Investigating corruption and misconduct in public office: Commissions of inquiry – powers and procedures

By Peter M Hall QC
Lawbook Company, 2004

For anybody appearing in commissions of inquiry this book is essential.

Peter Hall QC was recently counsel assisting the inquiry into the Waterfall train accident. In this book the author has followed a far wider brief. As he writes in the preface he has set out to consider 'the functions, powers and procedures of standing commissions of inquiry and of federal and state royal commissions'. He also turns his attention 'upon the investigation of corruption and other forms of illegal or improper conduct in public office'.

The result is an exhaustive analysis of those subjects.

The first few chapters deal with corruption and bribery in a more general sense. There is an historic treatment of the concept of public trust and a detailed treatment of bribery and corruption offences. A number of chapters deal with the history, practice and powers of specialist commissions of inquiry in New South Wales, Queensland and Western Australia.

The permanent commissions of inquiry dealt with in detail in this state are the Independent Commission Against Corruption and the Police Integrity Commission. The author's thorough treatment of both bodies is compulsory reading for any practitioner appearing there.

The book also includes a wealth of information relating to search warrant powers, listening device and telephone intercept legislation and controlled operations powers and techniques.

The final chapters have been given over to an examination of procedure and practice in royal commissions and the like and judicial review of commissions on inquiry. They are indispensable reading for any practitioner in this field.

There are many intriguing details in the text. For example it seems that it is largely agreed that the Doomsday Book ordered to be compiled by the Norman Conqueror, William I is the first recorded royal commission in England.

This is a significant publication and Peter Hall can take pride in producing such a valuable reference work.

Reviewed by Keith Chapple SC

Judicial review of administrative action

By Mark Aronson, Bruce Dyer and Matthew Groves
Lawbook Company, 2004

Although nominally the third edition, this book has its provenance in Whitmore and Aronson's *Review of administrative action* (1978) and in Aronson and Franklin's 1987 work of the same name. The first two editions of the present title were by Aronson and Dyer, published in 1996 and 2000.

These earlier works have been cited regularly in the High Court and in state and federal courts of first instance and of appeal over the last 25 years. Over the same period they have been text books of first resort for practising administrative lawyers.

The present title has a sharper focus on judicial review itself. There is here no treatment of merits appeals, freedom of information or the ombudsman. In this edition there is necessarily much more on s75(v) of the Constitution given the continuing invocation of the High Court's refugee jurisdiction and the impact of the section on attempts by the Commonwealth Parliament to limit judicial review, as explained in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

The treatment of judicial review is comprehensive, covering with critical commentary a vast number of reported and unreported decisions There are 868 pages of text. The chapters are logically organised, beginning with 'Judicial power to engage in judicial review', traveling through 'The scope and nature of judicial review', 'Errors of law and fact' (much re-written from the second edition), 'Irrationality', 'Illegal outcomes and acting without power', procedural fairness (250 pages), the results of establishing a ground of judicial review, standing to sue, remedies (140 pages) and 'Statutory restriction of review'.

Bruce Dyer has retained primary responsibility for 'Procedural fairness: the scope of the duty'. Matthew Groves, who has joined as an author for the third edition, has taken over primary responsibility for 'The hearing rule' 'The rule against bias' and 'Habeas corpus' while Mark Aronson wrote the remainder.

The book remains lucidly written. It tackles the difficult issues, such as the consequences of a decision infected by

jurisdictional error as explained in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, and does so by reference to principle. The new edition thus retains the radical edge of the earlier editions. Wherever one opens the book, the discussion is invariably pithy and stimulating.

The book is sharply up to date. There is a reference on page 246 footnote 454 to *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [46] where Santow JA, last December, cited the relevant page of this new edition having 'had the advantage of reading the relevant chapters in typescript.' The proposition was that '*the merits*' is that diminishing field left after permissible judicial review. It is a good example of the powerfully distilled propositions which makes the text a pleasure to read.

The authors write that this edition is current to the end of March 2004, with some important cases decided after that point noted.

The new edition includes reference to and important discussion of *Plaintiff S157/2002* (above); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179; (2003) 77 ALJR 1263 on the difficult question of the means of distinguishing between public and private power; Re Minister for Immigration and Multicultural Affairs; ex parte Lam (2003) 214 CLR 1 on the overriding requirement for practical injustice to be established by the applicant in a denial of procedural fairness case and the downgrading of the role of legitimate expectations; and *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59; 77 ALJR 1165 (*Gamaethige's* case) on the question of whether irrational or illogical reasoning constitutes jurisdictional error.

Whether S20/2002 supports the authors' contention that a new review ground of extreme irrationality or serious illogicality has been generated remains to be seen. But the argument is persuasively developed in Chapters 4 and 5. It certainly seems clear that Wednesbury unreasonableness review is not presently available for review of factual findings and that a different and arguably more stringent test is to be applied, even where the relevant function is couched in terms of the decision-maker's satisfaction or opinion.

A discussion of *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 and any aftermath must await the next edition. There the Court of Appeal held that the time had now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts, such as asylum law, 'where the parties share an interest in co-operating to achieve the correct result'.

It seems reasonable to assume that the gap between English and Australian administrative law will continue to widen, as evidenced by the treatment by the High Court in *Lam's* case (above) of the judgment of the Court of Appeal in *R v North and East Devon Health Authority; ex parte Coughlan* [2001] QB 213 concerning substantive remedies for denial of procedural fairness. The learned author of the headnote in the *Commonwealth Law Reports* notes that *Coughlan's* case was 'doubted' by the High Court, a mild enough statement of the treatment that case received.

The index is full if sometimes whimsical. It is as well that the only entry in the index to *Craig v South Australia* (1995) 184 CLR 163, explaining jurisdictional and non-jurisdictional error, is not 'Volvo driver'. The reference on page 100 to Sir John Laws' metaphor for the intention of parliament as a fig-leaf to cover the true origins of judicial review is indexed as '**nude** Laws J'.

The important refugee cases named in the law reports and media neutral citations only by number and year are difficult to find in the table of cases. They seem to be listed only under 'Immigration and Ethnic Affairs'.

I would have wished to read what the authors would say on the relationship between invalidity and tortious liability, for example whether, in the context of discretionary powers, administrative action which is not ultra vires may be negligent. *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 and *Northern Territory v Mengel* (1995) 185 CLR 307 are tantalisingly mentioned. But that matter, unfortunately, is outside the scope of this work.

This is a textbook of broad learning and scholarship, clearly and attractively written. Ready access to a copy remains essential for those who practice in administrative law, federal or state.

Reviewed by Alan Robertson SC