) 41 *Fordham Urban Law Journal* 1527, 1534–5, 1567.

[24] I will explain the provisions that establish this below in Part IV.

[25] For the United Kingdom, see Cabinet Office, *Consultation Principles: Guidance* (14 January 2016) Gov.UK <https://www.gov.uk/government/publications/consultation-principles-guidance#history>; Paul Craig, *Administrative Law* (Sweet and Maxwell, 7th ed, 2012) 454 [15-019]. For Canada, see Treasury Board of Canada Secretariat, Government of Canada, *Cabinet Directive on Regulatory Management* (2012) <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrpr-eng.asp>; John Mark Keyes, *Executive Legislation* (LexisNexis, 2nd ed, 2010) 198–9. For New Zealand, see Cabinet Office, Department of the Prime Minister and Cabinet (NZ), *Cabinet Manual 2008* (2008) 92–3 [7.40], 99 [7.85]–[7.86]; R I Carter, R M Malone and J S McHerron, *Subordinate Legislation in New Zealand* (LexisNexis, 2013) 98.

[26] See, eg, *Scurr v Brisbane City Council* (1973) 133 CLR 242, 252 (Stephen J).

provided by members of the public are considered by the decision-maker,[27] and can require a new round of consultation when substantial changes are made to a proposal after the initial consultation process is held.[28] In these ways, Australian courts have enforced public consultation rules when they are included in legislation as mandatory requirements and have ensured a basic minimum of deliberative decision-making. Of course, courts cannot carry out such a role for administrative regulations when the consultation requirements are expressly unenforceable.

The lack of generally applicable, enforceable rules requiring transparency and public participation in Australia is particularly concerning when it is considered that administrative regulations have become the most prevalent form of legislation. For example, from 1992 to 2011, the Commonwealth government made between 1546 and 3004 administrative regulations each year,[29] compared to between 84 and 264 Acts of Parliament.[30] The amount of regulations has also increased in recent years. Whereas from 1985 to 1990 the Commonwealth government made between 855 and 1352 regulations each year, between 2004–11 and 2013–15, over 1800 regulations have been made each year.[31] This suggests that administrative regulations have become the primary form of law-making in Australia. Scholarship from comparable Commonwealth countries indicates that this is not only an Australian phenomenon.[32]

[27] *Tickner v Chapman* (1995) 57 FCR 451, 463–4 (Black CJ); *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265, 281, 284 (Finn J).

[28] *Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88–9 (Priestley JA).

[29] Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 415–16.

[30] Chamber Research Office, Department of the House of Representatives, *House of Representatives: Legislation Statistics* (7 December 2016) <http://www.aph.gov.au/Parliamentary_Business/Statistics/~/media/889A1A19021743AB84B9F39180031A72.ashx>.

[31] Evans and Laing, above n 29, 415–16; Office of Parliamentary Counsel, *Annual Report 2014–15* (2015) 45.

[32] Richard Cracknell and Rob Clements, 'Acts and Statutory Instruments: The Volume of UK Legislation 1950 to 2014' (Standard Note SN/SG/2911, House of Commons Library, Parliament of the United Kingdom, 19 March 2014); Andrew Green, 'Regulations and Rule Making: The Dilemma of Delegation' in Colleen M Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications, 2nd ed, 2013) 125, 126; Caroline Morris and Ryan Malone, 'Regulations Review in the New Zealand Parliament' (2004) 4 *Macquarie Law Journal* 7, 8.

III The Fork in the Road: Constitutional Principles

Constitutional laws regarding delegation of law-making powers by Parliaments to administrators provide a convenient starting point as they establish the organising principles for administrative regulation-making systems. Although delegation of regulation-making power is permissible in both the US and Australia, there are important differences between them in regard to the controls they impose on such delegation. These differences are highly significant for administrative law principles and processes applying to regulation-making. They played an important role in the primary Australian case regarding delegation of law-making power to administrators, *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* ('*Dignan*').[33]

The *Dignan* case involved a challenge to a regulation-making power concerning the employment of transport workers. The regulation-making power in the relevant Act was very broad and the regulations made according to it had raised substantial political disagreement.[34] The applicant challenged the provision in the Act granting power to make regulations for breaching the separation of powers in the *Commonwealth Constitution*. The High Court rejected the challenge.

Dixon J, and to a lesser extent Evatt J, understood the options for resolving the issues as involving a choice between US and Westminster parliamentary approaches to delegation of law-making powers.[35] Dixon J understood the US non-delegation principle as ensuring that the scope of power delegated to an administrator is limited.[36] The principle is commonly referred to as the 'intelligible principle'[37] and it requires the provision delegating legislative power to include parameters. On the other hand, Dixon J understood the Westminster parliamentary approach as allowing very broad delegation of regulation-making powers. Although Dixon J accepted that 'logically or theoretically' the *Commonwealth Constitution* made Parliament the exclusive repository of law-making power,[38] he accepted that the Westminster parliamentary approach was right for Australian law due to 'the history and usages

[33] (1931) 46 CLR 73.

[34] See G S Reid, 'Parliament and Delegated Legislation' in J R Nethercote (ed), *Parliament and Bureaucracy: Parliamentary Scrutiny of Administration — Prospects and Problems in the 1980s* (Hale and Iremonger, 1982) 149, 154–5; Stellios, above n 18, 203–4.

[35] *Dignan* (1931) 46 CLR 73, 89–102 (Dixon J), 114 (Evatt J).

[36] Ibid 94 (Dixon J).

[37] *JW Hampton Jr & Co v United States*, 276 US 394, 409 (Taft CJ) (1928).

[38] *Dignan* (1931) 46 CLR 73, 101.

of British legislation and the theories of English law',[39] and because the High Court had effectively adopted it in earlier cases.

Consistently with this understanding of administrative regulations, the limits on delegating regulation-making powers in Australia are minimal — requiring only that the delegating provision of the Act be within a head of power under s 51 of the *Constitution*[40] and that Parliament not abdicate its law-making power by establishing an institution with general law-making power.[41]

The justices in *Dignan* explained how administrative regulations are understood within the Westminster parliamentary constitutional framework. Dixon J stated that in this model particular regulations rely on the empowering legislation for their efficacy, not only at the time a regulation is made, but also in a continuing sense.[42] Evatt J echoed this view and based it on parliamentary supremacy: that Parliament is not limited in its ability to delegate regulation-making power and retains control over the regulation that is made through its power to invalidate the Act or the regulation.[43] Australian constitutional law scholars have stated that the High Court's decision in *Dignan* understates the limits on delegating regulation-making power that could be derived from the separation of powers in the *Commonwealth Constitution*.[44] Nevertheless, the High Court has not added to the criteria initially set out in *Dignan* for the delegation of regulation-making powers and accordingly it is appropriate to understand that case as establishing the constitutional principles by which regulation-making systems in Australia have developed.

Accordingly, Australian constitutional law is relatively permissive in regard to Parliaments granting powers to administrators to make regulations. The emphasis is on parliamentary authorisation and potential ongoing control over particular regulations. Constitutional law does not require, or 'prod',[45]

[39] Ibid 102.

[40] Ibid 101.

[41] Ibid 95–6.

[42] Ibid 102.

[43] Ibid 118.

[44] Gabrielle Appleby, 'Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation' (2016) 69 *Parliamentary Affairs* 269, 274, 280–3; Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 48–9; G Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 186–7.

[45] For an argument that constitutional law should prompt reform of regulation-making process see Appleby, above n 44, 280–3.

procedural requirements for administrative regulation-making. The US non-delegation principle does include such processes, albeit as secondary requirements that have been brought to light in recent scholarship. While the US non-delegation principle has only been applied to invalidate legislation in two cases, and those two cases were decided as long ago as 1935,[46] the principles developed in the non-delegation cases provide important conceptual background to administrative law principles for regulation-making.

The US non-delegation principle's primary feature is the just-mentioned 'intelligible principle', which requires that the legislation that delegates regulation-making power to administrators includes standards that guide administrators when they exercise the power.[47] The intelligible principle establishes an important role for administrative law litigation. If called upon, courts can determine whether particular regulations comply with the standards included in the statutory power to make regulations.[48] Importantly, however, the US non-delegation principle includes an additional requirement. Recent scholarship has shown that the early non-delegation case law in the 1920s and 1930s included not only the intelligible principle but also a requirement for administrators to make particular statements when exercising powers granted to them. Professor Stack highlights that in these cases, the US Supreme Court determined that administrators must make an express statement in the administrative order or record that statutory conditions, those that are necessary for the constitutional validity of the Act, are satisfied for the administrative action relevant in the case.[49] The Court insisted that it could not presume that findings regarding such conditions had been made by the administrator.[50] Professor Stack examines how this requirement influenced the Supreme Court's non-delegation cases and subsequently-developed

[46] *Panama Refining Co v Ryan*, 293 US 388 (1935); *ALA Schechter Poultry Corporation v United States*, 295 US 495 (1935). See also Peter L Strauss, *Administrative Justice in the United States* (Carolina Academic Press, 3rd ed, 2016) 46.

[47] *JW Hampton Jr & Co v United States*, 276 US 394, 409 (Taft CJ) (1928); *Panama Refining Co v Ryan*, 293 US 388, 429–31 (Hughes CJ) (1935); *ALA Schechter Poultry Corporation v United States*, 295 US 495, 530, 541–2 (Hughes CJ) (1935).

[48] Strauss, *Administrative Justice*, above n 46, 46; Laurence H Tribe, *American Constitutional Law* (Foundation Press, 3rd ed, 2000) vol 1, 985.

[49] Kevin M Stack, 'The Constitutional Foundations of *Chenery*' (2007) 116 *Yale Law Journal* 952, 982–9; *Wichita Railroad & Light Co v Public Utilities Commission (Kan)*, 260 US 48, 58–9 (Taft CJ) (1922); *Mahler v Eby*, 264 US 32, 42–5 (Taft CJ) (1924); *Panama Refining Co v Ryan*, 293 US 388, 431 (Hughes CJ) (1935).

[50] *Wichita Railroad & Light Co v Public Utilities Commission (Kan)*, 260 US 48, 57–9 (Taft CJ) (1922).

principles of US administrative law; in particular, administrators' obligation to provide reasons established by *Securities and Exchange Commission v Chenery Corporation*.[51]

The US non-delegation principle contributes to deliberative decision-making to an extent. The cases do not expressly extend to requiring public participation procedures for administrative regulation-making.[52] That would be inconsistent with due process principles that require procedures for administrative action affecting a small number of people on individual grounds but not for general determinations.[53] The significance of the US non-delegation principles for my purposes is that, unlike the High Court's approach in *Dignan*,[54] they enable a role for courts to review the legality of, and require an express justification for, the exercise of delegated authority.

Accordingly, the High Court's decision in *Dignan* to continue with the approach taken by English courts to delegation of regulation-making powers placed Australian law on a different path to US law. The implication of the High Court's decision in *Dignan* is that Parliament is the primary place for control of regulation-making, at least to repeal the particular regulation or the legislation on which it is based. This aspect of *Dignan* is consistent with what Professor Paul Craig refers to as the concept of 'parliamentary monopoly' inherent in A V Dicey's account of administrative law; that '[a]ll governmental power should be channelled through Parliament in order that it might be subject to legitimation and oversight by the Commons', and that 'all real public power [is] concentrated in the duly elected Parliament.'[55]

On the other hand, the US non-delegation principle is designed to limit the scope of administrators' law-making authority and provide a role for courts in supervising the exercise of such powers. Professor Peter Strauss explains it as establishing a system that encourages administrators to acknowledge that they are obliged 'to demonstrate to the courts that they have

[51] 318 US 80, 94–5 (Frankfurter J) (1943). See also *Citizens to Preserve Overton Park Inc v Volpe*, 401 US 402, 418–20 (Marshall J) (1971); Mashaw, 'Public Reason', above n 10, 15; Peter Cane, 'Records, Reasons and Rationality in Judicial Control of Administrative Power: England, the US and Australia' (2015) 48 *Israel Law Review* 309, 320–1.

[52] For an argument that the cases do extend in this way, see Evan J Criddle, 'When Delegation Begets Domination: Due Process of Administrative Lawmaking' (2011) 46 *Georgia Law Review* 117, 170–6.

[53] *Bi-Metallic Investment Co v State Board of Equalization*, 239 US 441, 445–6 (Holmes J) (1915).

[54] (1931) 46 CLR 73.

[55] P P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 20–1.

legal authority for their actions, that they have followed required procedure, that they can justify the conclusions they have reached in terms of the information presented to them, and so forth.'[56] In this way, the US non-delegation principle prods administrators to make regulations in a manner that can be justified legally and by relevant information. Additionally, some US administrative law scholars have understood the non-delegation principle as having connections with subsequent administrative law developments that I will examine in the next Parts of the article. The connection is that while the non-delegation doctrine has been under-utilised since the 1930s, the courts subsequently compensated by way of administrative law doctrine by increasing their supervision of regulation-making procedures.[57]

It is, therefore, significant for the development of Australian regulation-making systems that Dixon J, and to a lesser extent Evatt J, perceived the issue in *Dignan* as a choice between Westminster and US models of constitutional law and that they decided to take the Westminster path. This path focuses on Parliament providing administrators with authority to make regulations with minimal additional constitutional constraints. US constitutional law includes constraints and provides an important role for the courts in administrative law proceedings. The next three Parts of the article explain the primary features of Australian regulation-making systems in order to highlight how they differ from the equivalent features of the US deliberative model.

IV Regulation-Making Legislation

The Australian legislation that provides the general controls on regulation-making focuses on Parliament as the primary supervisor of administrative regulation-making. If public consultation requirements are included in such legislation, the provisions generally make clear that they are not judicially enforceable requirements. This is an important contrast with the equivalent legislation in the United States, the *Administrative Procedure Act*, 5 USC (1946) ('*Administrative Procedure Act*'). While that Act does not establish all the characteristics of a deliberation-focused system of regulation-making, it provides a basic framework that supports it.

[56] Strauss, *Administrative Justice,* above n 46, 48.

[57] Kathryn A Watts, 'Rulemaking as Legislating' (2015) 103 *Georgetown Law Journal* 1003, 1043, 1049–51; Gillian E Metzger, 'Ordinary Administrative Law as Constitutional Common Law' (2010) 110 *Columbia Law Review* 479, 490–4.

The primary features of Australian regulation-making legislation are publication and commencement requirements for final regulations, tabling of regulations in Parliament and scrutiny by parliamentary committees.[58] These features can be understood as providing a procedural framework by which Parliament can supervise regulation-making. In this way these Acts support the Westminster-based principles accepted in the *Dignan* case[59] as a matter of constitutional law.

Some Australian jurisdictions also include public consultation provisions in these Acts.[60] However, the provisions are designed to make clear that consultation is not mandatory. Whether consultation is carried out or not is controlled by an administrative official, typically the relevant Minister.[61] It is common for Australian regulation-making legislation to expressly state that non-compliance with consultation provisions does not lead to invalidity of the regulation;[62] a signal to the courts that breach of these process requirements will not lead to a remedy invalidating the regulation.[63]

The discretionary nature of the public consultation provisions in Australian regulation-making legislation does not conflict with the constitutional principles expressed in *Dignan* and, as explained in the Introduction, is similar to comparable Commonwealth countries. Regulation-making legislation in such countries does not usually include public consultation requirements and instead there are guidelines for consultation provided in policy documents.[64] While public consultation was included as a mandatory

[58] Pearce and Argument, above n 14, chs 2–3.

[59] (1931) 46 CLR 73.

[60] *Legislation Act 2003* (Cth) s 17; *Subordinate Legislation Act 1989* (NSW) s 5(2); *Subordinate Legislation Act 1992* (Tas) s 5(2); *Subordinate Legislation Act 1994* (Vic). The states and territories without consultation provisions are: Australian Capital Territory (*Legislation Act 2001* (ACT)); Northern Territory (*Interpretation Act 1978* (NT)); South Australia (*Subordinate Legislation Act 1978* (SA)); Queensland (*Statutory Instruments Act 1992* (Qld)); Western Australia (*Interpretation Act 1984* (WA)).

[61] *Legislation Act 2003* (Cth) s 17; *Subordinate Legislation Act 1989* (NSW) ss 5(2), 6; *Subordinate Legislation Act 1992* (Tas) ss 5–6; *Subordinate Legislation Act 1994* (Vic) ss 8–9, 12F.

[62] *Legislation Act 2003* (Cth) s 19; *Subordinate Legislation Act 1989* (NSW) s 9; *Subordinate Legislation Act 1992* (Tas) s 10. Note that lack of consultation may need to be explained by the rule-maker in an explanatory statement: see, eg, *Legislation Act 2003* (Cth) s 15J(2)(e).

[63] Note that some general regulation-making Acts indicate that supervision of consultation processes is a matter for parliamentary committees: see, eg, *Legislation Review Act 1987* (NSW) s 9(2)(b); *Subordinate Legislation Committee Act 1969* (Tas) s 8(1)(ab); *Subordinate Legislation Act 1994* (Vic) s 21(1)(j).

[64] See above n 25 and accompanying text.

requirement in 19th century United Kingdom legislation,[65] the provisions were not reproduced in the Act that replaced it, the *Statutory Instruments Act 1946*, 9 & 10 Geo 6, c 36,[66] and as explained in the previous paragraph, have also not been adopted in current Australian legislation.[67] Public consultation in Westminster parliamentary systems is regarded as an optional extra at the government's discretion. It may be acknowledged in Australian regulation-making legislation but it does not rise to the level of an enforceable legal requirement. Most importantly, the result is that in general there is no role for courts to supervise public consultation processes.

In the US, the *Administrative Procedure Act* contributes to the deliberative nature of the regulation-making system through its notice and comment provisions. Under these provisions, notice of the proposed regulation is required to be published in the federal register,[68] interested persons are provided an opportunity to make submissions, and regulations are required to include reasons in the form of 'a concise general statement of their basis and purpose.'[69] The notice and comment provisions are recognised by US scholars as essentially based in administrative law but have constitutional law significance. They allow courts to avoid determining whether such procedural requirements are required by constitutional law, and constitutional principles have inspired the courts' approach to enforcing the provisions.[70] Most importantly, the notice and comment provisions are recognised as establishing a framework for deliberative decision-making — a process for debate about the content of regulations.[71]

Australia's regulation-making Acts focus instead on parliamentary supervision. This makes sense in a Westminster parliamentary system where Parliament is recognised as having a monopoly on political power. According-

[65] *Rules Publication Act 1893*, 56 & 57 Vict 1, c 66. For the history of this Act see Sir Carleton Kemp Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law* (Stevens and Sons, 3rd ed, 1965) 98–9.

[66] That means that in the same year that public consultation provisions were dropped from general regulation-making requirements in the United Kingdom, they were introduced in the US by the *Administrative Procedure Act*.

[67] It is worth noting that equivalent provisions were included in early Australian legislation but repealed in 1916: *Rules Publication Act 1903* (Cth) s 3, repealed by *Rules Publication Act 1916* (Cth) s 3.

[68] *Administrative Procedure Act* § 553(b).

[69] Ibid § 553(c).

[70] Metzger, above n 57, 489–93. See also Criddle, above n 52, 177–9.

[71] Cass R Sunstein, 'Deliberative Democracy in the Trenches' (2017) 146(3) *Daedalus* (forthcoming).

ly, whereas in the US a member of the public is generally entitled by law to participate in regulation-making processes, in parliamentary systems a member of the public will have to rely on government practices for there to be a consultation process.

V Grounds of Judicial Review

The judicial controls applied to administrative regulations are fundamentally different under the two models. As will be explained in this Part, the Australian Westminster parliamentary system has an instrumental focus. In this system the courts do not review regulations for compliance with court-developed principles of procedural fairness,[72] and the courts rarely test administrative regulations against otherwise commonly-applied administrative law grounds of review, such as the failure to consider relevant matters.[73] Instead courts test the challenged regulation in instrumental terms: that is, whether the regulation is a legally permissible means for achieving statutory purposes. On the other hand, the standards applied by US courts in their review of administrative regulations are commonly understood to establish a deliberation-based model. In this Part, I outline how these two approaches to judicial review of regulations are influenced by differences in the two constitutional systems. The High Court's acceptance of the Westminster parliamentary path in *Dignan*[74] has led to a very different set of judicial review standards than those which apply according to the approach taken in the US.

The instrumental approach to judicial review of administrative regulations applied by Australian courts can be seen in the grounds of review applied by the courts. Courts test regulations by asking whether they are consistent with the primary Act. The provision in the primary Act delegating power to make regulations is interpreted to enable regulations to be made for a particular, either express or implied, purpose.[75] This is made clear in *Shanahan v Scott*,[76] where the High Court stated that a regulation-making power in a primary Act 'will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which

[72] *Re Gosling* (1943) 43 SR (NSW) 312, 318 (Jordan CJ); *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J) 619–21, (Brennan J), 632–3 (Deane J).

[73] Pearce and Argument, above n 14, 173–5 [12.9].

[74] (1931) 46 CLR 73.

[75] Pearce and Argument, above n 14, 315 [20.1].

[76] (1957) 96 CLR 245.

the legislature has adopted to attain its ends.'[77] Australian courts commonly test the consistency of administrative regulations with the primary Act by determining whether the regulations have been made for an improper purpose,[78] involve means for achieving the statutory purpose that are inconsistent with the means permitted by the Act,[79] or are an attempt to extend the field of operation of the Act rather than fill in the details.[80]

When Australian courts are requested to go beyond testing whether regulations are consistent with the empowering Act in this way, and instead rely on grounds of review such as unreasonableness or uncertainty, there have been attempts by the courts to conceive such grounds in instrumental terms. For example, Dixon J in *Williams v Melbourne Corporation*[81] said of the applicant's challenge to a by-law on the ground of unreasonableness that the High Court had not treated unreasonableness as a separate ground of invalidity.[82] Instead, Dixon J reviewed the regulation according to instrumental reasoning: whether the by-law was a reasonable means for achieving the statutory purpose.[83] Similarly when an administrative order was challenged in the High Court on the ground of uncertainty in *King Gee Clothing Co Pty Ltd v Commonwealth*,[84] Dixon J would not accept that this is a separate ground of review and instead understood a requirement for certainty to be implied in the provision delegating the relevant power.[85] These cases highlight that Australian courts favour methods of reviewing regulations that can be framed in terms of compliance with the primary Act. Instrumental reasoning has been favoured by the courts in order to present such review as involving mere enforcement of the primary legislation, rather than the imposition by courts of additional criteria.

While judicial review of administrative regulations in Australia commonly occurs according to instrumental reasoning, this does not mean it is necessarily a restrained form of review. The courts can read the empowering Act and the regulations in a fine-grained manner to determine whether it is an

77 Ibid 250 (Dixon CJ, Williams, Webb and Fullagar JJ).

78 See, eg, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

79 See, eg, *Paull v Munday* (1976) 9 ALR 245, 251 (Gibbs J).

80 *Shanahan v Scott* (1957) 96 CLR 245, 253–4 (Dixon CJ, Williams, Webb and Fullagar JJ).

81 (1933) 49 CLR 142.

82 Ibid 154.

83 Ibid 155.

84 (1945) 71 CLR 184.

85 Ibid 195–7.

authorised means for achieving the statutory purposes.[86] This is closely related to the concept of parliamentary monopoly in Westminster-based systems. The courts in these cases can closely examine whether administrators have gone beyond the scope of the power granted to them by the primary legislation. If so, the administrators are regarded, in Professor Paul Craig's terms, as usurping Parliament's monopoly on public power.[87]

Professor Craig has also suggested that the general lack of procedural review of regulations in Westminster parliamentary systems can be explained by such procedures implying that regulation-making involves a form of non-parliamentary politics — an implication that would undermine Parliament's purported monopoly on public power.[88] Although it is difficult to know precisely why Australian courts have not imposed procedural fairness obligations on the making of administrative regulations,[89] I would offer a different reason for such reluctance. Australian courts may be reluctant to extend procedural fairness to administrative regulation-making because it would involve imposing controls on administrative regulation-making beyond the instrumental terms that courts usually apply to the task of reviewing regulations.[90] Dixon J may have been able to characterise the unreasonableness and uncertainty grounds of review in instrumental terms but it would be implausible to see enforceable procedures in that way. Courts usually understand procedural fairness as being court-developed — that it involves 'common law notions of justice and fairness',[91] and that 'the justice of the common law will supply the omission of the legislature.'[92] It is also difficult to imply consultation procedures into regulation-making powers when general regulation-making legislation in Australia imposes procedures for commencement, publication and tabling of regulations in Parliament but expressly stops short of establishing enforceable public consultation require-

[86] See, eg, *Paull v Munday* (1976) 9 ALR 245; *Evans v New South Wales* (2008) 168 FCR 576.

[87] Craig, *Public Law and Democracy*, above n 55, 20–3.

[88] Craig, *Administrative Law*, above n 25, 8–9 [1-007].

[89] See Andrew Edgar, 'Judicial Review of Delegated Legislation: Why Favour Substantive Review over Procedural Review?' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 189, 196–200.

[90] See also D J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 488–9.

[91] *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J). See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

[92] *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194; 143 ER 414, 420 (Byles J).

ments.[93] Accordingly, while a number of scholars have argued for procedural fairness to be extended to regulation-making,[94] the courts have not done so.

To be clear, Australian courts have no reluctance applying mandatory public consultation requirements when they are included in primary legislation,[95] but, of course, such provisions are not included in general regulation-making legislation. In Part VII, I will examine the significance of their inclusion in sector-specific legislation (eg, environmental legislation, public health legislation etc).

The grounds of review applied by the US courts to administrative regulations have a different focus. In brief terms, the courts have developed the requirement for public notice of administrative regulations in § 553(b) of the *Administrative Procedure Act* to require agencies to disclose the information on which the proposed rule is based.[96] The requirement in § 553(c) of the Act that the agency includes with their regulation 'a concise general statement of their basis and purpose' has been interpreted very broadly by the courts. The courts require agencies to consider and respond to significant comments lodged by members of the public.[97] The classical statement of this requirement was made in *Automotive Parts & Accessories Association Inc v Boyd*[98] by Judge McGowan that the administrator's reasons 'will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.'[99] The apparent purpose of this form of judicial review is to provide an accountability mechanism directed to protecting and enhancing participation of members of the public in regulatory

[93] See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 450–2 [7.230].

[94] See, eg, Geneviève Cartier, 'Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?' (2003) 53 *University of Toronto Law Journal* 217; Galligan, above n 90, 491; G J Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16 *Melbourne University Law Review* 569.

[95] See Andrew Edgar, 'Judicial Review of Public Consultation Processes: A Safeguard against Tokenism?' (2013) 24 *Public Law Review* 209.

[96] *Portland Cement Association v Ruckelshaus*, 486 F 2d 375, 392–4 (Judge Leventhal) (DC Cir, 1973); Richard J Pierce Jr, *Administrative Law Treatise* (Wolters Kluwer, 5th ed, 2010) vol 1, 582–4; Strauss, *Administrative Justice*, above n 46, 322.

[97] *Perez v Mortgage Bankers Association*, 135 S Ct 1199, 1203 (Sotomayor J) (2015); *Department of Natural Resources and Environmental Control (Del) v Environmental Protection Agency,* 785 F 3d 1, 11, 14–16 (Judge Randolph) (DC Cir, 2015). See also Pierce, *Administrative Law Treatise*, above n 96, 594.

[98] 407 F 2d 330 (DC Cir, 1968).

[99] Ibid 338.

processes.[100] Public law scholars in the United States have expressly linked the *Administrative Procedure Act*'s notice and comment requirements and the related case law with the constitutional non-delegation principle,[101] and deliberative democracy principles.[102]

Accordingly, judicial review of administrative regulations in the US has a different focus to such review in Australia. The Australian courts' approach is consistent with the Westminster parliamentary model that was adopted by the High Court in *Dignan*. The overtly instrumental approach that has influenced the key Australian cases requires courts to keep a close eye on administrators' attempts to expand their powers beyond the confines of the primary Act but seems to have disabled courts from imposing the procedural requirements that are applied in other administrative law contexts.

On the other hand, the approach adopted by US courts to the *Administrative Procedure Act* provisions is directly focused on deliberative principles. This is due to the combination of prompting by the constitutional non-delegation principle (which, as explained in Part III, gives constitutional significance to requirements to provide reasons), enactment of the *Administrative Procedure Act* with its notice and comment provisions, and the development of participation-based judicial review standards. Professor Richard Stewart, a leading scholar of the US developments, sums up these developments as meaning that '[t]he judiciary is the vital cockpit' in this deliberative conception of administrative law.[103]

VI Access to the Courts

Administrative law scholarship in the US has also emphasised that laws regarding access to the courts and the timing of judicial review litigation have particular relevance to the courts' ability to supervise administrators' deliberative practices. In particular, this scholarship identifies a paradigm shift in the 1960s and 1970s in which standing and justiciability principles were broadened in a manner that enables the courts to supervise public participa-

[100] Stewart, 'US Administrative Law', above n 15, 74–5. See also Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Rethinking Judicial Review of Expert Agencies' (2015) 93 *Texas Law Review* 1681, 1720–1.

[101] Stack, above n 49, 962–3, 992–6; Criddle, above n 52, 175–9.

[102] Mashaw, 'Public Reason', above n 10, 13–18; Sunstein, 'Interest Groups in American Public Law', above n 15, 61–3, 85.

[103] Stewart, 'US Administrative Law', above n 15, 75.

tion in administrative regulation-making processes.[104] While Australian law in these areas has also been liberalised since this period, it has not occurred to the same extent. This has important consequences for the courts' ability to supervise administrative regulation-making in a manner that ensures deliberative decision-making.

It is helpful to start by examining the connection between principles regarding access to the courts and the stakeholders in regulatory debates. Traditional judicial review principles enable proceedings to be brought to challenge regulations that are being enforced against the plaintiff or when the plaintiff is clearly at risk of enforcement. Standing laws guarantee access to the courts for these plaintiffs, sometimes referred to as 'regulated persons'. On the other hand, there are beneficiaries of regulatory laws who seek to enhance the purposes of the Act such as protecting the environment, public health and safety, and national and local heritage and cultural matters. They may seek to bring judicial review proceedings on the ground that they were not given fair treatment in the regulation-making process. There are, however, difficulties for these potential plaintiffs. Their interests are less likely to match the courts' understanding of interests that satisfy standing requirements. Additionally, their complaint about the unfairness of the regulation-making process will arise at the time regulations are made rather than when they are enforced. According to traditional judicial review principles, these difficulties mean they are unlikely to be granted access to the courts.

Australian standing and justiciability laws in regard to challenges to administrative regulations are based on traditional judicial review principles. They limit the courts' jurisdiction by reference to a regulation's actual or likely harm to a person's individual rights and interests. Challenges to administrative regulations can be brought by way of a collateral challenge: that is, when a person is alleged to have breached the regulation and the person defends the action by claiming that the regulation is invalid. Many of the landmark Australian cases are of this kind.[105] There is no question in such cases that the regulation applies directly to the defendant; they have been singled out by officials for enforcement. Declaratory relief is the primary remedy when

[104] Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1669–70; Jerry L Mashaw and David L Harfst, *The Struggle for Auto Safety* (Harvard University Press, 1990) 157–63; Peter L Strauss, 'Revisiting *Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community' (1992) 39 *UCLA Law Review* 1251, 1258–60.

[105] See, eg, *Shanahan v Scott* (1957) 96 CLR 245; *Paull v Munday* (1976) 9 ALR 245; *Foley v Padley* (1984) 154 CLR 349.

regulations are challenged in proceedings not involving a collateral challenge.[106] The general principles for declaratory relief require the plaintiff to have a real or sufficient interest in the subject matter of the litigation;[107] the case must have practical consequences for the plaintiff, and must not raise hypothetical questions.[108] Challenges to regulations may be made prior to enforcement of them by officials,[109] although the plaintiff will need to show that their freedom of action is affected by the challenged law or that they are at risk of it being enforced against them.[110]

Both kinds of proceeding, collateral challenges and applications for declarations according to the just-mentioned limits, protect the interests of individuals and organisations that are regulated by the relevant regulation. The common justification for limiting judicial review in this manner is that it is a method of restricting courts from interfering with political decision-making.[111] Accordingly, in the absence of legislation that extends standing, the general principles of Australian law are consistent with traditional judicial review principles. Members of the public with property or commercial rights and interests restricted by a regulation will have a sufficient interest to bring proceedings according to Australia's general judicial review principles. When Australian law includes enforceable public consultation requirements these

106 Pearce and Argument, above n 14, 402 [26.3].

107 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 626–7 [19-175]–[19-180].

108 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 76 [64] (Bell J), 90 [112] (Gageler J), 123 [235] (Keane J), 152 [350] (Gordon J).

109 See, eg, *Evans v New South Wales* (2008) 168 FCR 576, 585–6 [28]–[35]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 357. See also Aronson and Groves, above n 93, 894–5 [15.140].

110 *Kuczborski v Queensland* (2014) 254 CLR 51, 61 [6] (French CJ), 87–8 [99] (Hayne J), 107 [178] (Crennan, Kiefel, Gageler and Keane JJ), 133 [283] (Bell J); *Croome v Tasmania* (1997) 191 CLR 119, 127–8 (Brennan CJ, Dawson and Toohey JJ), 138–9 (Gaudron, McHugh and Gummow JJ); Pearce and Argument, above n 14, 410–11 [26.11].

111 Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 227–9; Peter Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23, 29; Mashaw, *Creating the Administrative Constitution*, above n 7, 306.

stakeholders are entitled to bring proceedings claiming that such processes were not properly carried out.[112]

Access to the courts for stakeholders with beneficiary interests is more difficult. Their primary concern will be that the administrator has insufficiently pursued the public welfare purposes of the relevant legislation. But of course, they are not at risk of enforcement or having their freedom of action affected by the regulation as is required for standing rules regarding regulations. According to Australian judicial review principles, the beneficiaries would not be in a position to challenge administrative regulation-making processes, even when such procedural requirements are included in legislation.

Standing laws in the US shifted in the 1960s and 1970s to move beyond the traditional limits. These laws include a range of technicalities that are unnecessary to examine here.[113] The significant point is that US standing laws are sufficiently flexible for beneficiaries to be granted standing to argue that the challenged regulations or decision has not gone far enough to promote the public welfare purposes of the particular legislation. For example, the interests that are accepted by the courts extend to 'aesthetic, conservational, and recreational' matters;[114] thus enabling standing for beneficiaries of environmental laws. While beneficiaries may regularly gain access to the courts,[115] the US Supreme Court has recognised that they are more likely than regulated parties to have difficulty establishing it.[116] Administrative law scholars highlight that there are continuing tensions between acceptance of, and resistance to, standing for such plaintiffs that are played out in the cases in argument relating to technicalities within standing doctrine.[117] Accordingly, while standing has been extended to enable a broader range of persons to

[112] See, eg, *Tickner v Chapman* (1995) 57 FCR 451, 467 (Burchett J); *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265, 267 (Finn J).

[113] See, eg, *Spokeo Inc v Robins* (US Sup Ct, No 13-1339, 16 May 2016) slip op 5–10 (Alito J); Richard J Pierce Jr, *Administrative Law Treatise* (Wolters Kluwer, 5th ed, 2010) vol 3, ch 16.

[114] *Association of Data Processing Service Organizations Inc v Camp*, 397 US 150, 154 (Douglas J) (1970), quoting *Scenic Hudson Preservation Conference v Federal Power Commission*, 354 F 2d 608, 616 (Judge Hays) (2nd Cir, 1965).

[115] See, eg, *Friends of Animals v Jewell*, 824 F 3d 1033, 1040–2 (Judge Edwards) (DC Cir, 2016); *Environmental Integrity Project v McCarthy*, 139 F Supp 3d 25, 36–8 (Judge Moss) (DC Cir, 2015).

[116] *Lujan v Defenders of Wildlife*, 504 US 555, 562 (Scalia J) (1992).

[117] See, eg, Jeffrey S Lubbers, *A Guide to Federal Agency Rulemaking* (ABA Publishing, 5th ed, 2012) 370–1; Strauss, *Administrative Justice*, above n 46, 429–39.

engage the courts to review administrative regulations than under traditional judicial review laws, standing-related issues still regularly arise in the cases.

Judicial review in the US also includes greater flexibility in regard to the timing of judicial review proceedings. The landmark case is *Abbott Laboratories v Gardner* ('*Abbott Laboratories*') in which the Supreme Court held that a regulation that had not been enforced could be reviewed by the Court as the regulations had legal status and affected the applicants.[118] The case is regarded as establishing a pragmatic rather than formal approach to the timing of judicial review.[119] The result of *Abbott Laboratories* is that challenges to notice and comment processes for making regulations can be brought when regulations are made rather than when they are enforced.[120] The change marked by *Abbott Laboratories* is commonly recognised as being an essential feature of the US regulation-making system.[121] It allows regulated parties and beneficiaries to bring proceedings at the time the regulation is made, thus enabling argument regarding the regulation-making process from both sides of regulatory debates.

The expansion of access to the courts through extended standing and the acceptance of pre-enforcement judicial review of regulations in the US have been understood as involving fundamental change to the nature of judicial review of administrative action. Professor Peter Strauss has referred to it as shifting the court's function to 'protect[ing] the integrity of political processes'.[122] The important point is that deliberation-enhancing forms of judicial review require development beyond the limits set by traditional judicial review laws. The developments in the US highlight that extended standing and flexibility in regard to the timing of judicial review are important steps in the change to a deliberation-enhancing system of judicial review.

[118] 387 US 136, 151–2 (Harlan J) (1967).

[119] *United States Army Corps of Engineers v Hawkes Co Inc* (US Sup Ct, No 15-290, 31 May 2016) slip op 7 (Roberts CJ); Richard J Pierce Jr, Sidney A Shapiro and Paul R Verkuil, *Administrative Law and Process* (Foundation Press, 4th ed, 2004) 200.

[120] See, eg, *Automotive Parts & Accessories Association Inc v Boyd*, 407 F 2d 330, 334 (Judge McGowan) (DC Cir, 1968); *Portland Cement Association v Ruckelshaus*, 486 F 2d 375, 392–4 (Judge Leventhal) (DC Cir, 1973).

[121] Mashaw and Harfst, above n 104, 157, 268–9 n 13; Strauss, 'Revisiting *Overton Park*', above n 104, 1260. See also Lubbers, above n 117, 407.

[122] Strauss, 'Revisiting *Overton Park*', above n 104, 1259.

VII Exceptions: Mandatory Public Consultation Requirements

While general regulation-making systems in Australia have the characteristics examined in the previous Parts of the article, they do not apply to all regulation-making processes. It is always possible for legislation to include mandatory public consultation requirements for regulations and to even up access to the courts. Such systems are worth examining, albeit here in a brief manner, to identify features common to the adoption of such provisions. They provide some indication of when we can expect such provisions to be included in regulatory legislation.

The environmental planning legislation in New South Wales is a good example of an exception to the Westminster parliamentary norm. It establishes a regulatory system designed for public participation that can be supervised by the courts. In particular, the *Environmental Planning and Assessment Act 1979* (NSW) includes mandatory public consultation requirements for making local environmental plans.[123] The courts have interpreted these requirements in a purposive manner to ensure that public notices of new plans are not misleading,[124] that submissions lodged by members of the public are considered,[125] and that a new round of public consultation is conducted if substantive changes are made to the proposed plan.[126] Accordingly, New South Wales environmental planning legislation and its interpretation by the courts go a long way to establishing a system that enables and ensures deliberative regulation-making. The courts have not, however, gone as far as the US courts by requiring administrative officials to respond to the major issues raised in the submissions.[127] Nevertheless, the case law indicates willingness to enforce mandatory consultation provisions in a manner that supports the purpose of facilitating discussion between government and members of the public prior to making administrative regulations.[128]

123 *Environmental Planning and Assessment Act 1979* (NSW) s 57.

124 *Homeworld Ballina Pty Ltd v Ballina Shire Council* (2010) 172 LGERA 211; *El Cheikh v Hurstville City Council* (2002) 121 LGERA 293.

125 *South East Forest Rescue Inc v Bega Valley Shire Council* (2011) 211 LGERA 1, 32–7 [127]–[150] (Preston CJ).

126 *Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88–9 (Priestley JA); *Save Little Manly Beach Foreshore Inc v Minister for Planning [No 3]* [2015] NSWLEC 77 (8 May 2015).

127 See Edgar, 'Judicial Review of Public Consultation Processes', above n 95, 220–2.

128 See, eg, *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91, 101–2 (Rolfe AJA); *Canterbury District Residents & Ratepayers Association Inc v Canterbury Municipal Council*

The public participation system established by the *Environmental Planning and Assessment Act 1979* (NSW) has additional important features. The Act includes an open standing provision,[129] and a three-month time limit on bringing proceedings to challenge planning rules.[130] These provisions enable New South Wales courts to review plan-making processes without considering whether the applicant's interests are affected or whether the applicant is at risk of the particular planning rule being enforced against them, as was shown in Part VI would otherwise be required. The nature of the applicant's interests and whether or not the applicant is at risk of enforcement of the plan against them are irrelevant to judicial review of local planning rules.

There are two aspects of the system worth emphasising. The first is that the *Environmental Planning and Assessment Act 1979* (NSW) establishes a framework on which the courts have been able to build a set of deliberation-focused principles. These principles have been drawn from the provisions of the Act and the purposes of the provisions as understood by the judges. The laws that would apply if the provisions had not been enacted would point in the opposite direction — that is, there would be no participatory requirements and great uncertainty about access to the courts. Accordingly, it must be recognised that deliberation-based regulation-making systems are likely to require legislation that includes mandatory public consultation provisions and provisions that extend access to the courts.

The second point is that the provisions establishing mandatory consultation, open standing and pre-enforcement judicial review, apply to administrators in the New South Wales planning system that are to a large extent outside of the state-level Westminster parliamentary institutions. That means that the incentives influencing regulation-making legislation identified by leading administrative law scholars do not apply in this context. These scholars have highlighted that the lack of enforceable public consultation provisions in general regulation-making legislation in Westminster-based democracies is due to the reluctance of governments, who largely control the legislature in such systems, to impose controls on themselves.[131] In such systems, the

(1991) 73 LGRA 317, 320 (Stein J); *Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88–9 (Priestley JA). See also *Scurr v Brisbane City Council* (1973) 133 CLR 242, 251–2 (Stephen J).

129 *Environmental Planning and Assessment Act 1979* (NSW) s 123.

130 Ibid s 35.

131 Susan Rose-Ackerman, 'Policymaking Accountability: Parliamentary versus Presidential Systems' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 171, 176–8; Peter Cane, *Controlling Administrative Power: An Historical Comparison*

governmental incentives are to minimise controls on discretionary administrative powers.

However, in the New South Wales planning system, local councils have the primary responsibility for making the local plans that are subject to the mandatory consultation requirements.[132] These councils are established by legislation as a particular branch of government. While the *Environmental Planning and Assessment Act 1979* (NSW) identifies the Minister for Planning as the official who ultimately makes local plans,[133] that power has been delegated to local councils.[134] The provisions relating to local plans in the Act provide an exception that helps to prove the general rule. The reluctance to impose mandatory transparency, participation and accountability provisions on Westminster parliamentary insiders is just not relevant to plan-making by local councils.

On the other hand, the general reluctance to impose such requirements comes into play again for state-level plan-making by the Minister. The provisions of the *Environmental Planning and Assessment Act 1979* (NSW) for these plans make public consultation discretionary. The Minister is 'to take such steps, if any, as the Minister considers appropriate or necessary' to publicise a proposed state plan and 'to seek and consider submissions from the public'.[135] Accordingly, the Act establishes the key legal elements of a deliberative decision-making system for plan-making conducted by officials outside of the ministerial responsibility system but for plan-making inside that system; such a legal framework is regarded as unnecessary.

This distinction made by the *Environmental Planning and Assessment Act 1979* (NSW) seems to be consistent with the way enforceable consultation provisions are included in Commonwealth legislation. The below Table sets out Commonwealth authorities that are granted regulation-making powers subject to enforceable public consultation provisions.[136] Each of them is

(Cambridge University Press, 2016) 316. See also Aronson and Groves, above n 93, 405–8 [7.50]; Edgar, 'Deliberative Processes', above n 13, 26–30.

132 But note that the Minister may direct other officials to have that role: *Environmental Planning and Assessment Act 1979* (NSW) ss 54, 57.

133 *Environmental Planning and Assessment Act 1979* (NSW) s 59.

134 Department of Planning and Infrastructure (NSW), 'Delegations and Independent Reviews of Plan-Making Decisions' (Planning Circular, PS 12-006, 29 October 2012); Minister for Planning and Infrastructure (NSW), *Instrument of Delegation*: *Environmental Planning and Assessment Act 1979*, 14 October 2012.

135 *Environmental Planning and Assessment Act 1979* (NSW) s 38.

136 It should be noted that there are exceptions to the pattern highlighted in the table. For example, regulations made by departmental officials rather than independent authorities may

formally classified as a 'statutory agency' or 'body corporate' by their enabling legislation, which distinguishes them from departments of state for which Ministers are responsible. This gives these authorities a degree of independence from the general system of ministerial responsibility, although Ministers may be granted statutory powers to issue directions to them,[137] or may be required to accept or approve regulations made by such authorities.[138]

Table 1: Commonwealth Authorities with Regulation-Making Powers Subject to Enforceable Public Consultation Provisions

Authority	Type of administrative regulation	Mandatory consultation provisions
Australian Communications and Media Authority	Australian content standards Numbering plans for carriage services	*Broadcasting Services Act 1992* (Cth) s 126 *Telecommunications Act 1997* (Cth) s 460
Australian Fisheries Management Authority	Fisheries plans of management	*Fisheries Management Act 1991* (Cth) s 17
Food Standards Australia New Zealand	Food regulatory measures	*Food Standards Australia New Zealand Act 1991* (Cth) ss 55–65
Great Barrier Reef Marine Park Authority	Zoning plans and plans of management	*Great Barrier Reef Marine Park Act 1975* (Cth) ss 32C, 39ZB, 39ZE
National Health and Medical Research Council	Regulatory recommendations and guidelines	*National Health and Medical Research Council Act 1992* (Cth) ss 12–13[139]

be subject to mandatory consultation provisions (see, eg, *Therapeutic Goods Regulations 1990* (Cth) pt 6 div 3D sub-div 3D.2) and regulations made by independent authorities may be subject to unenforceable consultation provisions (see, eg, *Civil Aviation Safety Regulations 1998* (Cth) reg 11.295; *Corporations Act 2001* (Cth) ss 901J, 903G).

137 See, eg, *Australian Communications and Media Authority Act 2005* (Cth) ss 14–15; *National Health and Medical Research Council Act 1992* (Cth) s 5E.

138 See, eg, *Great Barrier Reef Marine Park Act 1975* (Cth) s 35C; *Sydney Harbour Federation Trust Act 2001* (Cth) s 31; *Water Act 2007* (Cth) ss 41, 44.

139 See also *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265.

Authority	Type of administrative regulation	Mandatory consultation provisions
Murray-Darling Basin Authority	Basin plan	*Water Act 2007* (Cth) ss 42–3
Repatriation Medical Authority	Statements of principle	*Veterans' Entitlements Act 1986* (Cth) ss 196B, 196E–196G
Reserve Bank of Australia	Access regimes and designated payment system standards	*Payment Systems (Regulation) Act 1998* (Cth) ss 12, 18, 28[140]
Sydney Harbour Federation Trust	Trust land plans	*Sydney Harbour Federation Trust Act 2001* (Cth) ss 29, 30

The mandatory public consultation provisions for regulation-making by these authorities are exceptions to the discretionary public consultation provisions included in the general, federal regulation-making legislation, the *Legislation Act 2003* (Cth).[141] The provisions of these Acts indicate that enforceable consultation provisions may be regarded as suited to regulation-making by authorities that are a step removed from Westminster parliamentary systems of accountability. In such contexts governments may see the benefit of a legal framework for political discussion through public consultation processes. It must be noted, however, that the provisions in the above table do not include provisions that extend standing and enable pre-enforcement review. Accordingly, the beneficiaries of these laws will have difficulty accessing courts to enforce public consultation provisions. The enforceable public consultation provisions in these Commonwealth Acts are therefore an important, but not sufficient, step towards a deliberative regulation-making model.

To summarise this Part of the article, there are two points that I want to highlight in relation to the legislation that provides exceptions to the norm of discretionary public consultation arrangements for regulation-making. The first is that the development by New South Wales courts of deliberative norms for plan-making is facilitated by enforceable public consultation

[140] See also *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, 417–18 [548]–[554] (Tamberlin J).

[141] *Legislation Act 2003* (Cth) ss 17, 19.

provisions and also by provisions that extend standing and enable pre-enforcement judicial review. This indicates that the legal developments that have facilitated deliberative regulation-making in the US as a matter of judicially-developed public law require legislative foundations in Australia. The second point is that the prominent examples of enforceable public consultation provisions suggest that they are likely to be imposed for regulatory systems administered by independent agencies, rather than Ministers with departmental support. This indicates that governments may seek to control regulation-making powers through enforceable procedures when the regulation-making agency is separated from the system of ministerial responsibility.

VIII Conclusion

While some aspects of Australian public law have evolved in recent decades to ensure transparency, public participation and reasons for government actions, the general systems for regulation-making in Australia are focused on parliamentary control rather than engagement with the general public. That means that members of the public are reliant on government authorities to voluntarily facilitate public debate for proposed regulations that are morally, socially or economically controversial or are reliant on Members of Parliament to raise it there. The primary features of our regulation-making systems base the legitimacy of regulations on the parliamentary authority provided by the legislative provisions that empower administrators to make them and the potential for parliamentary control. The major features of Australian law regarding regulations — constitutional law reflected in the *Dignan* case, state and Commonwealth general regulation-making legislation, principles of judicial review, and rules of access to the courts — all give primary significance to parliamentary authority and control.

This is very different to the regulation-making system in the US which has developed in a manner that makes an agency's direct deliberation with members of the public a condition of the legitimacy of administrative regulations. As examined in this article, deliberative processes play some role in the US's constitutional principles regarding delegating regulation-making power and have a major part in statutory and judicially-developed administrative law doctrine.

The exceptions in Australia, the statutes that provide for mandatory public consultation processes, suggest that greater need for enforceable provisions is recognised when regulation-making power is delegated to statutory agencies that have a degree of independence from ministerial control. This indicates

that, when examining regulation-making in Westminster systems, there is a need to take into account the difference between empowering Ministers to make regulations and regulation-making by statutory agencies. In addition, it should be recognised that for public consultation to be supervised by courts in a fair manner, consideration should be given to extending standing and providing for pre-enforcement review.

Accordingly, deliberative regulation-making systems in Australia's Westminster-based framework have to be established by legislation. Our constitutional law does not require it, courts have not established the procedural framework for it, and Parliaments are likely to be reluctant to facilitate it in areas in which Ministers have control.