Book Reviews

An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark edited by MARCUS HAWARD and JAMES WARDEN (Hobart, Centre for Tasmanian Historical Studies, University of Tasmania, 1995) pp i–x, 1–199 (text), 200–221 (essays by Clark), plus end-notes and index.

Andrew Inglis Clark (1848–1907) was born in Hobart, Tasmania, and there for a time, as a young man, he managed his father's engineering business. He then turned to the study of law and became successively a barrister, a politician and a judge. *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (which for ease of reference I will call *An Australian Democrat*) results from a conference convened at the University of Tasmania in September 1991. The conference and work associated with it were inspired by the centenary of the Australian Constitutional Convention of 1891, which was concerned with the proposed federation of the Australian colonies and in which Clark played an important part.

The book comprises seventeen chapters — some quite short, others a good deal longer — contributed by fourteen authors, of whom seven are or were residents of Tasmania. The majority of the authors are associated with the history department or the political science department of an Australian university; two have been judges in Tasmania and two are academic lawyers; one is a schoolteacher and one occupies a chair in the Research School of the Earth Sciences at the Australian National University. The latter, Alex C. McLaren, is a grand-nephew of Clark and contributes a chapter on his family and Scottish background.

This format gives a somewhat disjointed picture to the reader who is trying to discern the man behind the name — but then the editors say that the book makes no claim to be a comprehensive biography. There is naturally a certain amount of repetition from one contribution to another. Some of the material is not very polished, and there are too many slips or misprints. There is extensive and useful referencing by means of end-notes, not always present in publications derived from a conference. A note on pp. 236–7 lists books and articles dealing with Clark, and refers to an inventory of his papers which are held by the University of Tasmania Library.

By 1891, Clark had become Attorney-General of Tasmania and had been appointed one of the delegates from that Colony to the Constitutional Convention. In February, he circulated to various men prominent in the federal movement the draft of a Constitution Bill, for their consideration before the Convention opened at Sydney on 2 March. This draft had evidently been prepared, under his direction, by the Tasmanian Parliamentary draftsman, W.O. Wise. To paraphrase a later comment of Sir Samuel Griffith, it was used as the basis of the labours of the Constitutional Committee, which was appointed by the Convention, about half way through its session, to prepare a bill to establish a federal constitution. Clark was a member of this Committee and participated in its work ashore, but because of illness did not join his

colleagues on the cruise of the S.S. *Lucinda* over the Easter break. Many of Clark's ideas, especially in taking the constitution of the United States of America as a model and in relation to the federal judiciary, and a good deal of his language, can readily be recognised in the text finally adopted by the Convention; and indeed in the Imperial Act 63 & 64 Vic. c.12 which, nearly ten years later, established the Commonwealth of Australia and its Constitution. These matters are elaborated in chapters by Alex C. Castles, Marcus Haward and James Thomson.

Clark did not seek election as a representative at the later Convention of 1897–98. It appears that he had been ill and had arranged a journey to the United States over the time of the first session. Then, in June 1898, he was appointed a judge of the Supreme Court of Tasmania, an office which he still held at his death. This appointment no doubt precluded him from continuing to advocate the federal cause publicly. The late F.M. Neasey suggests, in his contribution to *An Australian Democrat*, that if things had been otherwise, Clark's national stature as a 'founding federationist' would have been much higher over the last hundred years than it has in fact been.

In 1903, Clark was tentatively offered by the Commonwealth Attorney General, Alfred Deakin — and was prepared to accept — a seat on the original bench of the High Court of Australia. However this did not eventuate, partly because the original Judiciary Bill was amended, against Deakin's wishes, by reducing the number of judges from five to three; and partly because Sir Edmund Barton decided to retire from politics and accept appointment to the Court. Clark was apparently not seriously considered when the bench was enlarged to five in 1906. A lengthy note on p. 257 gives sources, both primary and secondary, for these assertions.

The present Chief Justice of the High Court, Sir Gerard Brennan, expresses regret, in his foreword to *An Australian Democrat,* that Clark was not appointed to the Court and that F.M. Neasey, a judge of the Supreme Court of Tasmania 1963–90, a contributor to the book and to whom the book is dedicated, was not appointed to it either. One is reminded of Sir Owen Dixon's expressions of regret at the failure of the Government to appoint Sir Leo Cussen and Sir Frederick Jordan to the High Court and which indeed he referred to as 'tragedies in the life of the High Court' ((1964) 110 CLR x–xi; *Jesting Pilate*, p. 257). A few lines further on Sir Owen says, of Sir Samuel Griffith and Inglis Clark, that 'the Constitution owes its shape more to them, probably, than to anybody'.

Sir Guy Green, Chief Justice of the Supreme Court of Tasmania 1973–95, suggests in his contribution that the failure to appoint Clark may be attributable to the fact that he did not come from one of the more populous States. In going on to consider aspects of Clark's judicial work, Sir Guy says that it is an indication of its quality to find that a number of his judgments are still regarded as relevant today, despite the activities of the High Court and the State Courts of Appeal in restating much of the law during the last thirty years or so. He might have mentioned also the activities of the legislature.

Other chapters discuss Clark's liberal idealism and political philosophy and his editorship of a short-lived journal of politics, literature and philosophy, *Quadrilateral.* Three chapters discuss the 'Hare-Clark' system of voting,

originally designed in the 1850s by Thomas Hare, an Englishman, to achieve proportional representation of the differing views of electors. It was Clark's strong advocacy of this system that led to his name being associated with it and to its adoption for elections to the Tasmanian House of Assembly, to a limited extent for a few years in his lifetime and fully from 1909. These chapters assist in understanding Clark as a person of wide interests and with achievements in many areas.

Marcus Haward, in his chapter 'Andrew Inglis Clark and Australian Federalism', cites *Cole* v. *Whitfield* (1988) 165 CLR 360, a case occasioning an important change in the interpretation of s.92 of the Constitution. All seven judges joined in the one set of reasons for judgment and, in the course of it, referred extensively to the Convention Debates — though previously the Court had not regarded them as a legitimate aid to interpretation.

The organisers of the conference in 1991 which led to the publication of *An Australian Democrat* may well have considered that, for this and other reasons, there was likely to be an increasing interest in their subject over the following years. No doubt they hoped to foster such an interest and at the same time to assist in satisfying it. But it is hardly likely that they foresaw all the ways in which that interest has subsequently manifested itself.

There is no mention in their book of *Theophanous* v. *The Herald & Weekly Times Ltd* (1994) 182 CLR 104, a case in which judgment was given long after the 1991 conference, though before the date of the editors' preface. In his judgment in that case, Deane J quotes with strong approval from Clark's *Studies in Australian Constitutional Law* (1901) and refers to him at p. 172 as 'the primary architect of our Constitution'.

Then in 1996 the University of Tasmania Press published *The Supreme Court of Tasmania: Its First Century 1824–1924,* written by Clark's son, Carrel Inglis Clark, and edited by Richard Ely, a contributor to *An Australian Democrat* on Clark's 'Religious Liberalism'. That work includes some account of Clark's service as Attorney-General and later as a judge.

Now, in 1997, Clark's *Studies in Australian Constitutional Law* has been reprinted, with a foreword by Sir Anthony Mason, who retired in 1995 as Chief Justice of the High Court, and a substantial introduction by John M. Williams. Sir Anthony speaks of the judgment in *Cole* v. *Whitfield* and that of Deane J in *Theophanous* as events which have brought Inglis Clark's views on the Constitution into greater prominence. The introduction provides some biographical material about Clark and discusses his views on the constitutional questions dealt with in his book. In the course of doing so, Williams refers in a number of places to chapters in *An Australian Democrat.*

It is not usual to draw attention in a book review to events which have occurred since the book was published. The justification for doing so on this occasion is to demonstrate how subsequent events have vindicated the piety and enterprise of the Centre for Tasmanian Historical Studies, in organising a conference about the life, work and consequences of Andrew Inglis Clark and in publishing these papers.

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Carrel Inglis Clark: The Supreme Court of Tasmania: Its First Century 1824–1924, Edited by RICHARD ELY (Hobart, University of Tasmania Law Press, 1995) xxx, 248.

Between April 1922 and May 1923, a Hobart weekly journal, the *Critic*, published a series of forty seven articles on the history of Tasmania's Supreme Court. The author of the articles, Carrel Inglis Clark, a former journalist, was, at the time of writing, Clerk Assistant in the State's Legislative Council. Clark was the youngest of the five sons of Andrew Inglis Clark, one of the influential fathers of the Australian federation and from 1898 until his death in 1917 a puisne judge of the State Supreme Court.

The book under review is a reformed version of C I Clark's series of articles in the *Critic*. Dr Ely's reformation has involved considerable rearrangement of Clark's text, under headings and sub-headings chosen by the editor; emendation of that text (some of it in light of material found in the C I Clark Papers held by the Crowther Library of the State Library of Tasmania); provision of further and better particulars of the sources upon which Clark relied; and references to later works of relevance to the subjects dealt with by Clark (e.g. references to entries in the *Australian Dictionary of Biography*). The outcome is what Sir Guy Green, the Governor of the State and a former Chief Justice of its Supreme Court, describes in his foreword as 'a varied and interesting miscellany' (xiii).

In his introduction to the book, Dr Ely confesses that '[o]n any view, the scholarly quality of the forty seven *Critic* articles ... must be admitted to vary greatly' (xxvii). He maintains, however, 'that, taken all in all, Carrel Clark had collected an impressive body of material, which he often deployed to good effect in charting and explaining the unfolding history of the court' (ibid). 'The editorial challenge' had been 'to bring out and do justice to ... [Clark's] achievement; to make it accessible, while somehow, not playing fast and loose with the text as presented in the *Critic*' (xxvii–xxviii). Dr Ely expresses a hope that his edition of Clark's work 'will become a useful reference point for future study of the history of the Supreme Court of Tasmania' (xxx). That hope is not, I think, misplaced, and to it one might add a further hope that Dr Ely's edition may prompt other historians to renavigate the waters charted by Clark.

Clark was neither a professionally trained lawyer nor someone schooled in the discipline of history. He wrote as an amateur local historian and for a lay audience. (In his introduction, Dr Ely records that, at one stage, the *Critic* was described in its masthead as the 'official organ of the Tasmanian Farmers and Stockowners Association', but that, at the time Clark's articles were published, the journal had ceased to be so identified, but was nevertheless published in two weekly editions — one catering for rural readers, the other for town readers.)

Clark offered his readers biographical sketches of the judges of the Supreme Court, beginning with John Lewes Pedder, the first Chief Justice, and, until 1833, the only judge of the Court; a brief account of the history of the legal

profession in the State (including the law officers of the Crown); descriptions of some of the cases which had come before the Court and of legislation which had affected the law administered by the judges; and accounts of various episodes concerning relationships between the judiciary and the other branches of government. Among the last mentioned were the controversy between the judges and the Governor and the Ministers in 1877 regarding the function of the Governor in Council in exercising the royal prerogative of mercy, and the stand taken by the judges in the same year in reply to a request by the Governor for an advisory opinion. As might be expected, Clark wrote at some length about the dismissal of the State's first puisne judge, Algernon Montagu, and the ensuing litigation before the Privy Council (*Montagu* v *Denison* (1849) 6 Moo PCC 489).

The sources upon which CI Clark drew in the writing of his articles for the *Critic* were limited: the *Hobart Town Gazette*, newspapers, parliamentary papers and journals, and various books of history. The provenance on which today's historians of the Court may draw is much more extensive, including as it does much accessible archival material. The documentation supplied by Dr Ely in footnotes indicates that since Clark wrote, surprisingly little has been written about the Court and its judges, apart from entries in the *Australian Dictionary of Biography*, a few journal articles and papers in *Papers and Proceedings of the Tasmanian Historical Research Association*.

Clark's work is certainly not in the same class as JM Bennett's *History of the Supreme Court of New South Wales* (1974) and BH McPherson's, *The Supreme Court of Queensland 1859–1960: History, Jurisdiction, Procedures* (1989). Nonetheless it is a useful starting point for those interested in the history of Australia's oldest Supreme Court. (The Tasmanian Court opened seven days before its counterpart in the parent colony of New South Wales.)

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Reminiscences of a Colonial Judge by JAMES SHEEN DOWLING, edited by ANTHONY DOWLING (Leichhardt, NSW, The Federation Press, 1996) pp. i–xix, 1–201 plus biographical references and index.

James Sheen Dowling (1819–1902) was a judge of the District Court and Chairman of Quarter Sessions in New South Wales from 1858 to 1889. He wrote his reminiscences after retirement and effectively completed them during 1890. He wrote with a view to publication, but did not find a publisher and could not himself afford the expense. They began to be printed in serial form, a year after his death, in a magazine called *Old Times*, but only about a third had appeared when the magazine ceased publication. The manuscript was purchased by the Mitchell Library in 1911.

The author's father, Sir James Dowling (1787–1844), had been appointed a

judge of the Supreme Court of NSW in 1827 and served as the second Chief Justice of that Court from 1837 until his death. The son's reminiscences provided material for the entry on the father in volume one of the *Australian Dictionary of Biography* and for that on the son in volume four. Judge H.T.E. Holt in *A Court Rises*, his biographical work on the judges of the District Court of NSW (1976), uses the reminiscences as a source for his entries on various of the judges, especially of course that on Judge Dowling himself. They were also used as a source by C.H. Currey in his 1968 biography of the first Chief Justice of the Supreme Court of NSW, Sir Francis Forbes, and by J.M. Bennett in his *Portraits of the Chief Justices of New South Wales* (1977).

With the assistance of The Law Foundation of New South Wales, the text of the reminiscences has now been made available in print, under the editorship of the author's great-grandson, Anthony Dowling. In a preliminary note, the editor gives some account of the manuscript and indicates the nature of the changes he has made to the text. End-notes to each chapter provide additional information and in places correct errors made by the author.

James Dowling, the father, arrived in Sydney with his family, including his son the author, then eight years old, on 24 February 1828. The reminiscences quote the father's account of his being rowed ashore on the following day, wigged and gowned and under a salute of eleven guns. He was met by the Chief Justice and a 'numerous assembly' of other gentlemen and conducted on foot to Government House where he presented himself to the Governor, General Darling, and took the usual oaths.

Young Dowling attended various schools in Sydney and then in 1836, at the age of sixteen and in company with Chief Justice Forbes, on sick leave, and Mrs Forbes, he sailed for England. He attended King's College and took the degree of LLB at the University of London in 1841. He was called to the Bar at the Middle Temple in 1843 and practised in London for a time before returning to Sydney in September 1845. He was admitted to the NSW Bar in October and obtained some practice there.

In 1846, the British Government decided to set up in Australia a new Colony for the reception of convicts, pardoned or time-expired, who could not obtain employment elsewhere. It was to be called North Australia and comprise so much of NSW as lay to the north of latitude 26° South (Brisbane is in 27° 50′ South). The first settlement was to be at Port Curtis (now called Gladstone, presumably after the then Secretary of State for the Colonies), a harbour about 350 miles north-west of Brisbane. Dowling was appointed Attorney-General of this Colony and the advance party, including Dowling, left Sydney on 7 January 1847.

However, in the meantime, the British Government had changed its mind and decided to abandon the project. Earl Grey, who had succeeded Gladstone at the Colonial Office, conveyed the decision to the Governor of NSW by letter of 18 November 1846. It was not until 15 April that the news reached Port Curtis, where the advance party had been living in tents: the weather had been very hot, provisions were not good, either in quantity or quality, and water was poor and scarce.

This abortive attempt at colonisation is not well known and that is the justification for giving a brief account of it here. No doubt it was in some ways a relief for Dowling to return to Sydney, but he had lost his government salary and hope of promotion and had to build up his practice at the Bar all over again. He was able to add to his income by reporting legal decisions of the Supreme Court for the *Sydney Morning Herald.*

From 1 January 1851, he was appointed Police Magistrate at Sydney, following application, and held that office until 1857 when he was appointed Crown Prosecutor for the whole of NSW, again following application. His salary went down by £50 from £750 a year but the work was less onerous and, instead of being tied to a desk, he was constantly travelling about the country.

Legislation of 1858 established District Courts in the Colony and Dowling was appointed a judge in December, at an annual salary of £1000 but with no entitlement to pension. Like the County Courts which had been established in Victoria in 1852, these Courts had a civil jurisdiction, limited to matters involving £200 or less, and the judges were each appointed to a particular district. Each judge was also appointed Chairman of Quarter Sessions (in Victoria called 'General Sessions') for the same district, with a wide criminal jurisdiction.

Dowling says that he did not seek this appointment and indeed that, when it was offered, he had some misgivings whether he was right in accepting. He chose the Western District: Bathurst, Carcoar, Dubbo, Hartley, Molong, Mudgee and Orange. He decided to live in Bathurst, for by living there

> I escaped the trouble and inconvenience of making eight journeys in the year over the [Blue] Mountains. This was to my advantage. On the other hand there was not much local Society, and in course of time one would be apt to know too much of the people, and be by them too much known. Having made the experiment, I have arrived at the conclusion that a District Court Judge ought not to live in his District unless the town he lives in is a very large one.

He left Bathurst on accepting the offer of appointment to a District covering Sydney and adjacent areas. He first sat in Sydney in October 1861 and remained in office there until he resigned on grounds of ill health from 1 August 1889. By that time, the judges had become entitled to a pension.

The reminiscences are lively, often humourous and free from undue technicality. They include a description of the author's school days and the Sydney of his boyhood. He gives verbal sketches of many of the legal figures in NSW whom he knew: Sir Francis Forbes; a later Chief Justice, Sir James Martin, who had been the author's schoolfellow; Burton and Dickinson JJ; Judge Cheeke, afterwards a Supreme Court judge, Judge Callaghan and others. He comments on the practice of the courts, on those who came before them and on the work of the police.

The author records some of the difficulties of being a prosecutor or a judge. He remembers travelling from Sydney to Dubbo on circuit and it taking him a week's hard driving to get there — a journey accomplished by rail, later in the

century, in about twelve hours. Accommodation on circuit was often very poor: small, badly lit and badly ventilated court rooms; merely a canvas partition between one room and another in the hotel; even having to sleep in the one bed with an attorney travelling the same circuit.

He describes driving from one particular town to another by an almost unbeaten track; on other occasions, crossing rivers by taking the buggy to pieces, floating it over on a boat and at the same time swimming the horses. Once, when trying to go through a creek which was running a banker, the horse could not pull the buggy up the far bank and lost his footing in the current. The buggy was overturned, the horse drowned, books and other personal belongings were carried away; the judge and the Registrar of the Court managing to reach dry land by swimming and wading. The judge had no change of clothing and was obliged to appear on the Bench in clothes borrowed from the landlord of his hotel. 'His clothes were far too big for me and I must have appeared very unlike a Judge in them, but I was thankful to have escaped with my life.' On another occasion, the coach collided against the stump of a tree and was overturned: the judge broke his arm in three places and broke his leg also.

Dowling managed to return to England on leave twice and to visit New Zealand once. He gives an interesting account of his experiences on these occasions. Altogether, the book contains a great deal of information and enables the reader to obtain a good understanding of the author's forty-five years of professional life.

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Judicial Review of Administrative Action by MARK ARONSON and BRUCE DYER (Sydney, The Law Book Company, 1996) pp ciii, 1022.

In the forward of this book, the authors describe their work as 'the successor to M Aronson and N Franklin, *Review of Administrative Action* (1987), which in its turn succeeded a 1978 book of the same name by H Whitmore and M Aronson.'[1] That is the best description of this book, which is not a new edition of these earlier works, but retains some of their intellectual flavour and structure. The new title, *Judicial Review of Administrative Action*, signifies some substantial changes. The earlier works contained several chapters on related topics associated with judicial review, such as freedom of information, public interest immunity and the AAT. This book is more narrowly focused. It is a treatise on the principles of the nature and scope judicial review.

In the first chapter, which is a short exposition of the nature and development of Australian administrative law, the authors explain the scope of the book and give some insights into their views on the nature of judicial review.

[1] M Aronson & B Dyer, *Judicial Review of Administrative Action* (1996) Preface, v.

Many of these themes are also examined in chapter three ('The Scope and Nature of Judicial Review'), in which the authors explain the source of the grounds of judicial review. Aronson and Dyer acknowledge the strong influence that Sir William Wade has exerted over the development of English and, therefore, Australian administrative law. Wade states that 'A first approximation of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject . . .'[2] In the opinion of Wade, the *ultra vires* doctrine is the central principle of English administrative law.[3] He believes that the legislative source of most public powers, and the public trust that accompanies the repose of any such power, provide support for the view that implied rules accompany the conferral of public power.[4] Judicial review is a means by which to enforce those rules. It is clear, however, that the views of Wade are too narrow for Aronson and Dyer. They are also attracted to the 'constitutional principles' that are endorsed in de Smith.[5] Those principles, which are perhaps better described as constitutional *values*, include the rule of law, political participation, equality of treatment and freedom of expression.

Aronson and Dyer are of the opinion that the varying definitions of administrative law can be traced to the differing expectations that people have of this area. In keeping with this functionalist approach, the authors make no bones about what they expect from administrative law. In a short passage, which encapsulates the principles that permeate their analysis, Aronson and Dyer state:

> We know what we want. As a minimum, we want a legal system which addresses the ideals of good government according to law. We take those ideals to include openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.[6]

[2] HRW Wade & CF Forsyth, *Administrative Law* (7th ed, 1993). On a similar vein Aronson & Dyer, op cit (fn 1) 6 state that 'We see administrative law as concerning itself only with the exercise of government power . . .' The comment is made in a discussion of whether administrative law should extend to regulate public activities that have been privatised.

[3] Wade recently referred to some of the more noted critiques of the *ultra vires* doctrine as 'deconstruction'. He did not use the term favourably: '*Habeas Corpus* and Judicial Review' (1997) 111 LQR 55, 66. Wade's co-author clearly shares his views: CF Forsyth, 'Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122.

[4] Accordingly, Wade believes that the concept of an unfettered public power is a logical contradiction. He accepts that the notion of an unreviewable discretion is similarly contradictory: Wade, op cit (fn 4) 393. It should be noted that Aronson & Dyer, op cit (fn 1) return to this theme in a subsequent chapter, in a section titled 'All powers have limits' 91–100.

[5] SA de Smith, H Woolf & J Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) 14–5. This is not unlike the characterisation of administrative law as the regulation of the exercise of power in the public interest: P Birkinshaw, 'Teaching Public Law The Hull Experience', in P Birks (ed), *Examining the Law Syllabus — The Core* (1992) 72.

[6] Aronson & Dyer, op cit (fn 1) 1. The authors elsewhere state that 'administrative law represents an important institutional component in the attempt to achieve a just society, and we think that judicial review is an interesting, and at times important, element in that struggle': id 7.

Whilst this statement suggests some clear connection to political theory, the authors assert that they 'have no developed theory of the state, and we do not attempt to present one.'[7] The authors further state that they are 'puzzled by the common insistence that the crucial inter-disciplinary link with administrative law is political theory.'[8] The connection appears obvious, even by the authors' own admission. Surely the very adoption of a model that includes values, such as participation and accountability, is itself founded upon assumptions about the value of participation of people who stand to be affected by administrative action, and the notion that decision makers should be accountable for their actions? Such a model necessarily presupposes that these values are ones that a society ought to protect and cultivate. In my opinion Aronson and Dyer simply presuppose a theory of the state, by virtue of the advocacy of a set of normative assumptions.

Chapter two provides an account of the inherent jurisdictions of the State and Territory Supreme Courts, and the forms of statutory judicial review that are available in selected States. There is also a comprehensive analysis of the jurisdiction of the High Court and the Federal Court to undertake judicial review. Elsewhere in the book the authors largely undertake a generalised study on the principles of judicial review, but this chapter emphasises the differing nature of jurisdiction that arises within Australia's constitutional arrangements. The structure of this chapter illustrates that the book is not simply a treatise on judicial review of federal administrative action, with appended passages on State issues wherever necessary.

It should be noted that, despite the careful attention paid to the arrangement of power in the Australian constitutional structure, there is no discussion of the consequences of the virtual monopoly of judicial review of federal administrative action enjoyed by the Federal Court.[9] Nor is there any examination of the reasons for, or consequences of, the apparent differences in judicial attitudes of the various State Supreme Courts in judicial review decisions.[10] There is a clear difference between the federal nature of Australia's legal system, and the regional character of much of its legal culture. The influence of merits review tribunals, particularly the Commonwealth AAT, could have received more attention. The authors comment, in a brief passage, that 'Australia's administrative law system consists of more than just

[7] Id 6. This statement is made in the form of a reply to the often quoted remark of Harlow and Rawlings that 'behind every theory of administrative law, there lies a theory of the state': C Harlow & R Rawlings, *Law and Administration* (1984) 1.

[8] Id 7.

[9] The authors are, however, conscious of the privileged position enjoyed by the Federal Court over judicial review of federal administrative action: Aronson & Dyer, op cit (fn 1) 90. They do not endorse this arrangement. The maintenance of the Federal Court's premier position in the cross-vesting scheme is described as 'indefensible': 47, fn 180.

[10] For example, the chapter on bias draws heavily on recent decisions from the New South Wales Supreme Court. Surely some of the preparedness of the judges of that State to engage in rather frank statements, in an area where most judges tread carefully, can be attributed to the legal culture of that state.

judicial review . . .'[11] They also acknowledge that many litigants will view a possible appeal to the AAT as a more attractive and useful option than judicial review. They do not, however, examine the undoubted effect that the existence of the AAT has had on the development of the principles of judicial review in Australia.[12]

In chapters four ('Error of Law') and five ('Error of Fact') the authors cover the most difficult aspects of administrative law, such as jurisdictional error, the fact/law distinction, and the jurisdictional fact concept. The authors rightly attempt to demystify, rather than simplify, these difficult areas. Both chapters contain a particularly good explanation of the divergence of English and Australian law. The authors are also very mindful of the many judicial slips and brazenly pragmatic judgments that litter this area. It is refreshing that many of these decisions are explained in a constructive form, rather than used as easy targets for criticism.

In chapter four the authors give much attention to the High Court's decision in *Craig* v *South Australia*.[13] In that case the Court effectively drew a bold distinction between the application of the jurisdictional error doctrine to inferior courts on the one hand, and tribunals on the other. The High Court edged close to the total abolition of the concept of non-jurisdictional errors in respect of tribunals, but emphatically declined to curb the application of the distinction between jurisdictional and non-jurisdictional errors of law in respect of inferior courts. Whilst the first aspect of the decision was unashamedly pragmatic (the Court was anxious that certiorari should not become a discretionary general appeal for error of law), the second aspect appeared to have no coherent foundation.[14] The decision has dramatically narrowed the potential scope for the grant of certiorari against inferior courts, but not tribunals. In my view the *Craig* decision contains no convincing theoretical explanation for the distinction drawn between courts and tribunals, nor any apparent appreciation of the potential consequences that the

[11] Aronson & Dyer, op cit (fn 1) 105. There is also a short passage on the distinctions between review and appeal, in which attention is given to the nature of the AAT's function: id 186–9. The authors comment, in typically frank terms, that the Tribunal 'is a de-facto court': id 187.

[12] One exception is the decision of the High Court in *Cunliffe* v *Commonwealth* (1994) 182 CLR 272. The authors suggest, rightly in my view, that the decision in that case, on the constitutional validity of a very wide statutory discretion, may have been different if the power had not been amenable to both merits and judicial review: Aronson & Dyer, op cit (fn 1) 105.

[13] (1995) 184 CLR 163. Unfortunately the authors do not seem to have had sufficient time to incorporate any substantial consideration of the Court's decision in *Minister for Immigration and Ethnic Affairs* v *Wu Shan Liang* (1996) 185 CLR 259. There the Court repeatedly emphasised the limited function of a court in judicial review, and the need for the exercise of judicial restraint to preserve the proper scope of this function. The decision may herald the development of a principle of judicial deference towards administrative judgment.

[14] The Court did note that many tribunals are constituted by non-legally qualified members, and do not form part of the ordinary judicial hierarchy: (1995) 184 CLR 163, 176–7. It is doubtful that this point can provide sufficient support for the distinction drawn by the High Court. Most administrative tribunals contain some legally qualified members, who normally determine cases which may involve a legal problem.

distinction might cause.[15] Aronson and Dyer provide a frank, and remarkably clear, assessment of this difficult but important case. The *Craig* decision is frequently analysed through the remainder of the book, so that it also explained in a thoughtful and contextual manner.[16]

Many of the grounds of review are examined under unusual titles, such as 'The Irrationality Grounds of Review' (chapter 6), and 'Illegal Outcomes and Acting Without Power' (chapter 7). These titles would sound familiar to any administrative law scholar. They are drawn from the categorisation of the grounds of judicial review expounded by Lord Diplock in *CCSU* v *Minister for the Civil Service*.[17] This approach reinforces the point that the book is not simply a review of judicial review under the *AD(JR) Act*.

The principles of procedural fairness are covered in two very long chapters (chapters 8 and 9). These two chapters cover an enormous amount of judicial and academic material, but the discussion is well organised and fluent. Chapter eight deals with the nature and origins of the doctrine, and chapter nine deals with the content of the hearing rule. It should be noted that, whilst chapter nine examines many of the particular features of the hearing rule, it also maintains a strong emphasis on the flexible nature of the rule. This point may seem trite; any explanation of the rule is prefaced by a reminder that the requirements of fairness will vary according to the circumstances of the case at hand. But it is refreshing to see an explanation of the hearing rule that places so much emphasis on providing guidance to help determine whether a particular procedural feature may or may not be required to be observed.

Five of the eighteen chapters are devoted to prerogative and equitable remedies. The authors include a great deal of historical material, which is drawn upon to explain the modern Australian character of the remedies. The nature and scope of each remedy is examined, including a detailed explanation of the factors that may influence the discretion to grant each form of relief. There are several thoughtful sections dealing with the potential overlap or conflict between various remedies.[18] There is also a very good chapter on *habeas corpus*. While the practical importance of the writ has clearly declined in this country, the authors are mindful of the continued relevance of the writ in other common law jurisdictions. There is an ongoing controversy in England as to the exact scope of the grounds for the issue of *habeas corpus* against official detentions. In particular, whether the writ is available in all cases where an applicant can demonstrate a legal flaw in his or her detention, or

[15] It is interesting to note that prior to the *Craig* decision, Professor Allars had argued that the doctrine of separation of powers and, by implication, the law of judicial review, should not be constructed on any supposed distinction between tribunals and courts: M Allars, 'The Difference Between a Court and a Tribunal of Morals: The Case of the Independent Commission Against Corruption' in O Mendelsohn & L Maher (eds), *Courts, Tribunals and New Approaches to Justice* (1994) ch 3.

[16] For example, in the last section of the last chapter (on privative clauses) the authors explain the possible effect of the decision on the future drafting of privative clauses: Aronson & Dyer, op cit (fn 1) 987–8.

[17] [1985] AC 374, 410. The third of Lord Diplock's categories, procedural impropriety, is not used.

[18] There is a good section that compares recent decisions concerning declarations and certiorari: Aronson & Dyer, op cit (fn 1) 743–55.

only against a detention based on want or excess of jurisdiction.[19] To my knowledge, Aronson and Dyer provide the only detailed modern Australian analysis of the writ.

The authors' style of writing deserves special praise. Whilst the book is long and the analysis detailed, the writing is consistently lucid and concise, and many of the editorial comments, particularly those within footnotes, display an unusual and refreshing level of wit and irony. The chapter on the rule against bias demonstrates the benefit of this style. It is beyond question that the bias rule is a crucial part of the principles of procedural fairness and demands careful consideration in any treatise on judicial review; but the majority of academic discussions on the doctrine are extremely dull. In my opinion, most texts place too much emphasis on attempting to distil principles of broader application in an area where the content of any general principles depends very much on the facts at hand. Aronson and Dyer devote just over sixty pages to an exhaustive examination of bias. Much of the chapter is taken up with quite detailed factual accounts of cases, and draws heavily from recent decisions of the Supreme Court of New South Wales. Many of the footnotes provide useful and entertaining explanations of particular cases. This unusually literate style of legal analysis does not detract from the strong functional analysis of bias. The authors do not hesitate to pierce the judicial reticence, which is the trademark of many judicial decisions on bias, to extrapolate a full explanation of many otherwise obscure cases.

The sheer volume of material covered in the book, and the sophistication of much of the analysis, indicates that it is aimed more at specialist practitioners, academics and those with a particular interest in administrative law. It is not, however, obscure or difficult to read. Much of these virtues can be attributed to the careful attention that has been paid to the division of material between text and footnotes. Without detracting from the text, the authors have consistently managed to relegate much of the complex detail, additional analysis drawn from many academic commentators and extra references into the footnotes. Accordingly, the book manages to convey an extraordinary amount of information, without becoming too dense.[20] This is a fine work, and I commend it unreservedly.

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[19] The doctrinal errors of some recent decisions by the English Court of Appeal are explained by Sir William Wade in '*Habeas Corpus* and Judicial Review' (1997) 113 LQR 55. Wade believes that *all* of the established grounds for judicial review ought to be equally available on application for *habeas corpus*, if they affect the prisoner's right to liberty.

[20] On a rough count, I estimate that the book has just under 5000 footnotes.

Cases on Review of Administrative Action by STANLEY D HOTOP (3rd ed, Sydney, The Law Book Company, 1995) pp xl, 996.

This casebook, which is in its 3rd edition, states that it comprises 'a selection of important cases to provide the essential case law in the field of administrative law.' It also stresses that its format is deliberately not that of a digest and that editing has been kept to a minimum. What it does not explain, however, is that it is simply a 'casebook' in the sense that it contains absolutely no commentary or other materials such as extracts from statutes, articles or reports. As such it is intended simply as a source of copies of the leading Australian cases on Administrative Law for use by undergraduate students of administrative law.

Advocates of this form of casebook generally suggest that it better meets the needs of Lecturers who wish to adopt a Socratic approach to teaching. However, given the complexity of the subject, it is suggested that some additional commentary would be more of a help than a hindrance to most students. Furthermore, even if it is accepted that there are sound pedagogic reasons for omitting any commentary which attempts to explain the significance of particular cases, it is unclear why the book has to be confined purely to cases and, in particular, why it does not include extracts from (or even make reference to) the statutory provisions which provide the Administrative Law framework. While it might be expected that students would have their own copy of the *Administrative Decisions (Judicial Review) Act* 1977 and possibly even of the *Administrative Appeals Tribunal Act* 1975 (Cth) and the *Administrative Law Act* 1978 (Vic) (or equivalent legislation in other States), it would add value to the text as a resource which eliminates the need to make copies of key materials if relevant extracts from other key provisions were included.

Insofar as its coverage of cases is concerned, this casebook contains most of the key cases which formed the core of a general administrative law course subject at the date of its completion. Its usefulness has, however, been to some extent diminished as a result of the increasing number of important decisions which have post-dated its completion at the end of 1994. Some of the more significant cases which fall in the latter category include *Minister for Immigration and Ethnic Arrairs* v *Teoh*[1] in respect of implication of natural justice/procedural fairness, *Webb* v *The Queen*[2] in respect of bias and *Craig* v *South Australia*[3] in respect of jurisdictional error.

As explained by the author in the preface, editing and pruning of cases has been kept to a minimum so as to allow the process of reasoning which underlies each judgment to be appreciated and understood more fully by students. The cases, which have been deliberately limited to decisions of Australian courts and, in particular, of the High Court, are well chosen and logically organised with appropriate cross-references.

[1] (1995) 183 CLR 273.
[2] (1994) 181 CLR 41.
[3] (1995) 131 ALR 595.

The first topic on Natural Justice/Procedural Fairness is arranged under the headings of implication, exclusion, requirements (audi alterem partem and bias) and reasons for decisions (but not probative evidence). However, while the chapter commences with extracts from *Kioa* v *West*[4] it somewhat surprisingly omits *Annetts* v *McCann*,[5] the case which most clearly demonstrates the significance of the change in the implication test that resulted from the decision in *Kioa* and also the divergence in approaches of Mason CJ and Brennan J (as they then were).

In the second chapter, which deals with ultra vires, the cases which establish the grounds for review are grouped under the headings of substantive ultra vires, procedural ultra vires and abuse of power and undertakings and representations regarding future exercise of power. The category of abuse of power is in turn subdivided into specific grounds such as improper purpose and unreasonableness. There are also subheadings for justiciability and severance although the coverage of justiciability is confined to one devision — *Church of Scientology* v *Woodward*.[6]

The next four chapters deal with jurisdictional error, error of law on the face of the record, privative clauses and judicial remedies. Chapter 5 on privative clauses contains sub-headings for the different types of clauses and for federal privative clauses and the High Court. There is, however, no heading in respect of privative clauses and the Federal Court or privative clauses and State Supreme Courts and, as the book is confined to case extracts, no mention either here or in Chapter 7 of the effect of the *Administrative Decisions (Judicial Review) Act* 1997 or the *Administrative Law Act* 1978 (Vic) on the operation of privative clauses. Chapter 6 on Judicial Remedies is logically organised according to the type of remedy but once again, because it is exclusively confined to case law, there is no reference to the different avenues of federal and state jurisdiction. Furthermore, there is no material on collateral attack or the consequences of invalidity and no material which specifically deals with boundaries between public and private law.

Finally the book concludes with chapters containing cases on the operation of *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and non-judicial review of administrative action. The latter is devoted exclusively to Ombudsman review and review by the Commonwealth Administrative Appeals Tribunal.

In conclusion the book provides a useful resource for students who wish to have easy access to many of the cases decided up to 1994 that they need to read as part of an Administrative Law course.

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[4] (1985) 159 CLR 550.
[5] (1990) 170 CLR 596.
[6] (1982) 154 CLR 25.

Majah: Indigenous People and the Law Editors: GRETA BIRD, GARY MARTIN and JENNIFER NEILSON (Sydney, Federation Press, 1996) pp vii, 298.

Indigenous People and the Law in Australia By CHRIS CUNNEEN and TERRY LIBESMAN (Sydney, Butterworths, 1995) pp xii, 254.

Indigenous Legal Issues: Commentary and Materials By HEATHER McRAE, GARTH NETTHEIM and LAURA BEACROFT (2nd edn. Sydney, LBC Information Services, 1997) pp xxviii, 540.

The recent controversies over the High Court's *Wik* decision, the HREOC National Inquiry into the Separation of Indigenous Children from their Families and the speeches and recommendations arising out of the Australian Reconciliation Convention highlight the need for law students and their educators to come to grips with the relationship of the Anglo-Australian legal system to the Indigenous peoples of this country.

The arrival of three new books on this topic is a welcome addition for those seeking to understand the historical and cultural context that underpins our contemporary legal system. The three are essential for the teaching of the nature of legislative control, 'protection' and disempowerment experienced by Indigenous Australians in and with the Australian legal system.

Cunneen and Libesman's text is an extensive investigation of indigenous legal relations designed to meet the requirements of secondary and early tertiary legal studies courses. As such it provides an accessible, critical examination of the key issues such as policies of dispossession, assimilation and child removal and over-representation in the criminal justice system, particularly in the area of public order offences. Naturally the whole gamut of land rights and ownership issues is canvassed and, thankfully, this is tackled in a particularly clear and straightforward manner, a bonus for students.

The text covers a wide range of topics in a plain English format, incorporating contributions from a range of perspectives and the authors have made use of extracts, interviews and discussion questions to vitalise the legal material and analysis presented.

Whilst this is a valuable introductory text, it is not appropriate for use in a tertiary law subject that seeks a more detailed analysis of the interrelationship of Indigenous people and the Australian legal system. It should be acknowledged that the authors did not set out to produce a university level law text, their objective was to produce a 'timely and accessible book, accessible to a non-specialist audience' and in this they have succeeded.

The collection of essays compiled in *Majah* examine the impact of Majah, the White boss, or White colonialism, upon Indigenous peoples, particularly those of Australia. The authors of each piece challenge the perception of Australia as being a 'post-colonial' state, explicitly or implicitly asserting that Indigenous people in Australia remain colonised peoples in a neocolonial condition.

The chapters are organised into four thematic groups. The first theme is colonialism present and past, while the role of international law forms

the basis for the second theme. The third theme questions the representation or construction of Indigenous people through the imposition of a colonial vision, imagination or discourse, and the final theme focuses on the criminal justice system, and the effect that the jurisprudence of *Mabo (no 2)* may have on the extended legal landscape. Within each of these themed groups is an excellent collection of analytical and academic writings that examine the nature of modern law and justice for Indigenous peoples.

This book would be of particular interest to any law teachers conducting introductory or later level classes that incorporate analysis of indigenous legal issues. In particular, the essays that examine specific issues pertaining to international law, intellectual property, and criminal justice would be valuable to teachers of those subjects who might wish to incorporate varying perspectives into their curricula.

The most recent addition to this trio of texts is by far the most comprehensive. The second edition of McRae, Nettheim and Beacroft's *Indigenous Legal Issues* sets out to provide a wide range of teaching materials covering the perspectives and issues arising out of the title. This edition is a substantial overhaul of the 1991 edition (which fast went out of date with the changes wrought by the High Court in 1992), and substantial new material has been incorporated.

The book is divided into five parts, dealing broadly with Distinct Identity and Law, Autonomy Issues, Territorial Issues, Equality Issues and concluding with Outstanding Issues. These broad headings encompass chapters on Indigenous laws and history, sovereignty, land rights and title, racism, criminal justice, welfare and reconciliation. Each chapter deals with relevant legislative schemes and case law, and further incorporates commentary and wide-ranging extracts combining perspectives from diverse disciplines, government reports, Indigenous and non-Indigenous authors, and historical materials.

Substantial indices and a detailed bibliography combined with excellent notes and questions and cross referencing to *The Laws of Australia* (Sydney, LBC Information Services) make this an impressive text. Not only would it be ideal for those teaching indigenous issues in tertiary law courses, but also for those who deal with Indigenous legal matters in governmental and non-governmental bodies.

Whilst this long awaited book is impressive with regards to the areas outlined above, and represents an essential component of any collection on the topic, through inadvertence or bad timing it has missed some recent important legal issues. For instance the Kumarangk/Hindmarsh Island affair receives a scant paragraph, *Wik* is alluded to in brief, and the publication date in early 1997 precluded inclusion of the report of the National Inquiry into the Stolen Generations. Whilst the chapter on Child Welfare provides ample background material on the subject, the same cannot be said for the treatment of the other two examples given. In general the law is stated as at March 1996, and only brief mention is made to later events, although another year passed from that date until publication.

Although all three texts have different aims and audiences they generally meet their objectives very well, and are indispensable to any academic, student or practitioner undertaking analysis of Indigenous legal issues. All three books give voice to the Indigenous experience — a voice that had been lost in the legal wilderness of terra nullius.

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