

REVIEWS

ADMINISTRATIVE LAW Australian Studies In Law

Michael Harris and Vicki Wayne
(eds); The Federation Press, 1991;
hardback \$60.

Administrative Law is a collection of diverse essays in administrative law. Indeed, viewing the book as a whole, the one meaningful comment which can be made about it is that it brings together essays which differ in theme, style and the depth with which they cover their subject matter.

The book is divided into three parts: Judicial Review, Statutory Review and Reappraisal and Reform. Part I on Judicial Review contains two essays. The first is by C.D. Baker, titled 'The Availability of Judicial Review in the Nineties'. Baker comprehensively reviews recent developments in the law relating to judicial review. He covers the development in English and Australian cases of the ambit of *certiorari* and prohibition, the law of standing in relation to both prerogative writs and equitable remedies, the liability of public bodies for the torts of negligence and misfeasance and the liability of the Crown. He effectively highlights inconsistency in the law in these fields. He examines judicial review in the Federal Courts under the Constitution, the *Judiciary Act* and the *Administrative Decisions (Judicial Review) Act 1977*. Finally, he considers the *Cross-Vesting Acts*. Given the breadth of his subject matter, Baker is very successful in synthesising the developments in the law.

He also highlights inconsistencies and irrationalities. For instance, he succinctly shows the absurdity of having two parallel procedures for judicial review in the Federal Courts. The essay is very much written for lawyers; the niceties of the rules of standing applicable to the various prerogative writs is probably an acquired taste. You would, however, go a long way to find a more complete account of the state of judicial review in Australia in so few pages.

Next, in a very readable essay, V. Wade examines the case law on justiciability. She argues that the danger in judicial review is not that courts will trespass into policy, which is the proper realm of the other arms of government, but rather that by treating policy judgments as neutral principles of law, the courts will lose the incentive for restraint. Relevant policy considerations are thoroughly canvassed, although not translated into a possible legal test.

Part II begins with an essay which is as practical as the previous two essays are academic. P. Vitali describes the way freedom of information legislation has been used to obtain information useful for litigation. In addition to the obvious use of freedom of information where a government department is a party or potential party, Vitali shows how government bodies subject to the legislation may hold information useful in litigation for citizens and even those involved in commercial competition. The essay is readable, concise and hard to ignore if you want to know less routine ways to prepare for litigation.

P. Bayne examines the problem inherent in allowing independent tribunals to review decisions on the merits. If a tribunal is independent how far can and should it be made to apply government policy? Bayne examines the way the Commonwealth Administrative Appeals Tribunal has exercised the discretion to waive debts under the *Social Security Act 1947* and explores possible responses to that, an approach which, it has been suggested, is more generous than that of the Department. This essay encapsulates the constitutional and policy issues raised. It is worth noting that since Bayne wrote his essay the Minister has in fact exercised power under the *Social Security Act 1991* to issue directions as to how the discretion to waive debts is to be exercised; if anything this makes the essay more worthwhile.

D. O'Brien brings together many useful statistics from Annual Reports of the Administrative Review Council. The information presented is not new

and much of the essay is an overview of the administrative review system.

T.J.H. Jackson in his essay on official notice in administrative tribunals considers a wide range of problems, including the question of when a tribunal should disclose the fact that it is going to use its own expertise. He suggests background knowledge need not be disclosed but that members' knowledge of particular facts applied in the decision-making process should be, the ultimate question always being one of 'fairness'. Perhaps because of the imprecise nature of the concepts with which it is dealing, the essay appears to circle around its subject matter a little.

Part III is headed 'Reappraisal and Reform'. All three essays in this part consider recent developments in administrative reform and all seek to suggest possible avenues of improvement based on recent experience. The South Australian Ombudsman, E. Biganovsky, argues for an expanded role for the ombudsman so that, among other things, policy can also be the subject of review. M.C. Harris considers what are the desirable features of a general administrative appeals tribunal, drawing largely on the experience of the Commonwealth AAT. Both these essays raise matters of interest to those concerned with the policy underlying the administrative law reforms of the 1970s and with their development.

The final essay, by J.F. Keeler, extensively surveys reform of the administration of workers' compensation schemes in South Australia, Victoria and New South Wales. The essay provides a wealth of detail, amidst which the author's conclusions lose some of their force.

In the light of the diversity of material in the book it is difficult to comment about it as a whole. While its diversity is welcome and results in a wide range of matters being covered, it might have benefited from stronger editorial direction. The administrative review system is outlined in a number of places (in the essays by O'Brien, Jackson, Biganovsky and Harris in

REVIEWS

varying degrees and forms) and this creates a sense of *deja vu* in places. Some of the essays, such as Vitali's, appear to be pitched at practitioners, while others, such as Bayne's, are perhaps of more academic interest. Taken as a whole, however, *Administrative Law* is a significant addition to the literature on Australia's administrative law system. Lawyers with even a passing interest in administrative law are likely to find many of the essays useful.

ANDREW CARTER

Andrew Carter is a Sydney lawyer working in administrative law.

LAW IN CONTEXT

by Stephen Bottomley, Neil Gunningham and Stephen Parker; Federation Press 1991; 365 pp; \$45 (pb).

The study of law in Australia is undergoing significant change. Law degrees are increasingly the path for careers outside traditional legal practice. The trend can only increase as universities churn out more law graduates based on a combination of student demand and low cost teaching. Adding to the pattern of change is demand for lawyers with broader expertise as the law plays an increasing role in social and economic regulations in areas such as business practices, environment and discrimination.

Combined degrees have been one response to this situation. Another has been more cross-disciplinary analysis of law within law studies. *Law in Context* is a book which grew out of a first year law course at the Australian National University. It is an attempt to relate the study of law to other social sciences and to alert students to the dangers of seeing law only as something found in law reports and judgments.

The book is structured as a combination of reprinted excerpts from other prominent writers within a framework

of the authors' own explanation and analysis. Australian material has been given preference. The content is up to date and well selected.

The book includes an historical background to dominant political and philosophical views of the legal system with a focus on liberalism and its claim to provide for 'rule of law' and formal equality of citizens. Analysis then focuses on the legal process, access to justice and the role of lawyers in both a criminal and civil context.

The book has a substantial section on 'Law and Economics'. The attempt to present a simplified explanation of marginal analysis, economic efficiency, public choice theory and other economic theory is generally very useful. The explanation of the ideological basis of economic and market assumptions is also welcome information in explaining the link between liberal political theory and the dominant 'Law and Economics' writings.

The remainder of the book covers some of the major critical challenges to liberal concepts of equality and the law through focus on gender, race (particularly focused on Australian law and Aborigines) and class. Coverage of the range of perspectives in feminist jurisprudence is quite broad whereas the analysis of views about class and power are more introductory. The section on law and economics points to a lack of critical impact from writers outside the market ideologists. Much of this last part of the book is in fact dealing with the deficient assumptions of liberalism and related economic theory.

Generally I found the style of the book very satisfying. The authors cover well the range of views of others and openly give their own views in a critical but non-dogmatic way. The dialectic of competing views and analysis is the basis for stimulating students and others to develop their ideas. The authors succeed excellently in this. Hopefully the legal text book writers who are satisfied to say 'unfortunately the report of the case does not disclose . . . ' could be encouraged to

see legal research extending beyond such superficiality.

A few critical comments of my own. I think the emphasis on liberal theory and law plays down both the influence of conservative social ideology on the law and the influence of interventionist political struggle to challenge both the conservative and liberal conceptions. The latter part of the book does assist in bringing this into focus but could it also be integrated more into the earlier material.

I found some difficulty in reading the book because of the poor quality of paper (allowing the reverse side printing to appear) and relatively small print. I would also appreciate some biographical material about the authors.

Overall I thoroughly recommend the book as an introduction to broader views about law and legal study.

ADRIAN SHACKLEY

Adrian Shackley is a lawyer working in South Australia.