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MODERN ADMINISTRATIVE LAW IN AUSTRALIA

CONCEPTS AND CONTEXT

Modern Administrative Law in Australia provides an authoritative overview of administrative law in Australia. It clarifies and enlivens this crucial but complex area of law, with erudite analysis and thoroughly modern perspectives. The full range of the subject is explored, from first principles to the cutting edge of controversies and concerns unfolding today.

The contributors – including highly respected academics from 11 Australian law schools, as well as eminent practitioners including Chief Justice Robert French AC and Justice Stephen Gageler of the High Court of Australia – are at the forefront of current research, debate and decision-making, and infuse the book with unique insight.

The book examines the structure and themes of administrative law, the theory and practice of judicial review, and the workings of administrative law beyond the courts. Each chapter addresses an important conceptual or procedural concern within administrative law with reference to current issues and trends, including human rights, environmentalism, immigration, privacy and integrity in government.

Administrative law affects innumerable aspects of political, commercial and private life, and yet is often considered difficult to understand. *Modern Administrative Law in Australia* unravels the intricacies and reveals how they are applied in real cases. Illuminating and engaging, it is an essential reference for students and practitioners of administrative law.

Matthew Groves is an Associate Professor in the Law School of Monash University, where he teaches and researches in administrative law. He is also a member of the Commonwealth Administrative Review Council, the peak body that advises the federal government on administrative law and policy.

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FOREWORD

It is an enticing book title – *Modern Administrative Law in Australia*. Why is it modern? How is it different from the system of Australian administrative law that has been familiar over decades to practitioners, teachers and students?

There are three characterising or long-standing elements of Australian administrative law. The first is the constitutional foundation. The separation of powers in the *Australian Constitution* both anchors the judiciary's role in controlling the legal exercise of executive power and places implied constraints on legislative freedom to immunise executive power from judicial scrutiny. Section 75 supplements that arrangement by giving the High Court a guaranteed jurisdiction to adjudicate legal claims against the Commonwealth and to restrain unlawful conduct by Commonwealth officers.

The second feature is that many foundation principles of Australian administrative law are drawn less from the *Constitution* than from the common law. Key concepts – the principle of legality, natural justice, principles of statutory interpretation, remedies and standing – were well developed before constitutional essentials became more pronounced in the last two decades. Indeed, books on Australian administrative law written before that time devoted little attention to the *Constitution* and focused instead on common law principles of judicial review, with a strong emphasis on landmark decisions of British courts.

The third feature is that Australian parliaments significantly expanded the scope of administrative law from the 1970s onwards. New institutions were created to which the community could turn to challenge or question government administrative action. Well-known examples are administrative tribunals, Ombudsmen and commissioners with specialist functions in areas such as human rights, corruption prevention and information regulation. Australian parliaments also enacted a range of new administrative law rights, such as the right to reasons, access to government information, protection of personal information, and whistleblower protection.

Modern Administrative Law in Australia, containing essays by leading jurists, practitioners and writers, presents a fourth element of administrative law. It evolves, changes and adapts to the changing face of government and community expectations. This is a unifying thread of all essays in this book. Together they provide a vivid picture of how administrative law values, doctrines and structures are dynamic and compelling. A few themes stand out.

One is that the *Constitution* has become, as Groves and Boughey observe, a 'major force that has shaped Australian administrative law in more recent years'. This influence is seen in many ways. The *Constitution* draws attention to overarching values and principles that now receive greater attention in administrative law jurisprudence, as they do in the essay by Chief Justice French. Essays dedicated to jurisdictional error, by Justice Gageler and Professor Aronson, similarly reflect how the *Constitution* has set a new doctrinal agenda – albeit one, as both observe, in which ambiguity is played out in case law and academic analysis. The inclusion in this book of a separate chapter on privative clauses conveys a similar message about the new constitutional agenda (Young). The development

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of the constitutional review jurisdiction has also sparked a lively debate about whether the *Administrative Decisions (Judicial Review) Act 1977* (Cth) has been overtaken or sidelined (Billings and Cassimitas).

A more intense focus on statutory interpretation is another contemporary administrative law theme, taken up in many essays, including in a separate essay by Barnes. The exquisite range of interpretive problems that can arise when the legislature seeks to codify a fundamental administrative principle – the right to a fair hearing – is examined by Pearson, in a discussion of judicial review of decisions by migration tribunals. This is also taken up in the essay by Groves, who explores the expanding breadth of natural justice doctrine and legislative attempts to exclude or confine it.

The newer structural elements of administrative law have evolved in interesting ways that reflect a greater complexity and sophistication. The institution of Ombudsman, as Stuhmcke discusses, now has many different forms and discharges a range of functions beyond complaint handling. There has been a comparable proliferation in the diversity, jurisdiction, procedure and caseload of administrative tribunals, described by Creyke as the effective face of justice to most Australians. Freedom of information legislation has moved from a first to a second generation model of providing public access to government information (Bannister). Privacy protection, once a neglected area of administrative law, has fast become a core concern for both government and the community (Paterson). Drawing these threads together, Brown examines the options for acknowledging the development of a fourth or integrity branch of government.

Administrative law has grown in scope and now plays a larger role in reviewing the exercise of public power. Should it go further still? Some essayists question whether Australian administrative law fulfils its potential to protect human rights (Duxbury), to review the exercise of coercive powers that have a national security dimension (Saul), or to provide standing to community groups to seek judicial review of environmental and planning decisions (Edgar). Are judicial review principles too procedurally focused, or should they provide redress against substantive unfairness (Weeks)? And is Australian administrative law unduly constrained by a classic but diminishing distinction between public and private power (Finn)?

Modern Administrative Law in Australia is a fitting title for an excellent collection of scholarly essays that convey the richness, growth and vigour of Australian administrative law. A particular strength of the book is that it is sure to play a central role in the next phase of development.

Professor John McMillan
Australian Information Commissioner

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Judith Bannister is a Senior Lecturer in the Law School at the University of Adelaide. Judith teaches and researches in intellectual property, particularly copyright and confidential information, and the regulation of information access. She has published many books and articles in these areas. Judith is currently completing her book, *Government Accountability: Australian Administrative Law* (with Gabrielle Appleby, for Cambridge University Press).

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Janina Boughey is a PhD candidate in the Law Faculty at Monash University. She researches and teaches in Australian and Canadian public law. Prior to commencing her PhD, Janina worked in administrative law policy at the Commonwealth Attorney-General's Department and as a researcher at the Australian Senate. She has published a number of articles on comparative administrative law.

AJ Brown is Professor of Public Policy and Law in the School of Government and International Relations at Griffith University. He is also program leader in public integrity and anti-corruption in the Centre for Governance and Public Policy, and a director of Transparency International Australia. His former roles include senior investigation officer for the Commonwealth Ombudsman and Associate to the Hon G E Tony Fitzgerald AC, President of the Queensland Court of Appeal. He researches, consults and teaches in public accountability, integrity, governance, federalism and intergovernmental relations. His authored and co-authored books include *Whistleblowing in the Australian Public Sector* (2008) and *Whistling While They Work* (2011, both ANZSOG/ANU E-Press), and the biography *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011).

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Robin Creyke is a Professor in the College of Law at the Australian National University. She is currently on leave while she acts in the role of Senior Member of the Commonwealth Administrative Appeals Tribunal. Robin's main research interest is administrative law, particularly the position of tribunals in our system of government. She has published many books and articles about administrative law, the most recent of which is Creyke and McMillan, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012).

Alison Duxbury is an Associate Professor in the Melbourne University Law School. She teaches and researches in international law, military law and public law. Alison has published widely in those areas, most recently *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge University Press, UK, 2011).

Andrew Edgar is a Senior Lecturer in the Law School at the University of Sydney. He teaches and researches in administrative and environmental law. Andrew's research focuses on judicial and merits review of environmental decisions, and he has published a wide range of articles and book chapters in that area.

Chris Finn was recently appointed as an Associate Professor at the Curtin Law School, before which he worked for many years in the Law Schools at the University of Adelaide and then the University of South Australia. Chris has published many articles and book chapters in administrative law.

Chief Justice R S French AC is the Chief Justice of the High Court of Australia. Prior to his appointment to the High Court, his Honour was a Justice of the Federal Court of Australia. Justice French has also held many other appointments, including the office of President of the National Native Title Tribunal (1994–98) and President of the Australian Association of Constitutional Law.

Hon Stephen Gageler is a Justice of the High Court of Australia. At the time of his appointment he was Solicitor-General of Australia. Prior to that appointment he maintained a practice in the New South Wales Bar in constitutional, administrative and revenue law, specialising in appeals to the Federal Court and the High Court. Before he was called to the Bar, Justice Gageler worked in both private practice and government, and was Associate to Sir Anthony Mason. He has published widely in the areas of public law and federal jurisdiction.

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Moira Paterson is an Associate Professor in the Law Faculty at Monash University. She teaches and researches in the field of information law, with a focus on freedom of information and privacy. Moira has published the book *Freedom of Information and Privacy: Government and Information Access in the Modern State* (LexisNexis, 2005), and many articles and book chapters on information and privacy. She is a member of the Board of the Australian Privacy Foundation.

Linda Pearson is a Commissioner of the Land and Environment Court of New South Wales and a member of the Commonwealth Administrative Review Council. She was previously a senior lecturer in the Faculty of Law, University of New South Wales, and has extensive experience in a number of tribunals, both Commonwealth and State, including the Migration Review Tribunal. Linda has written widely in administrative law and environmental law.

Ben Saul is a Professor of International Law at the Sydney Centre for International Law at the University of Sydney. He has published many books and articles in terrorism, human rights, the law of armed conflict, and international criminal law. His current research includes several projects funded by large competitive grants, including an Australian Research Council Future Fellowship on the emerging international law of terrorism.

Anita Stuhmcke is a Professor in the Law School at the University of Technology, Sydney. Her doctorate was an in-depth empirical study of the office of the Commonwealth Ombudsman. Anita has published widely in Australia and internationally on all aspects of the institution of the Ombudsman. She also teaches and publishes on the law of torts and legal research.

Greg Weeks is a lecturer in the Faculty of Law at the University of New South Wales, where he teaches administrative law. Greg's research interests are primarily related to judicial review, on which he has published a number of articles, and to the availability of private law remedies against public authorities. His recently completed doctoral thesis is on the remedies available when public authorities fail to adhere to their own soft law instruments.

Simon Young is a Professor of Law in the Law School at the University of Western Australia. He specialises in public law (particularly administrative law) and indigenous law and policy (notably native title). He has published several books, book chapters and articles in these areas.

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