

Interpreting Executive Power

Janina Boughey and Lisa Crawford (editors)

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Executive power touches virtually all areas of modern Australian life. While power conferred by statute is the most commonly exercised and litigated source,¹ one is hard-pressed to find clear answers on how courts determine when they are misused or exceeded.² *Interpreting Executive Power* edited by Janina Boughey and Lisa Burton Crawford fills a lacuna in scholarship on non-statutory executive powers³ by approaching the subject from a statutory interpretation perspective and examining executive power as a *basis* for legislation.⁴ In an accessible manner, it illuminates the tension between allowing leeway for efficient decision-making while ensuring statutory powers are exercised according to legal limits and values.

The volume's twelve essays from leading judges, practitioners, and academics are well-organised into three sections, and two implicit overarching themes enhance their cohesiveness: 'change' and 'values and norms'.

'Change' revolves around whether the law remains fit for purpose for modern governance. In some respects, the answer is a resounding 'no'. For example, Australian courts staunchly refuse to show deference to the executive on questions of law. Crawford, McMillan, and Boughey argue for a reconsideration. The contemporary executive has expertise in applying statutes⁵ and serves a vital 'communicative function' between the rules and those being ruled.⁶ According to Boughey, when several interpretations are open, the court *should* consider the executive's interpretations depending on their persuasive force. Boughey raises justifications based on the democratic accountability of the executive;

¹ Justice James Edelman, 'Foreword' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) v, v.

² Where it is discussed, as in Greg Weeks, Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017), the textbook nature of the literature is less accessible for broader audiences.

³ Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017).

⁴ Zaccary Molloy Menschelyi, Stephen Puttick and Murray Ryall Wesson, 'Does the Executive's Prerogative Power to Vary Treaty Obligations Qualify Parliamentary Supremacy?' (2018) 43(2) *University of Western Australia Law Review* 286.

⁵ John McMillan, 'Statutory Interpretation and Deference: An Executive Perspective' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 24, 27.

⁶ Lisa Burton Crawford, 'Between a Rock and a Hard Place: Executive Guidance in the Administrative State' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 7, 8–9.

fairness in allowing the public to rely on guidance issued by administrators; and facilitating coherence and predictability in the legal system. While some concerns are not discussed, such as interpretations not being supported by disclosed reasoning, they are nevertheless alleviated by the limited form of deference advocated. It only applies where multiple interpretations are open, only to the interpretations of expert bodies that issue public guidance, and courts decide the weight afforded to any given interpretation.⁷ Arguably, this final limitation potentially undermines the justification of fairness in public reliance on executive guidance. However, on balance, the authors persuasively demonstrate that limited deference is desirable and viable.

Section II continues the theme of ‘change’, examining contemporary problems when interpreting statutory executive power. Huggins investigates statutory meaning being ‘lost in translation’ when automating decision-making. Statutory interpretation involves nuanced examination of the provision, Act, and wider social context—complexities difficult to translate into computer code that underpins automation processes. As demonstrated using the Robo-debt controversy, this may create mass volumes of automated decisions that depart from the interpretation expected from administrators and courts. While Huggins could have better addressed how courts can preserve intended statutory meaning, her essay reminds readers that detrimental consequences can occur if the law misaligns with modern developments.

The second theme emerging from the essays is ‘constitutional and common law values and norms’. Among the most sacrosanct is the separation of political and judicial roles. Lim’s chapter attests to this in arguing that, when properly described, the principle of legality operates distinctively on constraining limits on executive power. Vital to his argument is the courts’ role when determining how to distribute the rights of individuals. Lim distinguishes between two situations. In one, the legislature directly strikes the balance. Here, the balance reflects a political decision courts will distort if they favour one right, as individuals are equal before the law. In the other scenario, the legislature *delegates* the power to strike the balance to the executive. Here, the inquiry is between individual and government, and safeguarding a right from unjustified interference is within the legitimate judicial role of interpreting the scope of executive power. This difference explains why courts may arrive at seemingly inconsistent conclusions in different cases involving the same right or freedom. Evidently, interpreting statutory executive power is inseparable from doctrinal foundations of our governmental system. Lim’s discussion addresses not only *how* courts interpret executive power, but also *why* they do so in certain ways.

⁷ Janina Boughey, ‘The Case for ‘Deference’ to (Some) Executive Interpretations of Law’ in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 34, 36–7.

While Lim answers the questions his essay raises, some contributions leave important questions unanswered. Regarding discretionary powers in migration law, Pillai and Smith observe a democratic accountability deficit between the executive and the legislature and suggest a possible role for statutory interpretation in minimising it. They acknowledge, but do not evaluate, other commentators' proposals to this end. Admittedly, Pillai and Smith frame the chapter to pose, rather than answer, this inquiry. However, in a volume *about* statutory interpretation, critically engaging with the suggestions would have been helpful in completing the otherwise comprehensive contribution. Such omissions may be disappointing for readers searching for solutions-based guidance. Nevertheless, they reveal research avenues, and may be necessary concessions to maintain the volume's accessible length.

Additionally, the volume could have greater acknowledgement of the relationship between judicial and non-judicial review mechanisms. While it is strictly the purview of courts to conclusively determine the scope of executive power, the decision-making process within merits review tribunals also involves interpreting executive power. Further, as mentioned by Dalla-Pozza and Weeks, the availability of non-judicial avenues to appeal adverse decisions can influence courts on matters regarding restrictions on judicial review.⁸ In a volume heavily grounded in practical modern realities, the shortage of substantive attention to such considerations seemingly neglects the fact that judicial review is a last resort in a diverse range of administrative law remedies.

However, these are minor criticisms in a volume that otherwise clearly explains how courts have, and should, interpret executive power, and how modern developments challenge this interpretive process. Overarching themes create a synergy between the essays, and this speaks to the commendable skill of both the editors and contributors. While the subject-matter renders a basic understanding of administrative law desirable, the authors take care in their explanations. Hence, this volume is recommended to people inside and outside the legal sphere—executive power impacts *all* lives.

*Chun Yu**

⁸ Dominique Dalla-Pozza and Greg Weeks, 'A Statutory Shield of the Executive: To What Extent Does Legislation Help Administrative Action Evade Judicial Scrutiny?' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 184, 190–1.

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