Federalism and Rights Deliberation

The relationship between federalism and rights is an understudied aspect of Australia’s constitutional system. Existing theories, which are mostly drawn from the United States, provide little assistance because they are premised on a federal system that alters substantive outcomes on rights (e.g. different states adopting different positions on rights). These accounts fail to resonate with Australia’s constitutional experience because its federal system tends to produce a large degree of policy uniformity.

In this paper, I argue that we should shift our analytical focus to the procedural dimensions of rights protection. Australia’s federal system has a significant effect on the course and content of deliberations on rights issues. Federalism creates space for debate between governments (inter-governmental partisanship) and expands opportunities for the public to participate in the lawmaking process (responsive government). I employ three case studies — counter-terrorism, same-sex marriage and organised crime — to evaluate how these federal mechanisms both positively and negative contribute to the deliberative process in Australia.

This understanding of the relationship has implications for the place of both federalism and rights in Australia’s constitutional system. It casts the overlap and duplication that federalism produces, which tend to be viewed as needlessly inefficient, in a more positive light because it can introduce different perspectives on rights issues. It also illustrates how the efficacy and legitimacy of Australia’s current approach to rights protection, which relies extensively on legislatures as sites of robust rights deliberation in the absence of a comprehensive form of rights-based judicial review, depends in part on the vitality of its federal system.
Greg Severinsen, University of Wellington

Catching Crumbs from the Table of Central Government: What role is left for local government when considering climate change in New Zealand?

The Resource Management Act 1991 (RMA) is the primary legislative mechanism by which the environmental effects of activities are regulated in New Zealand. It divides responsibilities and functions between various levels of government – central, regional and district. In the last decade, a “centralising” tendency has been observed in resource management law, including through the development of various national level policy documents that override local government plans, and in bypassing Council hearings in favour of direct referral to non-local decision makers.

A tension between local and national control of environmental matters has existed since the inception of the RMA, and debate still rages over the extent to which communities have a right to shape their own surroundings. One particularly controversial development has been in a 2004 amendment to the RMA. This prohibited local government from considering the effects of activities on climate change, and coincided with the implementation of New Zealand’s emissions trading scheme. The approach can be seen as one that imposes a jurisdictional bar on Councils while implementing a market based method to address greenhouse gas emissions.

The Courts have proved willing to use this jurisdictional bar to downplay the role of local government further. Two Supreme Court decisions have, in fact, done so to a degree not supported by the express wording of the amendments. The intention of Parliament was, it has been held, to remove all considerations relating to the causes of climate change from the purview of regional and district councils, despite the fact that the Act applies a jurisdictional bar only where an application is for a discharge or coastal permit. It can be speculated that some role for local government might remain, but it will only be minor.

New Zealand’s emissions trading scheme has thus far proved ineffective. While the ability of Councils to supplement this market with regulatory controls has been tightly constrained, they are still required to recognise the dangers of climate change and provide adaptation measures.

This paper explores whether the allocation of climate change jurisdiction between central and local government is justified, given the proper constitutional role of regional and district councils. Does institutional equity demand that those with the responsibility to address a problem also have the ability to mitigate its causes? Or do the problems uniquely associated with climate change demand that we rethink our assumptions around devolved decision making?
Lauren Butterly, ANU College of Law

Law, Rights, Regulation and Governance: Exploring Indigenous rights and their relationship to environmental governance in the context of Sea Country

Sea country is integral to many Aboriginal and Torres Strait Islander communities. Recognition of traditional usage rights, such as fishing, has been seen since the early days of colonisation. However, the Aboriginal Land Act 1978 (NT) provided the first legal recognition of broader Indigenous rights to the sea in the form of ‘sea closures’. The rights associated with sea closures were (and still are) severely restrictive. Three decades on, and with only recognition of non-exclusive native title rights to sea country, Australia has not progressed with respect to legal recognition of Indigenous rights to marine governance. However, progress has arguably been made in relation to implementation of environmental governance mechanisms by Indigenous communities.

We are currently seeing an expansion of participatory environmental governance mechanisms such as Sea Country Indigenous Protected Areas and marine co-management arrangements. This creates a situation where ‘the law’ is operating in a different sphere to these governance mechanisms but, arguably, seeking some related objectives. On an abstract level, we need to explore the relationship between law, governance, rights and regulation in sea country. The methodology of this thesis involves empirical legal research to investigate these relationships ‘on-the-ground’. However, this paper aims to set out the theoretical framework for this investigation. It will explore Indigenous rights in the context of nature conservation, consider regulation of ‘the commons’ (particularly by local communities) and analyse the issues that may arise due to co-existence of participatory governance mechanisms and legal rights. In the context of the relationship between Indigenous rights and environmental governance, the paper will also consider ‘what’ and ‘who’ is being regulated and how these questions may have multiple, and potentially conflicting, answers.

Stephen Olynyk, University of Western Australia

Expropriation and the Right to Property under the Australian Constitution and International Investment Treaties

The protection from uncompensated expropriation by a sovereign government is commonly referred to as the ‘right to property’. The right to property is enshrined in both the Australian Constitution and the various investment treaties that Australia is a party to. Under the Australian Constitution’s Acquisitions Power, a property-owner may believe that they have not been adequately compensated for a legislative expropriation of their property. The constitutional guarantee of ‘just terms’ in the Acquisitions Power allows them seek to have that law struck down for constitutional invalidity if ‘just terms’ have not been provided by the Commonwealth Parliament. In contrast, investment law is characterised by a private right of action granted to foreign investors, permitting them to initiate arbitration, mostly for damages, directly against the host-State in an international forum. A growing school of thought in international investment law contends that investment tribunals should look to principles of public law in order to develop an appropriate approach to questions of expropriation arising from general regulatory measures. Australia has recently seen both a constitutional and investor-State challenge against its plain packaging legislation, a regulatory measure of a general nature, designed to promote public health. This paper seeks to draw on public law
principles to highlight the relationship between the two legal regimes governing the sovereign power to regulate and expropriate property and correlative right to property.

Margaret Harrison-Smith, ANU College of Law

A Regulatory Framework for Australian Population Law and Policy

As observed over two decades ago by the now defunct National Population Council, ‘population is a pervasive and fundamental determinant of Australia’s form and character’, and ‘[t]hrough size, location and demographic characteristics, it impacts significantly upon the achievement of major national goals’.

Despite this fundamental link between population and government, the development of a regulatory framework for population law and policy has not previously been attempted.

Undoubtedly, the construction of such a framework is complicated by the fact that population law does not constitute a coherent body of law in the sense, for example, of contract, tort or trusts law. Moreover, policies with implications for population are diverse, often with multiple objectives and, at times, bearing little apparent relationship to each other.

However, my thesis is that the identification of a regulatory framework for population law and policy is demonstrably achievable.

In constructing the framework, I explore the concepts of ‘Australian population’; ‘population law and policy’ and ‘regulation’. I also undertake an empirical historical analysis of core elements of Australian population law and policy relating to natural population growth and migration. An important distinction is drawn between laws and policies that have a direct impact on the sovereignty of individual Australians, and those that do not.

In developing the framework, my initial focus is on primary population law and policy regulation. I also have regard to the key meta-regulatory influences on that regulation. These include: the Australian Constitution; federalism; state and individual sovereignty; national and public interest; the exertion of executive power; principles of liberal democracy; globalisation; the international legal system; and the projections arising from demographic and economic analysis.

My objective is to provide an enduring regulatory framework through which the salient dimensions of Australian population law and policy can be considered by government, cohesively and effectively.
2.00 – 3.00 pm Session Three: Courts – Courts and Adjudication

Brenda McKinney, University of Otago

Restoring Hope: Understanding New Zealand's Approach to Youth Justice and the Potential of Restorative Practice in Other Countries

Over the last 25 years, New Zealand has successfully improved its juvenile justice (JJ) system to further ensure that youth have the chance they deserve to strive for a better future. While there is still potential for further progress, New Zealand's implementation of Family Group Conferences (FGCs), especially, serves as an illustration of one country’s commitment to the rehabilitation of juveniles and as an exemplary model of progress for other nations. This presentation will describe current and ongoing research on the FGC process, from its roots in Māori customary law to modern best practices, which will aid in understanding how and why this community problem-solving mechanism enhances children’s rights and holds the potential to reduce racial disparities, in addition to addressing how it can be replicated in other countries where it is not formally implemented, such as the United States. The presentation will draw on examples from Australia’s use of FGCs to illustrate how the New Zealand model might different from other successful models, discuss the early results of the empirical research I am conducting on stakeholder perspectives of the system and also highlight complications with introducing this model.

Rodrigo Camarena Gonzalez, Macquarie University

A Theory of Constitutional Precedent for the Civil Law

Most of recent literature on the doctrine of precedent takes a universal an analytical approach focusing on similarities between the common and the civil law traditions. In contrast to such approach, this dissertation is explicitly situated at civil law jurisdictions and tries to connect analytical and normative dimensions. Thus, by focusing on the case study of relevant lines of controversial constitutional cases in Colombia and Mexico, and using the methodology of constitutional borrowings, this paper aims to provide a theoretical framework useful to follow precedent respecting the right to equality while developing coherently the values of particular constitutions.

The main claim is that the civil law reasoning is useful to adapt the doctrine of precedent developing Ethical Reciprocity as a criterion to follow precedent. Ethical reciprocity means that judgments must support and be supported by constitutional values as developed by case law, even if precedents do not deal with the exact same question but are implied in the case at hand. Thus, precedent not only provides concrete meaning to ethical beliefs entrenched in constitutions, but does so through the interpersonal epistemic process of adjudication. Moreover, an ethical commitment to the rule of law demands judges to treat similar cases alike, and unlike cases differently, but always giving reasons for following, distinguishing or overruling precedent. In this way, the theory aims to analyze the migration of precedent to the civil law and assess how the practice of adjudication gives real meaning to abstract and plural ethical values in evolving and heterogeneous societies.
Section 116 of the Australian Constitution - The Known Unknowns

“There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know.” Donald Rumsfeld

It is often easy to assume that we know what section 116 of the Australian Constitution is all about — as if its meaning is made up of Known Knowns. Much ink has been spilled interpreting the High Court’s decisions as if we know what it all means— we don’t. Despite over 100 years of case law section 116 of the Australian Constitution remains a mystery. With just five reported High Court decisions which explicitly consider the provision there are more unanswered questions than ones with answers. The paper examines just three of those unanswered questions – the Known Unknowns:

1. What is section 116 doing in Chapter V “The States”?
2. What would constitute a breach of section 116, in particular what kind of law would be an “undue infringement” of religious freedom as proposed by Latham CJ in the Jehovah’s Witnesses Case?
3. What would constitute a law “for imposing any religious observance”?

In examining these three unanswered questions the paper views section 116 from a new perspective. Rather than trying to give meaning to this mysterious provision, this paper examines the questions themselves. It explores the reasons these questions have not been answered, and investigates and evaluates multiple solutions. The paper does not present final solutions. Instead it argues that in some cases only time will bring answers, when an appropriate case is brought before the High Court, while for others the answer may only ever be a matter of speculation. It suggests that recognising our inability to answer these questions is essential to inform a constructive debate around section 116. Our understanding of section 116 is full of holes, ignoring the holes does not make it anymore complete.

David Arnold, University of South Australia

The Purposive Approach to Statutory Interpretation and the Principle of Legality: Should the Purpose of a Statute Equate to Words of Necessary Intendment?

In June 2013 the High Court, in X7 v Australian Crime Commission, reaffirmed the right of privilege against self-incrimination and the fundamental common law principle that the prosecution in a criminal case cannot compel the accused to assist it. Five months later in Lee v New South Wales Crime Commission the High Court found that the right and fundamental principle were abrogated by the legislation impugned in that case. Justices Hayne and Bell in dissent in Lee, but in the majority in X7, found no relevant distinction between the statutes in each case. The majority in Lee looked to the objects of the Act for the basis of their reasoning.

Fundamental common law rights exist in an uneasy symbiosis with sovereign power. And while the principle of legality exists to protect common laws rights against abrogation by legislation, difficulties arise in application of the principle. This paper will examine the
conflict that can arise between the purpose of a statute and the application of the principle of legality. It will conclude that the exercise of the sovereign power of parliament is not only subject to the constraints of the Constitution, but also those of the common law. The purpose of a statute should yield to the principle of legality so as to avoid an unnecessary abrogation of common law rights.

Robert Woods, University of New South Wales

Protecting Rights between Two Constitutional isms: The High Court on Constitutional Implications

The High Court faces an unusual set of institutional challenges. As the custodian of Australia’s federal system, the Court has frequently been called on to adjudicate disputes, between state and federal governments, of an intrinsically political character. At the same time, it operates in a historical-institutional context largely defined by the Westminster tradition of parliamentary responsible government. One compels political action, the other counsels political deference. The Court’s response to these competing demands was to cultivate a hierarchical conception of constitutional accountability, in which it stood outside the political system and coolly enforced the limits established by the Constitution, without recourse to underlying political values.

The sudden ubiquity of rights as the universalising language of politics in the latter half of the 20th century forced apex courts around the world to come to terms with their roles in protecting individual rights, and courts in political-constitutional systems were no exception. Through my doctoral research, I am looking at the way the High Court has conceived of and accommodated its rights-protective role, and how it has been influenced and constrained both by Australia’s particular politico-legal milieu and the path set by its own federalism jurisprudence. In the background to this is my broader interest in developing a mode of doctrinal analysis that is sensitive to historical context (drawing on insights from the American literature on judicial politics) while still adapted to the Australian legal system.

The project will ultimately encompass and contextualise both the implied freedom of political communication cases of the early 1990s, and the Court’s more recent jurisprudence on Chapter III and the separation of judicial power. For the Workshop though, I will focus on a reading of two positions on the source of legitimate constitutional implications in the implied freedom cases: the ‘logical and practical necessity’ line adopted by Mason CJ in Australian Capital Television Pty Ltd v Commonwealth, and the narrower ‘text and structure’ approach favoured by McHugh in Lange v Australian Broadcasting Corporation. Each, I will argue, represents a particular negotiation of the issues outlined above. Taken together, they provide a means of exploring the core issues implicated in the research project as a whole.
Deliberative democracy has gained popularity as a useful model to deal with problems of legitimacy in modern democratic societies. The concept of deliberative democracy is based on principles of mutual respect, reciprocity, fairness and rational argument. It is still questionable however whether deliberative democracy is applicable to divided societies where deep ethnic and religious conflicts prevent the emergence of common civic identity necessary for productive deliberation. This challenge is further complicated when considering divided societies with large diasporic populations. Conflicts and economic crises create large migration waves, and globalisation processes makes it easier for people to feel deeply connected to more than one state. The trend among legal scholars is to try and expand the state’s responsibilities and duties to include non-citizens; social and political theorists question whether citizenship can or should exist beyond the nation state and a defined territory.

This paper therefore raises a difficult challenge to advocates of deliberative democrats in divided societies. If we conclude that diaspora populations constitute an integral part of the demos, then they need to be included in deliberative processes preceding constitutional reforms in their home countries. But how then can they be engaged fairly and on an ‘equal basis’ when they do not live in the relevant territory and are not subject to the same rules as the territory’s residents?

This paper aims to address these challenges to deliberative democratic theory and to contend that deliberative democracy can nevertheless be relevant to divided societies with large diasporic populations. This can be done by applying what is called ‘elitist’ models of deliberation and democracy. Deliberative democrats differ on the role ascribed to governing elites in deliberation. The more common popular variants of deliberative democracy aim to encourage deliberation among the greater public. On the other hand, elitist varieties of deliberative democracy see elites as both capable and responsible for transferring, through deliberation, the often vague and unrefined demands of the masses into practicable law.

Although popular models of deliberation may be neither desirable nor practical in divided societies with large diasporic populations (for various reasons), I will argue that constitutional courts, acting as elitist deliberative bodies, can be useful in overcoming the challenges mentioned above.

Aline Jaeckel, University of New South Wales

Implementing the Precautionary Principle in an Administrative Context

As a well-established and widely accepted legal principle, the precautionary principle is a tool for taking early action in response to threats of (environmental) harm, even where scientific uncertainties remain. Despite its incorporation into numerous international agreements and domestic laws, the challenge remains to effectively implement the principle. My thesis...
examines this implementation process in the context of administering mineral mining on the international seabed. After decades of research and development, mining the deep ocean for minerals such as copper and manganese is about to become reality. However, the deep oceans are also unique habitats for extraordinary and diverse ecosystems e.g. around seamounts and hydrothermal vents. Given the novel nature of seabed mining and its potentially very destructive impact, combined with our merely rudimentary understanding of life in the deep oceans, and the fact that the vast majority of the seabed is uncharted territory, there remains a high level of uncertainty as to the precise environmental consequences of seabed mining. This situation warrants the application of the precautionary principle.

With mining on the international seabed being administered and regulated by the International Seabed Authority (ISA) on behalf of humankind, the ISA is under an obligation to apply precaution. In fact, the UN General Assembly has called for inter alia the ISA to better integrate precautionary biodiversity protection into its work and the Seabed Disputes Chamber, in its 2011 landmark Advisory Opinion, has provided new momentum for proactive implementation of precaution in the seabed regime. The question then is, how can the precautionary principle be implemented in an administrative context and how is the ISA attempting or achieving it? In order to answer this question, my research has identified several steps to implement precaution, which traverse three dimensions: institutional, procedural, and substantial. Concentrating on this theoretical framework, my presentation will discuss these dimensions and their role in helping to assess whether or not precaution is being incorporated into decision-making processes.

Anna Huggins, University of New South Wales

The Legitimating Logic of Global Administrative Law and Compliance Politics in the International Climate Regime: A Mismatch or Mutually Enhancing?

The efflorescent field of global administrative law (GAL) is centrally concerned with the legitimacy and accountability of administrative action in international institutions. To date, GAL’s traction in explaining compliance processes in multilateral environmental agreements (MEAs) remains largely uncharted. This paper addresses this gap by applying GAL to a case study of the Kyoto compliance system with a focus on both formal rules and procedures, and their practical implementation. Significantly, this analysis illuminates GAL’s traction and legitimating potential, as well as the compliance politics that, prima facie, place a strain on GAL’s account of international law.

The Kyoto compliance system ‘provides for an unprecedented administrative review of state action by independent international bodies’, suggesting its aptness as a GAL case study. To provide an analytical frame for this analysis, GAL is conceptualised as a logic of legitimation that may provide reasons that would help to persuade people to accept the exercise of authority within the Kyoto compliance system. This framing facilitates middle-level theorising by which an analytical frame at a medium level of abstraction is applied to a concrete, contextualised setting – in this case, the quasi-judicial decision-making apparatus in the Kyoto compliance system.

The analysis in this paper will show that this compliance system has developed a complex administrative apparatus with highly developed administrative rules and procedures pertaining to accountability, transparency, participation, reason-giving and review. From a GAL perspective, this accords with the legitimating logic of creating depoliticised, technocratic and autonomous sites for global decision-making.
However, this move towards administrative proceduralisation has been superimposed upon a political tradition of negotiation, diplomacy, cooperation and facilitation in international environmental law (IEL), which continues to exert significant influence on the practical operation of compliance processes. Thus, although there has been considerable progress towards the incorporation of GAL mechanisms in the Kyoto compliance system, a degree of dissonance between the administrative procedures on the books and the governance context persists. Importantly, rather than perceiving this mismatch as contributing to a legitimacy deficit, it is suggested that it may be more accurately described as a blending of traditional and ascending legitimating modes in IEL, which enhances the legitimation of the authority exercised by the Kyoto compliance system. This analysis underscores the desirability of concurrently examining both GAL rules and mechanisms, and the politics of practice, which has transferable relevance to GAL studies applied in diverse contexts in the international realm.
Peta Stephenson, University of Queensland

From Wooltops to Williams: The Evolution of the Nationhood Power in the High Court

In Williams v Commonwealth (2012) 248 CLR 156, a majority of the High Court accepted that the Commonwealth has executive power derived from Australia’s status as a nation. However, the Court was not convinced that this so-called ‘nationhood power’ could permit the Commonwealth to enter into an agreement for school chaplaincy services and make payments under it, absent statutory authority. This article examines the reasoning behind this conclusion. It traces the evolution of the nationhood power in the jurisprudence of the High Court, and contends that the narrow reading of the nationhood power in Williams signals a shift towards a renewed federal movement in Australia.

Karena Viglianti-Northway, University of Technology, Sydney

Political accountability and parliamentary supremacy in the High Court’s interpretation of Section 61 of the Constitution

In this paper I examine the ways in which the High Court has interpreted two aspects of responsible government its interpretation of s 61 of the Constitution. These two aspects I refer to as the parliamentary supremacy and political accountability aspects of responsible government. The small body of case law on s 61, including the Court’s recent decisions in Pape v Commissioner of Taxation and Williams v Commonwealth, demonstrate a consistent approach by members of the Court in using these aspects of responsible government in interpreting the Executive power in s 61. The paper will argue that the reasoning of the majority in Williams does not mark a major shift in the theory that underlies these aspects of responsible government in determining the validity of Executive action in s 61. What the majority decision in Williams does represent is a narrower approach to the form by which political accountability and parliamentary supremacy is to be achieved.
Taking Exception to the Rule: A Poststructural Analysis of Legitimacy in Fiji’s New Legal Order

In 2009 while I was living in Suva and teaching in the School of Law at the University of the South Pacific, the President of Fiji made an extraordinary intervention in Fiji’s law and politics. Abrogating the Constitution, authorising the continuity of some laws and dismissing the entire judiciary, President Iloilo appointed himself head of a new legal order. Preceding these acts was the decision in Fiji’s Court of Appeal which, the day before, had declared events surrounding the 2006 coup unlawful.

My work is concerned with the question of legitimacy as part of a problematic of legality, sovereignty and democracy that is at the heart of the politico-legal crises precipitating and conditioning the institution of Fiji’s new legal order. My inquiry is focused on the decision, or series of decisions made by both the President and the Military Commander which involved their judgment of the situation at hand as a crisis or emergency, and the way it would be regulated. These decisions expose a mode of power that appeals to contemporary scholarship in the form of an exception. Justified as an exception, the zone of power that interrupts the law passes into law, supplementing the law or complementing legality. The exception thus inscribes legitimacy in its occupying power. In this schema then, the crucial question for legitimacy asks how the exception is justified.

To tackle that question my work will trace the lineaments of the exception that has been determined and appropriated in service of the new legal order. Taking seriously the contingency of historically embedded institutions, the plurality of visions that makes politics and the particularity of local knowledge, I will explore the links between law, politics and the problems of justification.

For the purposes of the workshop, my discussion will centre on the concept of the exception in relation to the common law. While the concept has been developed largely by continental thinkers in the context of civil law systems, I am concerned with the utility or relevance of the concept for jurisprudential thought in the common law. The paper will focus in particular, on conceptualising the exception in relation to the doctrine of effectiveness, which in Fiji and other common law jurisdictions, has provided the test for a successful and lawful revolution.

The Exercise of Emergency Powers in Bangladesh: the Means for Subversion of the Rule of Law

An emergency is generally considered as the state’s constitutional or legal power to tide over an actual or imminent threat to its life by war, external aggression, armed rebellion, natural catastrophes and breakdown in the economy. Taking into account this reality, the Constitution of Bangladesh empowers the President to proclaim an emergency on the actual or imminent ground of war or external aggression or internal disturbance. However, the insertion of ‘internal disturbance’ in the Constitution as a ground for invoking emergency has provided the executive with the opportunity to proclaim all the five emergencies in Bangladesh on this vague ground for purposes other than that of securing the life of the nation. Furthermore, in the absence of any effective constitutional mechanisms for scrutinising the exercise of
emergency powers and a time limit on the continuation of a state of emergency, some of the proclamations of emergency continued even after the alleged threat posed to the life of the nation was over to perpetuate the survival of the party in power by repressing any political threat to the regime. This Article, therefore, recommends for insertion in the Constitution of Bangladesh detailed norms providing for legal limits on the wide power of the executive concerning the proclamation, administration and termination of emergency with a view to ensure that emergencies can no longer be resorted to as the effective means of discarding the rule of law.

Gabriella Shailer, Murdoch University

Determining the Legitimacy of Government Actions: Applying Social Contract Theory to the Mandatory Data Collection Scheme

Social Contract Theory (SCT) proposes that a Government is formed to create a society that is somehow superior to a group of individuals who function without external regulation. One of the basic elements expected of a Government is the provision of security for its citizens as part of a hypothetical social contract. In simplified models of governance, the responsibility to provide security can be discharged by protecting the survival of citizens. However the responsibility to provide security is often heightened to include the protection of a particular way of life and associated public goods in a modern representative democracy broadly operating under the principles of liberalism.

In contemporary society the definition of security should extend to “cyber-security” given the heavy reliance on computers systems for the provision of administrative functionality. The provision of cyber-security can be difficult. The relative infancy of cyberspace as an arena for human interaction means that policy seeking to protect an "online" way of life lacks historical support. The knowledge of threats to safety is equally sparse. The combat of cyber-threats are further complicated by rapid technological evolution. However the mind of the Government must be turned to the specificities of the environment. Any direction not supported by the appropriate consideration for cyberspace as a separate entity would be ineffective in promoting security.

With the aim of promoting "cyber-security"; the Australian Legislature passed legislation that allows for unfettered power to indiscriminately collect electronic intelligence. This thesis will argue that the Australian Government as erred in passing the mandatory data collection scheme. The scheme fails to promote security as either a survival or libertarian concern and therefore does not meet the criterion for legitimate government action as reasoned by SCT.

It will be argued that the data collection scheme fails account for protections to civil rights. This is the result of broad and unregulated powers afforded to collect electronic intelligence without the appropriate checks and balances in place to protect individual rights. Further it will be argued that the same broad scope of the powers to collect intelligence is indicative of the legislature’s superficial consideration of the specificities of cyber-crime. The legislation is limited in its capacity to protect the security of the Commonwealth or individuals beneath it because it is not specifically targeted to threats within cyberspace. The lack of regard for the basic element of the social contract questions the legitimacy of the Government action.
2.45 – 3.45 pm Session Eight: Administrative Law and Justice

Narelle Bedford, Bond University

Merits review in Australian State tribunals – at the frontiers of a hybrid jurisdiction

Numerous States in Australia have established one over-arching tribunal through an amalgamation process of smaller, independent tribunals with the creation of “super tribunals”. Some of these tribunals have a mixed civil and administrative jurisdiction. The institutional framework within which tribunals operate includes oversight by the judiciary conducting judicial review. The dichotomy in having a specifically non-judicial creation overseen by a Court has been referred to as institutional dissonance. The thesis will analyse recent decisions by State Supreme Courts (and other relevant courts) concerning the operation and nature of mixed jurisdiction tribunals. In this context leading decisions by Tribunals will also be considered. The thesis will also incorporate empirical research into Tribunal member views and experiences of operating in a mixed jurisdiction environment. A question raised by such mixed jurisdiction is whether the distinction between Courts and Tribunals has become blurred, and whether the defining characteristics of a Tribunal are at risk of being diluted by the more formal process and practice as applied in Courts.

Grant Hooper, University of New South Wales

The Rule of Law and Increased Judicial Power in Australia

Modern judicial review in Australia has been characterized by a significant increase in the judiciary’s willingness to constrain the actions of both the executive and legislature. Such has been the expansion of the judicial role that it has been observed by a highly respected jurist that “it is only a slight exaggeration to suggest that Australians are now living in an age of judicial hegemony”

How has this increase in judicial power come about? The obvious and quite simple doctrinal answer is that with some initial legislative assistance the judiciary has simply extended incrementally the reach of a number of very traditional common law principles designed to ameliorate the risk of arbitrary governmental decision making. Yet despite judiciary protestations that it only makes decisions on a case by case basis and that little is to be gained by resorting to overarching values and theories, it seems far to naive to accept that the judiciary’s increased power is the consequence of a coincidental confluence of individual cases. A far more satisfying explanation, and one taken up here, is that there has been an underlying shift in the role that the judiciary sees for itself. More specifically, there has been a shift in the judiciary’s understanding of what the rule of law now requires of it for, as Justice Brennan once famously observed, “[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action.”

In the absence of the judiciaryarticulating with any particularity what the rule of law actually means, it is suggested that the rise of judicial power in Australia can be usefully viewed (despite High Court scepticism) as an attempt by the judiciary to impose upon the executive and legislature standards akin to those underlying what has been termed a culture of justification.