BOOK REVIEWS

Review of Administrative Action by HARRY WHITMORE, LL.B. (Syd.), LL.M. (Yale); Professor of Law, University of New South Wales, Barrister of the Supreme Court of New South Wales, Barrister and Solicitor of the Supreme Court of the Australian Capital Territory and MARK ARONSON, B.JURIS., LL.B. (Hons) (Monash), D.PHIL. (Oxon.); Senior Lecturer in Law, University of New South Wales, Barrister and Solicitor (Victoria). (The Law Book Company, 1978), pp. i-xlv, 1-519. Cloth, recommended retail price $28.50 (ISBN: 0 455 19592 7); Paperback, recommended retail price $24.50 (ISBN: 0 455 19593 5).

This book is doubly welcome. It is the first comprehensive discussion of judicial review of administrative action in Australia, and it contains extensive footnoting which should, in principle, lead the reader to all significant cases on a point.

In their preface, the authors state that the volume is designed primarily for practitioners and that its chapters are self-contained "so that quick reference is possible where problem-solving is required". This book will be reviewed in the light of these aims and, in particular, the reviewer's experience in using the book for problem-solving.

A book designed for the practitioner and problem-solving must provide an adequate index, table of contents, and plentiful cross-references through the text. *Review of Administrative Action* is deficient in these respects. The table of contents merely lists the chapter headings and so cannot be used for problem-solving. The index contains some 700 references for a text of 512 pages, and just under half of those references are the titles of sub-sections of the text (which could well have appeared in the table of contents). The index is inadequate in other respects. The primary heading "delegated legislation", for instance, contains six references, none of which is to procedural defects in making delegated legislation (for which see page 193 of the text), and two of the six entries appear twice. Similarly, the heading "disciplinary powers" appears only under the rubric "certiorari" and there is only one page reference, yet equally or more significant discussion appears at pages 55, 68, 107-108, and 110, to none of which does the passage referred to in the index provide a cross-reference. A further example of a situation in which cross-references should have been provided is on page 110. It is said that the wrongful rejection of evidence does not itself amount to a breach of natural justice. There is no cross-reference to error of law in relation to evidence. (It may also be noted that the authors' statement is inaccurate since rejection of evidence may sometimes result in a failure to hear—see *General Medical Council* v. *Spackman*.)[1]

The Arrangement of the Book

Review of Administrative Action contains three parts (General, Grounds of Review, and Remedies) and fifteen chapters. It is an

[1] [1943] A.C. 627.

unfortunate commentary upon the state of the law relating to judicial review remedies that the authors' discussion of remedies is almost as long as that of the grounds of review.

Whitmore and Aronson are of opinion that the grounds of review run into one another and do not exist in separate compartments (page 38). Thus, their discussion of grounds of review is essentially in only three parts: natural justice, "ultra vires", and error of law. Their view, in which the reviewer concurs, could have been given greater prominence since it is the tendency to compartmentalise grounds of review which has led to most of the unnecessary complexity of judicial review law. Yet, while the authors recognise this, their discussion within the tripartite division tends to be compartmentalised and the relationships of grounds of review are not fully explored.

The law of judicial review is, in the reviewer's opinion, almost entirely procedural. The grounds of review are means of obtaining relief, so that the inquiry is not so much what is *the* ground of review as what is the most apt ground in the circumstances. Undue compartmentalisation tends to obscure this inquiry. A set of facts is multi-dimensional and may give rise to a number of grounds of review according to the point of view from which one examines the facts. Since a ground appears apt when the facts are examined from a particular point of view, what is important is to identify the generic structure of factual situations which appears when a particular ground is apt. The structure of the factual situation determines the most apt ground and not vice versa. Several grounds of review may be available because a set of facts may be analysed in terms of different generic structures from different points of view. The grounds overlap because from a particular point of view a set of facts may be capable of being seen as possessing several generic structures. Thus, the factual situation in *Anisminic Ltd* v. *Foreign Compensation Commission*[2] could have been analysed in terms of power to enter the inquiry, improper purposes, irrelevant considerations, or error of law on the face of the record. It was the presence of a privative clause and the exhaustive enumeration of criteria in the legislation (the generic structure of the facts) which made the irrelevant considerations ground the most apt because it was the most simple and direct. Other analyses could have been used but their paths would have been tortuous and uncertain.

Although seeking to avoid compartmentalisation, the authors' adoption of a single chapter on "ultra vires" may not be without problems. Although the grounds of review may overlap, functional distinctions between what may be called jurisdictional error and abuse of discretion (the distinction between what was done and why it was done) may be made. It may be that neither easily comprehends errors of procedure, and that jurisdictional errors relating to subject-matter have little in common with improper constitution and empowering of the decision-maker. A division of the chapter into at least four parts answering the questions who, how, what, and why may well have been better. In their

[2] [1969] 2 A.C. 147.

long chapter on "ultra vires", the authors first describe and trace the development of the concept of jurisdiction, and explain the collateral/merits distinction. There follow illustrations of the application of the concept to tribunals and a section on procedural breach of jurisdiction. The chapter then contains three sections on ultra vires (which would seem to be unified largely by the fact that the matters discussed are distinguishable from those of the following section), and abuse of discretion. The last three sections in the chapter cover the fusion of jurisdiction and "ultra vires", a section on "misunderstanding the nature of the power", and one on consent, waiver and estoppel. This is not a happily organised chapter. The weaknesses of organisation, indexing and cross-referencing seen in other parts of the book are here particularly prominent.

Division of the part relating to remedies into separate chapters on each remedy was, perhaps, inevitable. However, as the authors recognise, courts over the past few years have been attempting to obviate distinctions among the remedies. Discussion of each remedy separately may lead to continuing distinctions which may otherwise have disappeared. A general introductory chapter on remedies, seeking so far as possible to bring together the principles, might well have been of assistance to the reader and may have performed a useful function in promoting the assimilation of remedial principles. Given that it was decided to have separate remedial chapters, the authors have succeeded in providing a comprehensive, cohesive, and intelligible discussion.

Individual Chapters

In the fluid state of judicial review law, there are many propositions of law which will be disputable. Much depends on the policy view taken of the role of judicial review and an individual author's personal approach. In reading this book, the reviewer has often had cause to disagree with the views of the authors because his approach and, possibly, policy view differ from theirs. It would be out of place to go into each difference, but certain major differences may usefully be discussed.

Chapter 1 is a general introduction containing, inter alia, discussion of the classification of functions and the void/voidable distinction. Some discussion of the classification of functions is inevitable and the authors handle this difficult section lucidly and simply, providing adequate information for the reader without entering into the casuistry involved in an analysis of the cases. The authors propose that the void/voidable terminology be abandoned in favour of a valid/invalid distinction (page 14) which would not suffer from the history of ambiguity and controversy surrounding the present terminology. Both the appellation invalid and those of void and voidable must be accompanied by modifications indicating from when, for what purpose, with respect to whom, and with respect to what consequences an act is invalid. It may be that there are no degrees of nullity or invalidity, but it is undeniably true that a decision may be valid for some purposes and invalid or void for others. Chief Constable Ridge's dismissal may have

been void *ab initio* so that he continued in law to be Chief Constable (*Ridge* v. *Baldwin*)[3], but that does not necessarily mean that his replacement was invalidly appointed or that the decisions the latter made were invalid. The reviewer sees the failure to recognise that an invalid or void decision is not invalid or void in every circumstance, for every purpose, with respect to every person, and at every time, as leading to difficulties in the void/voidable distinction. There is, it is submitted, no reason to suppose that any new terminology (in the event that it should enter general use) would be immune from this.

Chapters 4 and 5 concern natural justice. They must be read against the authors' proposition that breach of the rules of natural justice is by far the most important ground of review (page 37). This approach permeates the chapter and the criticisms made of the cases usually derive from it. Thus, they criticise the recognition over the last few years that the content of the rules of natural justice vary widely. The reviewer does not share this approach. The extension of natural justice into general administration probably has the corollary that the content of the hearing will vary and may on occasions be limited to quite a basic level. The extension of natural justice is seen as desirable, but there is a danger that the quite basic levels of hearing will, in time and with the natural pressure to build upon existing rights, gradually become more rigorous until the decision-making process becomes unacceptably cumbersome and inefficient. This possibility should be considered in evaluating the modern move towards the variable content of hearing.

Derivation of the right to a hearing is treated by the authors largely in an historical format (pages 44-70). There is a danger in such an approach that insufficient prominence and analysis may be given to the derivation principles currently applied. Whitmore and Aronson set out the three factors examined by the Privy Council in *Durayappah* v. *Fernando*[4] and indicate how they were used in that case (pages 59-60). It may be, however, that they should have considered in more detail the extent to which the factors have become generally applicable and discussed how they may be applied. The authors would appear to hope that the rules of natural justice will become applicable to all administrative decision-making, but until that happens, the "*Durayappah*" factors are likely to retain their importance as the basis of implying a duty to give a hearing.

In their chapter on the content of natural justice, the authors conclude that there is a common law right to legal or other representation and they suggest that this right should extend to all tribunals (page 109). It is submitted that the authors are in error as to an existing right to representation. All the cases cited by the authors involve express legislative provision giving the individual a right to an oral hearing, and the dicta in those cases go no further. Entitlement to representation is submitted to be properly determinable only in the light

[3] [1964] A.C. 40.
[4] [1967] 2 A.C. 337.

of the nature of the tribunal, the nature of the proceedings before it and the character of the factual allegations involved. There will often be occasions in which a refusal to hear counsel would be in breach of natural justice, but it cannot be said that the law should entitle every person to appear by counsel. When an individual is inarticulate and unable to put his case, the case for representation is stronger, but a general legal entitlement, it is submitted, cannot be based upon these inarticulate souls. An inquisitorial tribunal may effectively draw out the arguments without impairing the justice of the hearing. Indeed, the community at large may be better off with such a tribunal than with one operating with counsel.

Probably the most complex area covered by Chapter 6 is that which explains and illustrates the proposition that jurisdictional error "in the narrow sense" may be detected by asking whether determination of the aspect of the decision in issue was "preliminary or collateral" to the merits of the decision. The authors' description of the cases and principles is very good and as clear as the subject-matter permits.

The phrasing "preliminary" and "collateral" suggests that a decision may be analysed by a logical order of progression through the matters to be decided in a given situation and by separating what is to be decided from what arises incidentally and apart from that to be decided. But this analysis is possible only if a clear line can be drawn by separating matters into the two classes. While some legislation may, by its form, adequately indicate that consideration is to take place in two sections, for instance, by defining an area of competence and then stating a series of situations in which particular action may be taken, legislation often states *uno flatu* all the conditions in which an administrator is empowered to take some action. In the latter situation there is scarcely ever any logical process by which a collateral/merits distinction can be made. The tortuous reasoning of Lord Morris in *Anisminic* illustrates the logical difficulties into which the distinction leads in the latter cases. In the reviewer's opinion there is no need to advert to the collateral/merits distinction in any but the clearest cases. There will be another, more apt ground of review which may be adopted, and usually that ground will be irrelevant considerations.

It is said that in Australia (perhaps as distinct from overseas) the grounds of review of actions of the Crown representative are very limited. This proposition is not treated adequately by the authors (see pages 201-202). There appears to be no mention of the question in the index and no relevant sub-heading in the text. The authors do not refer to the leading article on the principle,[5] nor do they indicate the ways in which the apparent restrictions on review may be circumvented as, for example, in *Banks* v. *Transport Regulation Board*.[6] No distinction is made in the book among the various actions of the Crown representative, or the width of review of those actions compared with

[5] Hogg, "Judicial Review of Action by the Crown Representative" (1970) 43 A.L.J. 215.

[6] (1968) 119 C.L.R. 222.

that which would have been available had the decision-maker been a Minister. Only two of the eight cases (nine if the obscure citation without case name of "N.S.W. 341" is decoded) said to support the full width of the principle in fact do so; the others are either irrelevant to the principle or are restricted to the propositions that *mala fides* cannot be alleged and that the prerogative writs are unavailable against the Crown representative. Finally, the authors are in error when stating that Jacobs J.A. mounted an "open attack" on the principle in *N.S.W. Mining Co. Pty Ltd* v. *Attorney-General*.[7] In that case, Jacobs J.A. was the only judge to *support* limits on review of the Governor-in-Council; Wallace P. left the question open and Holmes J.A. did not mention it. It may have been better had the authors considered the clear extent of the principle and the authorities which indicate how it may be avoided rather than have simply expressed their disapproval and implied in the text that the principle is wider than it may be.

Chapters 6 and 7 are divided essentially on the basis of jurisdictional v. non-jurisdictional error. The distinction between jurisdictional and non-jurisdictional error, between ultra vires and intra vires errors, is a purposive distinction which, it is submitted, today arises for only three purposes: overcoming privative clauses (assuming *Anisminic* is to be followed in Australia in this context), determining the availability of a particular remedy (error of law within jurisdiction may be reviewed only through some administrative law remedies), and determining the consequences of invalidity. The policy considerations behind deciding whether the courts, in the face of a privative clause, should review upon a particular ground are rather different from those behind the decision whether, for instance, mandamus should be available. "Jurisdiction", therefore, like "judicial" takes its colour from its surroundings so that it is important that the cases decided for one purpose should not be used to define or illustrate the meaning of jurisdiction for another purpose. In the reviewer's opinion, Chapter 6 loses sharpness of insight because, while generally cases are used only in the context of the purpose for which they were decided, there are occasions when this is not done.

When they discuss the border between jurisdictional and non-jurisdictional error, the authors adopt the view that, since *Anisminic*, any error of law may probably be regarded as going to jurisdiction since all can be described in terms of a failure to take account of relevant considerations or taking account of irrelevant considerations. The reviewer would disagree with this fundamental proposition which, in his view, results from a concentration on the dicta in *Anisminic* rather than the actual process of reasoning used by the majority in the House of Lords.[8]

Whether every error of law should be regarded as jurisdictional is a different question and the authors express reservations as to the extent to which courts should involve themselves with review of purely

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[7] (1967) 67 S.R. (N.S.W.) 341.

[8] See Taylor, "Judicial Review of Improper Purposes and Irrelevant Considerations" (1976) 35 Cambridge Law Journal 272, 280-281.

administrative decisons on this ground (page 274). In the reviewer's opinion, the distinction between certiorari and the other prerogative writs in this regard is based upon the sound principle that where a decision can only be made after a hearing, in which all the evidence is presented with the knowledge of all parties, it is proper that evidence-related errors of law should be made subject to review, but, where a decision is made in any other situation, such a close analysis of the material leading to the decision is inappropriate and difficult for the courts to undertake. Non-tribunal-type decision-making bears only limited analogy with judicial decision-making, and the scope for judicial review has been (it is submitted, correctly) restricted. The requirement that a decision-maker provide a statement of reasons setting out the facts found, referring to the evidence upon which they are based, and giving the reasons for the decision (Administrative Decisions (Judicial Review) Act 1977 (Cth), section 13) will probably alter the suitability of non-tribunal-type decisions for close judicial review. Whether the courts will as a result impinge more closely on the administration is yet to be seen.

The authors' discussion in Chapter 7 of error of law, particularly errors where the facts do not reasonably support the conclusion reached, is very good. Three approaches to error of law are found: the analytical, the pragmatic, and the reasonableness approaches. There is, however, no attempt to bring the three together although opportunity arises clearly from the authors' use of *Edwards* v. *Bairstow*[9] prominently in their discussion of all three approaches. Determination of whether there is an error of law because the facts do not reasonably support the conclusion is difficult at the best of times, but, if any useful basis for analysis exists, it is submitted that it will be found in Lord Radcliffe's speech in *Edwards* v. *Bairstow*.

The doctrine of jurisdictional fact is discussed on pages 275-276 of Chapter 8. The existence of that doctrine, which says that where a finding of fact relates to a question of jurisdiction the courts are not bound by that finding, may be questioned. As the authors note, where evidence on a jurisdictional fact is not clear-cut and the decision-maker has directed his attention to the issue, the courts will be reluctant to interfere. There appears to be no case where the courts have interfered otherwise than where the finding of fact by the decision-maker could be classed as unreasonable. The approach taken is identical with that of finding error of law for lack of supporting evidence. If this is so, then the approach is one of error of law and there is no case for maintaining a further complex distinction based on concepts of jurisdiction.

Part of Chapter 8 on evidence and procedure relates to proceedings before the courts. This could, in the reviewer's opinion, have been expanded and separated from the discussion of grounds of review (to which it relates only tenuously) and inserted in Part 3 on remedies. Issues relating to evidence and procedure in judicial review proceedings have been inadequately treated in the past, and one might have

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[9] [1956] A.C. 14.

expected a book aimed at practitioners to effect a long-overdue righting of this omission.

The otherwise fine Chapter 15 on privative clauses is marred in two ways. First, it is said that the High Court's holding in *Clancy* v. *Butchers' Shop Employees Union*[10] (which is essentially that held in *Anisminic*) is "good law in Australia" (page 495). Pages 504-507 are then dedicated to showing how the rule in *Clancy* has been authoritatively altered by the High Court since the Second World War (by "the *Hickman* formula"). The inconsistency with "the *Hickman* formula" is clear and the authors' statement cannot be sustained. It may be noted that only four of the twelve cases cited in support of the authors' proposition in fact support it. Secondly, two issues arise with respect to section 75(v) of the Constitution. The authors deal well with the first question whether a privative clause is ultra vires the Constitution because of section 75(v) (see pages 497-500), but the second issue of the effect of privative clauses in proceedings to which the section applies is not even discussed. Indeed, the authors suggest, incorrectly, that "the *Hickman* formula" applies. There are, in fact, two distinct approaches to privative clauses depending on whether or not section 75(v) applies. This is an important point and one which should not have been overlooked in the text.

The Technical Accuracy of the Book

In general, it is not useful to catalogue technical deficiencies of a book in the course of reviewing it. Where, however, deficiencies are considerable it is appropriate to point these out. Certain individual examples will be considered in this part, and other general matters indicated. The reviewer has been left with the feeling that the number of technical inaccuracies may possibly indicate correlative inaccuracies in substance.

Some examples of cases whose holdings have not been accurately stated have already been given. Three further important examples could be added. First, the Privy Council in *Jeffs* v. *New Zealand Dairy Production and Marketing Board*[11] held the opposite of that attributed to it in the first two lines of page 100. Secondly, there is nothing in *Posner* v. *Collector for Interstate Destitute Persons (Vict.)*[12] to support the proposition for which it is cited (page 104) and much that is contrary to it (see pages 472, 476, 483, and 489 of the report). Thirdly, at page 277 it is stated that "the courts have always examined the sufficiency of the evidence placed before the issuing magistrate" for a search warrant. In none of the cases cited is there a consideration of the sufficiency of evidence; all concern only the question of whether any evidence at all was presented, a rather different issue.

The mode of citation of cases is often incorrect, the worst page being page 49 where 10 of the 21 cases are cited incorrectly. Proof-reading

[10] (1904) 1 C.L.R. 181.
[11] [1967] 1 A.C. 551.
[12] (1946) 74 C.L.R. 461.

of footnotes is poor and parts of case names or citations are omitted on a number of occasions. The name of one case (*Healey* v. *Rauhina* on page 122 footnote 191) is incorrect and that error is carried into the table of cases. There are errors in the names and mode of citation of statutes. The title and date of the Bland Committee are incorrect. Only two and not three books were foreshadowed in the 4th edition of Benjafield and Whitmore, *Principles of Australian Administrative Law*.

Today, many of the rules of grammar are changing and what is ungrammatical to some is acceptable to others. The authors have, however, been unduly inventive. Among the new words appearing in the text are "mandamused" (page 364), "mandamusable" (page 367) and "certiorariable" (page 442). On page 217 the authors discuss "the most well-known case" on an issue. However, the statement which the reviewer will remember appears on 285: "a declaration is neither positive nor negative, but neuter".

G. D. S. TAYLOR*

Trade Practices Law. Restrictive Trade Practices Deceptive Conduct and Consumer Protection. Volume I. Introduction and Restrictive Trade Practices by BRUCE G. DONALD, B.A., LL.B. (A.N.U.), LL.M. (Harv.), Solicitor of the Supreme Court of New South Wales, Lecturer (part-time) in Restrictive Trade Practices, University of Sydney and J. D. HEYDON, B.A. (Syd.), M.A., B.C.L. (Oxon.) of Gray's Inn and the N.S.W. Bar, Barrister-at-Law, Professor of Law and Dean of the Faculty of Law, University of Sydney, Vinerian Scholar, Sometime Fellow of Keble College, Oxford. (The Law Book Company Limited, 1978), pp. i-lix, 1-508. Cloth, recommended retail price $34.50 (ISBN: 0 455 19598 6).

This work is a valuable addition to the Australian literature on competition law and will be an essential working tool on the Trade Practices Act 1974-1977 (Cth) for specialists and teachers. Volume 1 deals with Part IV of the Act (restrictive trade practices and mergers) and Volume 2, which is in preparation, will cover Part V (consumer protection).

The coverage and depth of detail in Volume 1 are excellent, most of the problem areas being discussed and sound solutions for them put forward.

An opening background chapter is followed by a survey of the constitutional foundation for the Act. The authors conclude that (subject to some reservations which do not go to the heart of the legislation) the Act is constitutionally valid. The question whether sections 47(8) and (9) are invalid as takings of property by the Commonwealth on unjust terms is not referred to. (This issue has been

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