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AUSTRALIAN ADMINISTRATIVE LAW: FUNDAMENTALS, PRINCIPLES AND DOCTRINES

By Matthew Groves and HP Lee
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With 23 chapters that traverse the full spectrum of administrative law and 23 authors that include some of the doyens of Australian public law, this book is unique within its field. Whilst those facts alone could justify its inclusion on the list of recommended texts in any administrative law course, the book's appeal rests more on its substantive contributions. The editors approached the book with dual aims — to provide readers with a 'lucid exposition of the principles' of administrative law as well as a 'scholarly exploration of doctrines and theories underpinning the subject'.[1] Thus, the book is intended to be both practical and doctrinal. Many of the contributions offer insightful and reflective commentaries on the law, as well as clear expositions of the law itself. In this respect, the book largely achieves these aims.

If anything is missing from the book it is a concluding chapter that draws thematic links and observations from each of the chapters. Indeed, there is little cross-referencing between chapters, despite the fact that particular themes and issues frequently arise in several places. This is perhaps surprising, given that many of the draft chapters had been presented and discussed at an earlier symposium held at the Monash Law Faculty.[2] What I perceive to be recurring themes throughout the book are canvassed in the early chapters by the editors, Matthew Groves and HP Lee, as well as Chief Justice French and Chief Justice Black (the latter contributing a foreword). Those themes include a resurgence in constitutionalism and the significance of the constitutional text within Australian administrative law, the continual (but increasing) concern with individual rights and administrative justice, and the ongoing tendency for Australian administrative lawyers to measure Australian law by comparison with United Kingdom law. With respect to both the constitutional matrix and human rights, Australia shares a common tradition with the United Kingdom, but as a distinct legal framework. Specifically, the absence of

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1 Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) ix.

2 Ibid.

a written constitution in the United Kingdom and the absence of a legislative charter of rights in Australia are key points of legal difference.

Constitutionalism and the constitutional text have emerged as significant influences on the development of Australian administrative law in recent years, and the book begins and ends with this point. Chief Justice Black states in the foreword that Australia's *Constitution* is 'often unnoticed' but occasionally stamps its own authority on the development of administrative law.[3] Stephen Gageler SC concludes the final chapter with the observation that, although the 'procedural simplicity and flexible remedies' offered by the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) have been unfulfilled, the 'refocus on s 75(v) of the Constitution has allowed a different paradigm of judicial review to emerge in Australia'.[4] At the heart of this refocus is a commitment to the notion of limited government and the rule of law, including 'the idea that public powers are subject to implicit or unspoken limits.'[5] As Chief Justice French states, '[i]t is fundamental to the rule of law that there is no such thing as an unfettered discretion' and that each of the themes and values of administrative law[6] is framed by the 'overarching concept of the rule of law'.[7]

The High Court's entrenched jurisdiction under s 75(v) and the structural separation of powers between the legislature, the executive and the judiciary under the *Constitution* give effect to both the rule of law and the separation of powers. Each doctrine has affected the development of rules and principles of administrative law, as well as the way in which we tend to measure and evaluate the law. This latter point is evident in many of the contributions. In his chapter on the doctrine of non-justiciability, Chris Finn highlights the constitutional premise which underpins it: 'true "non-justiciability" … is linked to understandings of the limits of judicial review.'[8] He concludes, however, that the doctrine 'constitutes a limit, if not an affront, to the rule of law'.[9] Roger Douglas, in his chapter on standing, observes that the power of the legislature to limit the right to seek judicial review 'sits oddly with the High Court's constitutionally entrenched administrative law jurisdiction'.[10] Naomi Sidebotham examines the relevant considerations ground of review and highlights the potential for 'judicial incursion into the merits of a decision' as a common point of criticism with respect to that ground.[11] Geoff Airo-Farulla makes

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3 Ibid vii.
4 Ibid 379.
5 Ibid 3.
6 See Ibid 16 where Chief Justice French identified the following themes and values: lawfulness, good faith, rationality and fairness, accessibility, openness, participation and accountability.
7 Ibid 17.
8 Ibid 145.
9 Ibid 156.
10 Ibid 163.
11 Ibid 186.

the argument for a constitutional basis underpinning the unreasonableness ground of review: 'the Constitution requires the courts to be more than mere rubber stamps to the existence of arbitrary and capricious power'.[12] Linda Pearson uses the separation of powers (and the merits/legality distinction) as a basis for questioning the use of 'practical injustice' as a determinative concept in procedural fairness cases.[13] However, Alison Duxbury in her chapter on *Teoh*,[14] *Lam*[15] and legitimate expectations, considers that concern for the separation of powers and the proper function of the three arms of government was the driving force behind the decision in *Lam*.[16] Cameron Stewart similarly uses the separation of powers and the rule of law as his basis for critiquing the United Kingdom developments on substantive legitimate expectations:

> It is a fatal mistake for lawyers to believe that they alone can achieve justice, and that judicial review can and should be applied to all decisions in order to achieve justice. Lawyers who believe this risk undermining the traditional role of judges, damaging the legitimacy of the judicial branch of government and threatening the very fabric of the rule of law. [17]

Further illustrating the constitutional dimensions of modern administrative law, Groves discusses the potential for the rule against bias to be protected under Chapter III of the *Constitution*.[18] And Aronson provides an excellent analysis of jurisdictional error and the importance of s 75(v). His chapter also returns to the broad values and 'grand principles' of administrative law discussed in the contributions of Chief Justice French, Groves and Lee:

> [O]ur grand principles … are so grand as to belong more properly to the field of constitutional law. The rule of law, the principle of legality, the separation of powers, even the recently advanced 'integrity principle' — these offer very little guidance to anyone wanting to know what the courts might commonly regard as the minimum standards of public administration.[19]

Using recent developments in the United Kingdom as examples of a 'top-down' approach, Mark Aronson considers an approach for Australian courts:

> [T]he courts cannot sensibly operate solely on either a top-down or a bottom-up approach. They need to do both, and probably cannot avoid it even if this is not always acknowledged. Grand value statements are usually too

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12 Ibid 214.
13 Ibid 278–279.
14 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
15 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
16 Matthew Groves and HP Lee (eds), above n 1, 315.
17 Ibid 280.
18 Ibid 318.
19 Ibid 341.

> indeterminate to do more than provide general guidance, but by the same token, one cannot operate the more precise grounds of review in a vacuum, divorced from any sense of their proper fit with each relevant administrative or regulatory context. [20]

Areas of Australian law are highlighted where 'grand principles' have had little purchase in the law's development by the courts — the duty (or lack thereof) to provide reasons for decisions,[21] the no evidence rule[22] and the role of ministerial directions in dictation cases.[23] However, throughout the book the point is frequently made that where human rights are at stake (and life and liberty in particular) Australian courts have for some time adopted a more rigorous approach to judicial review. As Sidebotham explains, '[w]hen dealing with areas that have such potential adverse impact upon the individual, it is necessary for the decision-maker to do more than pay lip service to fundamental principles.'[24] Mary Crock and Edward Santow highlight this point in the context of judicial interpretation of privative clauses.[25] Groves and Lee quote Kirby J, who asserts that courts should always take account of the 'impact of a decision upon the life, liberty and means of the person affected'.[26] Marilyn Pittard uses the contemporary focus on human rights in calling for new guiding principles and a new framework for determining whether reasons should be given.[27] Indeed, Pittard suggests that cases involving loss of liberty, for example, might warrant higher standards.[28]

The development of administrative law on the basis of a concern for human rights is also dealt with in the book — largely in the context of an examination of United Kingdom jurisprudence. However, Geoff Airo-Farulla, who examines the development of the unreasonableness ground of review in the United Kingdom following the introduction of the *Human Rights Act 1998* (UK), offers the following prediction:

> [U]nreasonableness's indeterminacy is a strength, not a weakness. It is indeterminacy that has allowed the Australian courts to slowly but surely turn up the intensity of review of factual findings. The effect of this, in my view, has clearly been to enhance the integrity of administrative decision-making in this country. It is also indeterminacy that has allowed the English courts to modify the traditional one-size fits-all approach to *Wednesbury* unreasonableness, in recognition that not all policies, and not all affected

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20 Ibid 342.
21 See Marilyn Pittard's comments: Ibid 180–4.
22 See Bill Lane's comments: Ibid 239.
23 See Maria O'Sullivan's comments: Ibid 254–8.
24 Ibid 194.
25 Ibid 366.
26 Ibid 11, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 198 ALR 59 at [170].
27 See Matthew Groves and HP Lee (eds), above n 1, 182–4.
28 Ibid 183.

> interests, are created equal. While the Australian courts have not yet gone down this path, the logic is strong, and it is probably only a matter of time until they do. [29]

The human rights dimension of administrative law is the subject of Ben Saul's chapter, which examines the convergence and divergence of human rights and administrative law in the absence of a bill of rights.[30] Alongside the contributions of Chief Justice French and Airo-Farulla, Saul's conclusion that 'Australian administrative law remains sequestered from the human rights influences which invigorate other common law systems' seems rather harsh. For example, Justice French highlights the importance of interpretive principles in identifying the limits of statutory powers. He also considers that the principle of legality (the presumption against the statutory removal of fundamental rights in the absence of unmistakably clear language) operates as a constitutional principle:

> [The UK] approach confers a certain 'constitutional' status on rights and freedoms without according to them the status of limits on legislative competence. The interpretive principles applicable in Australia have a similar juristic character although in a country which operates under written Constitutions there would be a reluctance to call those rights which they protect 'constitutional rights' and a readiness to emphasise the lower case 'c' if they are ...
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> That principle [of legality] may be less strongly stated in Australia but the principle itself can properly regarded as 'constitutional' in character even if the rights and freedoms which it protects may not. [31]

This approach is reflective of that adopted by Gleeson CJ in cases such as *Plaintiff S157/2002 v Commonwealth*.[32] However, in treating the principle as 'constitutional', Chief Justice French has gone further than Gleeson CJ, and it will be interesting to see if this view informs his future approach to judicial review cases under s 75(v).

What the contributions of Aronson, Chief Justice French, Airo-Farulla and others indicate is that the 'grand principles' of administrative law, together with interpretive rules such as the principle of legality, go some way to ensuring that individual rights are taken into account when applying the grounds of review, or are better protected through commitment to the rule of law and the separation of powers doctrine. This is strengthened when viewed through a prism of constitutionalism that is evident in Justice French's chapter.

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29 Ibid 232.
30 Ibid 51.
31 Ibid 26.
32 (2003) 211 CLR 323.

Groves and Lee have compiled a significant contribution to the literature on Australian administrative law. Its particular strengths lie in the analytical depth of its chapters, the breadth of experience and expertise of its contributors, and the book's capacity to offer both an overview and scholarly analysis of the law in Australia. Based on the contributions of the 23 authors, it is clear that in the last decade the constitutional aspects of Australian administrative law have increased in importance and that the impact of human rights considerations is still to be fully played out.