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978-0-521-69790-3 - Australian Administrative Law: Fundamentals, Principles and Doctrines

Matthew Groves and H. P. Lee

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Australian administrative law

The growth of administrative law in Australia has continued in an unabated form since the introduction of innovative reforms in the mid-1970s. The centre plank of these reforms was the establishment of the Administrative Appeals Tribunal with follow-on reforms relating to the Ombudsman, judicial review and freedom of information legislation. The impact of these reforms has been vast and significant. *Australian Administrative Law: Fundamentals, Principles and Doctrines* seeks to take stock of the growth and development of administrative law principles. Particular attention is paid to the important cases and key doctrines which provide the theoretical underpinnings of these principles.

In this book, a team of highly respected administrative law scholars and jurists aim to provide a lucid exposition of the relevant case law, principles and doctrines. The book illuminates the fundamental features of Australian administrative law and will prove useful to students and practitioners interested in this field.

Matthew Groves is Senior Lecturer in Law at Monash University.

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Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521697903

© Matthew Groves, HP Lee 2007

First published 2007

Printed in Australia by Ligare

A catalogue record for this publication is available from the British Library

National Library of Australia Cataloguing in Publication data

Australian administrative law : fundamentals, principles and doctrines.

Includes index.

ISBN 9780521697903 (pbk.).

1. Administrative law – Australia. 2. Administrative remedies – Australia. 3. Judicial review of administrative acts – Australia. I. Groves, Matthew. II. Lee, H. P., 1947–342.9406

ISBN 978-0-521-69790-3 paperback

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Foreword

The Hon M E J Black AC
Chief Justice of the Federal Court of Australia

The large, complex and evolving field of administrative law is of special importance to lawyers and indeed to all concerned with Australia's democracy. This is not only because administrative decision-making can, and increasingly does, touch upon almost any aspect of our lives but, more fundamentally, because administrative law is one of the primary means by which our commitment to the rule of law is applied. This commitment to the rule of law may be seen at its most direct in the field of judicial review. As a former Chief Justice of Australia has written:

*Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.*¹

Australian administrative law has its own distinctive character. Its influences include the Commonwealth's legislative reforms of the 1970s and early 1980s. These reforms covered a wide field, and included the establishment of a simplified process of judicial review before the newly created Federal Court of Australia. No less importantly, the reforms provided for merits review before a new and independent tribunal of high standing, the Administrative Appeals Tribunal. It would be a serious mistake to underestimate the importance of merits review by tribunals and other non-judicial aspects of administrative law, for tribunals are usually the first and most accessible avenue for Australians seeking review of executive decision-making. The reforms also created the office of the Commonwealth Ombudsman, and the Administrative Review Council to keep the new system under review and the reforms maintained. All this occurred against the rich background of the common law and its institutions and in the constant presence of Australia's Constitution – often unnoticed but, on occasion, stamping its own authority on the development of this body of law.

In this excellent new book, distinguished scholars from academia, the practising legal profession, and the judiciary explore and explain Australian administrative law, its theories, the ideas and the principles upon which it rests.

The intended readership includes tertiary students and to them I would commend the quality of the scholarship and the enthusiasm for the subject that the writing conveys; as lawyers they will have an important role to play in promoting an understanding of the fundamentals of our system of government.

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Administrative law, and its interaction with constitutional law, should be one of their special responsibilities. Also, although students will no doubt concentrate on particular chapters, I would urge them to read and consider the work as a whole, for administrative law is an area in which a clear understanding of the broad field – which the book provides in full measure – is needed for a proper understanding of the individual parts.

I am delighted to have the opportunity of writing the foreword to this very valuable contemporary work on administrative law in Australia.

M E J Black
Owen Dixon Commonwealth Law Courts
Melbourne
19 February 2007

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Preface

The development of administrative law is a prominent feature of the Australian legal landscape. The importance of this subject is highlighted by the fact that it is stipulated as a 'core' subject in the syllabi of many, if not most, law schools. One needs only to peruse the cases reported in the main law reports to appreciate its significance as a large area of legal practice.

In this volume of essays, the contributors examine a number of fundamental topics of practical and doctrinal importance. The contributors (who are drawn from academia, the judiciary and the legal profession) have sought to provide a lucid exposition of the relevant case law and principles and explore the doctrinal dimensions and theoretical underpinnings of those principles.

We hope this volume will be of great relevance and value to tertiary courses in Australian administrative law, the Australian legal system and government. As it will be concerned not only with the lucid exposition of the principles, but also with the scholarly exploration of doctrines and theories underpinning the subject, we expect that the volume will be of great interest to tertiary students, members of the judiciary, practitioners and legal academics.

We wish to record our gratitude to a number of persons who assisted us greatly in bringing this book to fruition. First and foremost we are extremely indebted to Enid Campbell, Emeritus Professor at Monash University and the undoubted doyenne of public law in Australia. Enid generously reviewed all the contributions and provided us with invaluable comments. Jill Henry and Kate Indigo at Cambridge University Press and Carolyn Leslie were most helpful and, fortunately for us, very patient as we sought to complete the editing of the book amidst our many other pressing commitments. We also would like to thank Maryanne Cassar and Audrey Paisley who provided us with efficient and chirpy secretarial assistance and the Monash Law Faculty for providing us with a grant to enable us to organise a symposium where a number of the draft chapters were discussed.

Last, but not least, we are indebted to the Honourable Michael Black, Chief Justice of the Federal Court of Australia, for his encouragement and for writing the foreword to the book.

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Stephen Argument is a government lawyer working in Canberra, and has also worked extensively in private legal practice for mainly government clients. Prior to commencing work in private legal practice in 2000, Stephen worked in the Australian Public Service where his positions included Secretary to the Senate Standing Committee for the Scrutiny of Bills. Stephen is co-author of the third edition of Professor Dennis Pearce's text *Delegated Legislation in Australia*. He has been the National Secretary of the Australian Institute of Administrative Law for over sixteen years. Stephen is the Legal Adviser (Subordinate Legislation) to the Australian Capital Territory Legislative Assembly's Scrutiny of Bills and Subordinate Legislation Committee.

Mark Aronson is Emeritus Professor of Law at the University of New South Wales. He has written extensively on issues in law, Crown liability, evidence and procedure. He is planning to begin work on a fourth edition of Aronson, Dyer and Groves' *Judicial Review of Administrative Action* (2004), which is currently in its third edition.

Colin Campbell is Lecturer at the Faculty of Law, Monash University. Prior to this he was a solicitor and a judge's associate. Colin holds masters degrees in law from the University of Melbourne and Cambridge University. Colin was recently awarded a PhD by Cambridge University for his doctoral dissertation, 'The Conception of Public Power in Judicial Review'.

Mary Crock is Associate Professor and Associate Dean (Postgraduate Research) at the Faculty of Law, University of Sydney. Mary teaches and researches in migration and refugee law. Her books and edited collections include: *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia* (2006); *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) (with Ben Saul and Azadeh Dastyari); *Immigration and Refugee Law in Australia* (1998). Mary

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has held many appointments related to migration and refugee issues including adviser to the Australian Senate (Inquiry into Australia's Refugee and Humanitarian Program, 2000) and consultant to the Human Rights and Equal Opportunity Commission (on immigration detention).

Robin Creyke is Professor of Law in the College of Law at the Australian National University, where she teaches mainly administrative law and military law. Her main research interests are in administrative law, notably the impact of judicial review cases and the position of tribunals in our system of government. Robin's publications include *Veterans' Entitlements Law* (2001, with P Sutherland) and *Laying Down the Law* (6th edn, with several co-authors) and *Control of Government Action* (2005, with J McMillan). Robin has held many positions in both government and the private sector. She is currently President of the Australian Institute of Administrative Law, a member of the Administrative Review Council (which advises the federal Attorney-General on administrative law issues) and is also a Special Counsel for Philips Fox Lawyers (where she advises on government and corporate issues).

Roger Douglas is Associate Professor at La Trobe University Law School, where he teaches administrative law, civil procedure, equity and trusts. His recent research examines the use of law to control political dissent. Roger's publications include numerous articles in law, sociology and criminology journals, and books including: *Dealing with Demonstrations* (2004), *Douglas and Jones' Administrative Law: Cases and Commentary* (5th edn 2006), and *Social Aspects of Law* (1973).

Alison Duxbury is Senior Lecturer at the Faculty of Law, University of Melbourne and a member of the Asia-Pacific Centre for Military Law. She holds bachelor degrees in Arts and Laws (Hons) from the University of Melbourne, and a Master of Law from Cambridge University. She has taught a variety of subjects, including constitutional and administrative law, international law, and military administrative law. Her main research interests include international law, human rights law, and the intersection between international law and public law.

Chris Finn is Senior Lecturer in Law at the Law School of the University of Adelaide. He teaches and researches in the areas of administrative law and competition law and has published in relation to Freedom of Information legislation, government contracting, privatisation and utility regulation (including the Australian National Electricity Market).

Justice Robert French was appointed to the Federal Court of Australia in 1986, and he is based in Perth. From May 1994 to December 1998, he also held the office of President of the National Native Title Tribunal. He was, until recently, President of the Australian Association of Constitutional

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Law. He is a member of the Australian Competition Tribunal and a part-time Commissioner of the Australian Law Reform Commission.

Stephen Gageler SC is a leading member of the New South Wales Bar, where he maintains a practice in constitutional, administrative and revenue law with emphasis on appeals mainly in the Federal Court and the High Court. Before he was called to the Bar, Stephen worked in both private practise and government and was Associate to Sir Anthony Mason. He has also published widely in the areas of public law and federal jurisdiction.

Matthew Groves is Senior Lecturer in Law at the Faculty of Law, Monash University where he teaches public law, legal ethics and succession law. Matthew is co-author of Aronson, Dyer and Groves', *Judicial Review of Administrative Action* (3rd edn, 2004) and has published widely on administrative law, prison management and military law.

Bill Lane is the Clayton Utz Professor of Public Law at Queensland University of Technology, having previously taught law at La Trobe University, Melbourne and the University of Queensland. He is joint author of Lane and Young: *Administrative Law in Queensland* (2001); joint editor of Lane and Young *Queensland Administrative Law* and the editor of the *Queensland Administrative Reports*. He is also a part-time Senior Member of the Veterans Review Board (Cth) and Member of the Non State Schools Accreditation Board (Qld).

HP Lee is the Sir John Latham Professor of Law at Monash University, where he is currently Deputy Dean of the Faculty of Law. He teaches and researches in Australian constitutional law and comparative constitutional law. His major works include HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (2003), E Campbell and HP Lee, *The Australian Judiciary* (2001), HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (1995) and HP Lee, *Emergency Powers* (1984). He is also currently the Vice-Chairman of the Australian Press Council.

Maria O'Sullivan lectures in administrative law at Monash University. She completed a BA/LLB (Hons) degree at the Australian National University in 1995, and a LLM in International Human Rights Law at the University of Essex in 2001. She has worked in various legal positions, including as a Policy Officer at the Human Rights and Equal Opportunity Commission, a researcher with Matrix Chambers, London, and a legal adviser with the Refugee Review Tribunal. Her primary research interests are administrative and refugee law. She is currently completing a doctorate on the cessation of refugee status.

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Information and Privacy in Australia: Government and Information Access in the Modern State (2005) and a Freedom of Information editor for the *Australian Administrative Law Service*. Moira was a legal consultant to the Public Accounts and Estimates Committee of the Victorian Parliament in respect of its report, *Commercial in Confidence Material and the Public Interest* (2000) and a founding co-editor of the *FOI Review*.

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Ben Saul is Senior Lecturer at the Faculty of Law, at the University of Sydney, and Director of the Sydney Centre for International and Global Law. He specialises in public international law and his books include *Defining Terrorism in International Law* (2006), the first scholarly work on the subject, and *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) (with Mary Crock and Azadeh Dastyari). Ben is involved in numerous professional and community organisations and practises occasionally as an academic barrister.

Naomi Sidebotham was formerly Senior Lecturer in Law in the School of Law, Murdoch University. She researches in the areas of administrative law

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Rick Snell is Senior Lecturer in Law at the University of Tasmania, where he teaches and researches in administrative law and comparative administrative law. In particular, his comparative research focuses on freedom of information and Ombudsman. He is a member of the Tasmanian Administrative Review Advisory Council, which reports to the Tasmanian Attorney-General on administrative law practices and reforms.

Cameron Stewart is Associate Professor of Law at Macquarie University. He is a solicitor and barrister of the High Court of Australia and a legal practitioner of the Supreme Court of New South Wales. He has degrees in economics, law, jurisprudence and a doctorate from the University of Sydney on end-of-life decision-making. He has published widely on medical decision-making and is currently researching Australian guardianship law and practice.

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