PART 1

THE STRUCTURE AND THEMES OF ADMINISTRATIVE LAW

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ADMINISTRATIVE LAW IN THE AUSTRALIAN ENVIRONMENT

Matthew Groves and
Janina Boughey

Introduction

In 2008 the now late Professor Michael Taggart argued that Australian administrative law was in many ways 'exceptional' amongst common law jurisdictions.[1] He was right to suggest that Australian public law, especially perhaps administrative law, 'stands apart' from other common law jurisdictions. Indeed that trend has continued, and it seems that Australian administrative law is becoming increasingly distant from its counterparts in the United Kingdom, Canada and New Zealand.[2] Taggart and others have noted that much of what is exceptional about Australian public law can be traced to our written constitution.[3] The *Constitution* and its implications are now the dominant force shaping Australian administrative law at the federal and state levels.[4] The separation of powers doctrine implied from the division of the *Constitution* into three chapters, and the express protection in s 75(v) of the High Court's original jurisdiction to remedy unlawful administrative action, have been instrumental in driving the direction of Australian administrative law.

The growing influence of the *Constitution* has diverted attention from our unique statutory framework of administrative law, which also sets Australia apart from most other jurisdictions. The reforms made in Australia during the 1970s and 1980s, resulting in what is widely known as the 'new administrative law', developed a modern and 'comprehensive system of administrative law'[5] which sought to shift focus from the courts as the central institution responsible for executive accountability, by creating several new systems and agencies of administrative review.

This chapter provides a snapshot of the evolution and current state of Australian administrative law. It is by no means an exhaustive analysis of the Australian administrative law environment, which, as readers will come to appreciate by the end of this book, is vast, complex and intertwined with many other areas of law. This chapter presents a context for the more detailed discussion of specific topics

1 Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1.
2 See, eg, Ben Saul's discussion of the distinctions between the Australian, UK and Canadian approaches to procedural fairness in national security decision-making in Chapter 5 of this book; Greg Weeks' analysis of the different approaches to legitimate expectations in various common law countries in Chapter 11; and Mark Aronson's discussion of the continued importance of jurisdictional error in the Australian context in Chapter 12.
3 Taggart, above n 1, 5; B Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues' (2002) 30 *Federal Law Review* 217, 229.
4 See, eg, J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77. See also the chapter by Chief Justice French in this book.
5 A phrase used by the Kerr Committee to describe its vision for Australian administrative law: Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report*, Parliament of the Commonwealth of Australia Paper No 144 (1971) (Commonwealth) ('Kerr Report'), 71.

contained in later chapters. It begins with an overview of the 'new administrative law' reforms of the 1970s and 80s, and how those reforms continue to affect modern administrative law in Australia. The chapter then considers the major force that has shaped Australian administrative law in more recent years – which is, ironically, far older than the 'new administrative law' – the *Constitution*. The final section examines some of the most recent and developing implications of the way in which the *Constitution* is seen to interact with administrative law in Australia.

The reforms of the 'new administrative law'

The various pieces of federal legislation comprising the 'new administrative law' package of reforms are now almost 40 years old, but remain central to the Australian public law landscape. The reforms were enacted in response to the reports of three committees which investigated administrative law during the late 1960s and early 70s. The first committee, the Commonwealth Administrative Review Committee, chaired by Sir John Kerr ('Kerr Committee'), was asked to report on: the judicial review jurisdiction for the proposed new Federal Court; the grounds on which review may be sought, and associated procedures; and the desirability of Australia introducing legislation along the lines of the United Kingdom's *Tribunal and Inquiries Act 1958*.[6] In its 1971 report, the Kerr Committee noted that the size and powers of executive government – including Ministers, government departments and statutory authorities – had expanded dramatically over the 20th century.[7] It concluded that this burgeoning government power – particularly discretionary power – should be balanced by adequate mechanisms which would ensure that the executive government exercised its powers and discretions in a fair rather than arbitrary manner.

The Kerr Report found that the three main avenues available to Australians to challenge adverse government decisions were significantly limited. The first avenue involved a check on executive power by the judicial arm of government. Individuals affected by a government official exercising discretionary functions could seek judicial review from the relevant superior court (the High Court of Australia if the decision-maker was a Commonwealth officer, or the respective State Supreme Court for decisions of State officials). The Kerr Committee found that judicial review

6 Ibid. The UK legislation was enacted on the recommendation of the Franks Committee (*Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd 218 (1957)).
7 Kerr Report, above n 5, 5.

of administrative action at common law was uncertain and complex.[8] The common law was based around the judicial remedies – the prerogative writs of mandamus, certiorari and prohibition, and equitable remedies of injunction and declaration – but these remedies carried a range of technicalities. For instance, each had different standing rules, time limits in which they could be issued, decisions they could remedy, and grounds on which they could be sought.[9] American Professor Kenneth Culp Davis famously described judicial review at common law as follows:

> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between the remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generality, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.[10]

The second mechanism designed to achieve executive accountability, which is also built into Australia's constitutional structure, is responsible government. The principle of ministerial responsibility was intended to ensure that Ministers were accountable to the Parliament for the actions of their departments through various parliamentary processes, but it provides no clear means for individuals to bring complaints directly to Parliament or to force a Member to do so on their behalf. Parliament itself does not have the time or resources to review all administrative decisions alleged to be erroneous.[11] The doctrine of responsible government was therefore a political one, offering no direct rights to individuals who wished to challenge the expanding power of governments.

Finally, the Commonwealth Parliament had recognised the need for additional accountability mechanisms in some areas where it had established boards or tribunals to review or oversee the exercise of executive discretion in areas including

8 See, eg, S A de Smith, *Judicial Review of Administrative Action* (Stevens, 1st ed, 1959) 17, 29.

9 Kerr Report, above n 5, 9–20. Some of these aspects of the common law have now relaxed slightly. As Andrew Edgar notes in Chapter 7, there is increasingly a single standing test for each of the remedies, focused on 'interest'. Similarly, the range of decisions to which each remedy applies, while still different, is at least broader because of the expanded notion of jurisdictional error following *Craig v South Australia* (1995) 184 CLR 163 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Mark Aronson discusses these developments in Chapter 12 of this book.

10 K C Davis, *Administrative Law Treatise* (West Publishing, 1st ed, 1958) 388.

11 Kerr Report, above n 5, 7–8.

taxation, veterans' entitlements, and film censorship. The Kerr Report noted that these review mechanisms were far from universal.[12] There were no clear principles or policies governing external review of administrative discretions. The areas where the Parliament had established specialist tribunals to review administrative decisions revealed no uniformity in the procedures the various tribunals followed.[13] Though this flexibility had the benefit of each tribunal being able to develop procedures that suited its own decision-making context, the Kerr Committee noted that this created 'a situation in which there is a lack of publicity and ignorance of procedure which is a handicap not only to legal advisors but to litigants generally'.[14]

The Kerr Committee took on the monumental task of addressing the gaps in accountability that existed under Australian law. It considered reforms and suggestions from the UK, New Zealand, the US and France, and recommended a suite of reforms drawing elements from each of those jurisdictions but adding new ideas. The reforms were intended to produce a 'comprehensive system of administrative law', rather than the ad hoc accountability provided by existing mechanisms.[15] The system envisaged by the Kerr Committee included:

- conferring jurisdiction on the proposed new Federal Court to review the lawfulness of administrative decisions;[16]
- enacting legislation to simplify, and in some cases extend, the judicial review jurisdiction of the new Federal Court;[17]
- establishing a new generalist Administrative Review Tribunal to replace the many specialist tribunals;
- establishing an Administrative Review Council to conduct research on discretionary powers and advise the governments on the review and oversight of such powers;[18]
- establishing a 'General Counsel for Grievances' to investigate complaints that were either outside the scope of administrative and judicial review, or otherwise 'not worth litigating before a tribunal or a court'.[19]

Following the Kerr Report, the government established two more committees to further examine aspects of the proposed reforms. The Committee of Review of

12 Ibid, 5–7.
13 Ibid, 26.
14 Ibid.
15 Ibid, 71.
16 At the time of the Kerr Report, the Federal Court of Australia had not yet been established. The Committee recommended that, if the plans for the Federal Court did not proceed, a specialist administrative court should be created: Kerr Report, above n 5, 73–4.
17 Kerr Report, above n 5, 76.
18 Ibid, 83–5.
19 Ibid, 93.

Prerogative Writ Procedures ('Ellicott Committee') considered the proposed judicial review legislation. It agreed with the Kerr Report's recommendations.[20] The Committee on Administrative Discretions ('Bland Committee') largely supported the Kerr Committee's proposals for a generalist tribunal and Counsel for Grievances, and fleshed out those reform suggestions.[21] Australian administrative law was completely refashioned by the enactment of these recommendations. While the full force of those changes can only be understood by their cumulative effect, it is useful to note their key individual elements.

Administrative Decisions (Judicial Review) Act 1977 (Cth)

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') confers judicial review jurisdiction on the Federal Court of Australia and the Federal Circuit Court of Australia (previously the Federal Magistrates Court).[22] It also adopts many of the Kerr and Ellicott Committees' recommendations to simplify, codify, and in some cases expand, common law judicial review. The ADJR Act was a radical and innovative reform. It quickly became the primary vehicle for federal judicial review, and the Federal Court was the main venue for those cases.[23] That changed when migration cases were largely excluded from the ADJR Act. Migration applicants were left with only one avenue of review – the original jurisdiction of the High Court. As migration cases flowed into the High Court, attention quickly shifted from statutory review in the Federal Court to constitutionally based review in the High Court. This change has led to criticism about the value of the ADJR Act, but the many benefits of the Act, as described below, should not be forgotten.

1 Establishing a single, simple procedure for judicial review

The ADJR Act creates a single procedure for judicial review, which applies regardless of the grounds used or the remedy being sought. The Act also contains a unified test for standing. The ADJR Act process is therefore

20 Committee of Review of Prerogative Writ Procedure, *Report of the Committee of Review of Prerogative Writ Procedure*, Parliament of the Commonwealth of Australia Paper No 56 (1973) ('Ellicott Report') 5, 11.

21 Committee on Administrative Discretions, *Final Report of the Committee on Administrative Discretions*, 1973 ('Bland Report').

22 Originally, jurisdiction was only conferred on the Federal Court. The Federal Magistrates Court was established in 1999 by the *Federal Magistrates Act 1999* (Cth), and the ADJR Act was amended to confer jurisdiction on the Federal Magistrates Court at the same time by the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth).

23 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 60.

significantly more straightforward than applications made under the common law or the *Constitution*. Cassimatis and Billings explain in Chapter 9 that the jurisdictional formula of the ADJR Act has proved difficult to apply and has perhaps created as much complexity in Australian judicial review as it resolved. The ADJR Act applies to decisions 'of an administrative character' and made 'under an enactment',[24] which provides a narrower jurisdiction than s 75(v) of the *Constitution*.This difference meant that some cases not covered by the ADJR Act could only be heard in the High Court. In 1983 the Commonwealth Parliament sought to rectify this situation by conferring additional jurisdiction on the Federal Court, which matched the High Court's constitutional jurisdiction.[25] Thus the Federal Court has two sources of judicial review jurisdiction, each with slightly different coverage: the ADJR Act; and s 39B of the *Judiciary Act 1903* (Cth). Cassimatis and Billings explain how the gaps between the two avenues of judicial review have increased as the ADJR Act jurisdiction has been interpreted more strictly. The result has seen the Federal Court's s 39B jurisdiction – originally intended only to supplement the ADJR Act – overtaking the ADJR Act in usage and importance. The Administrative Review Council ('ARC') recently recommended that the scope of the ADJR Act be expanded to ensure that the Act could continue to do the job of simplifying judicial review.[26]

2 Establishing a right to reasons

Decisions are almost impossible to challenge if no reasons are given, yet there is no general right to reasons under Australian common law.[27] Both the Kerr and Ellicott Committees recommended that people with standing to seek review of a decision should have a right to obtain reasons for that decision.[28] The ADJR Act adopted this recommendation in s 13, which enables anyone entitled to apply for review under the Act to request reasons from the decision-maker. Although there are some limits to the right to reasons under the ADJR Act,[29] s 13 has been described as 'the most significant right introduced into law by the [ADJR] Act'.[30] That is because a right

24 ADJR Act, s 3(1).
25 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 1983, 1046 (Lionel Bowen, Minister for Trade), discussing the *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth) which inserted s 39B into the *Judiciary Act 1903* (Cth).
26 ARC, *Federal Judicial Review in Australia*, (Report No 50, 2012) 77.
27 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
28 Kerr Report, above n 5, 78–9; Ellicott Report, above n 20, 8.
29 For example, the decisions listed in Schedule 2 are excluded from ss 13 and 13A of the ADJR Act. Decision-makers are also not obliged to provide certain confidential information.
30 *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, 583.

to reasons 'changes the balance of authority between the citizen and the state in a way the common law never recognised'.[31]

3 Codifying the grounds of review

Perhaps the most controversial feature of the ADJR Act is its codified list of the grounds of review. While other statutes around the world also do this, the level of detail in the ADJR Act grounds is unmatched.[32] Section 5 of the ADJR Act sets out a comprehensive, though not exhaustive, list of seventeen grounds.[33] These grounds were intended, and have been found, to restate the grounds available under common law.[34] The one exception is the 'no evidence' ground of review, which goes beyond the common law ground, although its precise scope remains unsettled.[35]

The English administrative law expert Sir William Wade cautioned the Ellicott Committee that codification might frustrate 'judicial development of additional grounds'.[36] The Ellicott Committee ultimately favoured codification but took heed of Wade's advice and recommended that the list of grounds include an open ended ground. The result was two 'catch all' grounds: that a decision is 'otherwise contrary to law';[37] or was an 'exercise of power in a way that constitutes abuse of the power'.[38] Neither ground has been widely used, perhaps because the enumerated grounds are sufficiently flexible to accommodate common law developments.[39] Justice Kirby suggested that the codified grounds of review in the ADJR Act had impeded common law development of the grounds of review.[40] He thought that Australia had not matched the expansion of a number of common law grounds of review in the UK since the 1970s because of the rigidity of the ADJR Act's grounds.[41] But others argue that codification of the grounds of review has made judicial review more accessible, both to lawyers and the wider public.[42]

31 J J Spigelman, 'Foundations of Administrative Law: Toward General Principles of Institutional Law' (1999) 58 *Australian Journal of Public Administration* 3, 8.
32 Eg, Canada's *Federal Courts Act*, RSC 1985, c F-7 sets out the grounds on which the Federal Court of Canada can review decisions in s 18.1(4). The six grounds set out are much broader articulations of the common law grounds than those set out in ss 5–6 of the ADJR Act.
33 Section 6 of the ADJR Act does likewise with respect to 'conduct' that may be challenged.
34 *Kioa v West* (1985) 159 CLR 550, 567 (Gibbs CJ), 576 (Mason J), 625 (Brennan J).
35 Aronson and Groves, above n 23, 248–53.
36 Ellicott Report, above n 20, 9.
37 ADJR Act, s 5(1)(j).
38 ADJR Act, ss 5(1)(j), 5(2)(j).
39 M Aronson, 'Is the ADJR Act hampering the development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 214–16.
40 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94–5.
41 Ibid, 97.
42 ARC, above n 26, 127–8. See also Aronson, above n 39.