

# Drake v Minister for Immigration & Ethnic Affairs (1979) 46 FLR 409

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## Facts

- Daniel Drake was a US citizen who had lived in Australia for 10 years.
- Drake was convicted of possessing a commercial amount of cannabis.
- He was fined \$400 and sentenced to 12 months imprisonment.
- Section 12 of the (then) *Migration Act 1958* (Cth) (**Act**) allowed the Minister for Immigration and Ethnic Affairs to deport non-citizens who had been convicted of a sentence which was one year or longer. This was Government policy.
- Drake appealed this decision to the Administrative Appeals Tribunal (**AAT**).

## AAT proceedings

- Sitting on the AAT were Brennan J and Davies J (federal court judges).
- The separation of judicial power is an integral part of the Australian Constitution and only judges appointed to a Chapter III Court under the Constitution could exercise judicial power.
- The AAT affirmed the Minister's decision to deport Drake under the Act.
- Drake appealed to the Federal Court of Australia.

## Issues

- Was it unconstitutional for a federal judge to exercise administrative powers?
- Did section 12 of the Act apply even though Drake was a permanent resident?
- Did section 12 apply even though Drake could be released after 3 months?
- Did the AAT rely too heavily on the Minister's policy?

## Held

- The Constitution did not preclude a judge from acting in another role in their personal capacity - the AAT was administrative in nature and not judicial.
- The Act applied to non-citizens, including permanent residents.
- Section 12 applied to the length of the sentence, not time served.
- The AAT had not made an independent assessment of whether the decision was a correct or preferable one, and used the Government's policy as the determining factor.

## Quotes

"The Tribunal was entitled to take into account Government policy which was not inconsistent with the provisions or the objects of the *Migration Act 1958* (Cth), although it was not under a statutory duty to regard itself as being bound by that policy. However, it was not entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever relevant general Government policy might be."

### **Full Text**

Full text available here: <https://jade.io/summary/mnc/1979/FCA/39>

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