BOOK REVIEWS

General Principles of Administrative Law by E. I. SYKES, B.A. (Qld), LL.D. (Melb.); D. J. LANHAM, LL.B. (Leeds), B.C.L. (Oxon) and R. R. S. TRACEY, LL.B. (Hons) (Melb.), LL.M. (Melb.). (Butterworths, 1979), pp. i-xxvi, 1-261. Cloth, recommended retail price $23.50 (ISBN: 0 409 37550 0); Paperback, recommended retail price $18.00 (ISBN: 0 409 37551 9).

Natural Justice: Principles and Practical Application by GEOFFREY A. FLICK, LL.B. (Syd.), LL.B., PH.D. (Cantab.); Lecturer in Law, University of Sydney. (Butterworths, 1979), pp. i-xxx, 1-175. Cloth, recommended retail price $15.00 (ISBN: 0 409 35260 8).

The publication of these two works is yet another indication of the growing interest in the subject of administrative law. The pervasive nature of modern government leaves no one in the community unaffected, in either business, professional or personal life, by regulation and other control, by subsidy and other benefits or by the provision of public services such as education, health, transport, electricity and so on. Inevitably, many will be aggrieved by government action, whether because the nature of the action requires that the interests of some be subordinated to a larger public interest, or because of some deficiency in the administrative process. The traditional concern of administrative law has been to ensure that the exercise of power by governmental authorities is kept within the bounds allowed by law. Increasingly, the inadequacy of this approach has been demonstrated, whether in the complexities of the traditional procedures and remedies, or in their failure to provide adequate remedies for the citizen aggrieved with the manner in which a discretion has been exercised or a government authority has gone about its task. In particular, administrative law has failed to ensure that those affected by government action are entitled to know why that action was taken. Thus the reversal, by the House of Lords in *Local Government Board* v. *Arlidge*[1] of the Court of Appeal decision that the inspector's report to the minister should be disclosed to the complainant passed up an opportunity to introduce a measure of open government by judicial decision. Those seeking more effective avenues of grievance redress have therefore turned to legislative reform, and to the establishment of institutions other than the "ordinary" courts. There is an urgent need for administrative lawyers to perceive the total picture, not only so that they may better advise their clients, but also that the various avenues of redress be kept in harmony with each other and with the fundamental principles of our system of ministerial government.

To a modest degree, each of the two works under review has moved beyond the narrow confines of the traditional concerns of the law. Sykes, Lanham and Tracey do it rather more selfconsciously than does Flick. They include chapters on the Ombudsman and parliamentary

[1] [1915] A.C. 120.

control, and sections on the new administrative "court", the Commonwealth Administrative Appeals Tribunal. Flick's larger perspective is interwoven with his treatment of traditional themes under the general heading of natural justice. He reveals an interest in the nature of the administrative process—which is different in essential respects from the judicial process—and in the giving of reasons by administrative decision-makers. Further, he brings into his treatment a reliance on United States decisions and blends these with English, Australian, New Zealand and Canadian decisions. The United States courts have, for a number of reasons, a much greater familiarity with the administrative process and there is much that Australian administrative lawyers can learn from their decisions. But for all that Sykes, Lanham and Tracey have broken some new ground, the book is a disappointing one. Despite their declared intention of doing so through the analytical device of distinguishing between the existence of power or jurisdiction on the one hand and the mode of its exercise on the other, the authors have not really succeeded in any simplification of what is admittedly a very difficult and confused area of the law. In part, this derives from their own inability to agree on a description of what the law is. Thus, apart from the introductory chapter, each of the three authors has contributed separate chapters, not presented consecutively, and there is a disclaimer of joint responsibility for any but the introductory chapter. Not only are there differences as to the substance of the law, but there are marked differences in style between the three authors (one cannot really describe them as co-authors). It is therefore easier in some respects to read the book by taking each group of chapters contributed by one of the authors and reading those chapters consecutively. Moreover, the style of one of the authors is such that a heavy editorial hand is needed to provide, in many passages, some clarity and elegance, and that editorial hand has not been applied.

It is unfortunate that, having settled on an analytical tool with the intention of bringing about some clarity of statement of the substantive law, the book revives questions of classification that have been largely left behind by the courts in the past fifteen years. One is the attempt to state the law in terms of a distinction between *ultra vires* and lack of jurisdiction, the other a revival of a distinction between administrative and judicial functions, with a seeking to breathe new life into "quasi-judicial". One hopes that these dry bones will not live again. Now that the courts have recovered from the aberration consequent upon the taking out of context of the famous dictum of Lord Atkin in *R.* v. *Electricity Commissioners; ex parte London Electricity Joint Committee Co. (1920) Ltd*,[2] it would be unfortunate if the duty of an authority to apply the rules of natural justice or the availability of certiorari and prohibition were once again to be made to depend upon some *a priori* classification of function rather than upon the substantive issue of interference with rights or "legitimate expectations".

Thus although it is the intention of the authors to produce a book

[2] [1924] 1 K.B. 171.

primarily for students, it is not likely to dispel the difficulties that most students find with the subject. No doubt it was for this purpose that the number of cases cited has been kept to a comparative few, with many propositions, some of them quite debatable, being put forward without any reference to authority. The wealth of citation in a book such as de Smith is confusing, but for the serious student there are simply not enough citations of authority in Sykes, Lanham and Tracey.

The authors conclude the discussion of each ground of review to which attention is given by a reference to the corresponding provisions of the Administrative Decisions (Judicial Review) Act 1977 (Cth). As well, there is a somewhat more extensive description of the Act in Chapter 25. Since the Act had not been proclaimed at the time of writing (nor has it yet been proclaimed at the date of writing this review) the authors have refrained from anything like a full discussion of its provisions. Nevertheless some attention might well have been given to the limitation of review under the Act to review of "decisions of an administrative nature". How far the reach of the Act will be constrained by questions of classification remains to be seen. It would be open to the courts to take an expansive view of what is meant by a decision of an administrative nature. For example, that one of the grounds of review is failure to accord natural justice may be taken to suggest that the fact that a function may be classified as judicial—although not involving an exercise of the judicial power of the Commonwealth—is not to take it outside the Act. On the other hand, there must be substantial doubt whether a function of a legislative character, such as the power to make by-laws of general application, is within its scope. Yet, for example, in Chapter 1, entitled Substantive Express Ultra Vires, in which most of the examples given concern the exercise of powers of a legislative nature, reference is made in paragraph 107 to relevant provisions of the Act without any indication that they might not apply to the kinds of functions previously referred to in the chapter. The Administrative Law Act 1978 (Vic.) was enacted too late for reference to it to be included. That Act raises its own problems of classification.

The authors express concern that "current tendencies" may "well not be desirable" (page 12) as cutting across traditional views as to the difference between judicial review and appeal. Whilst it may not be appropriate in many cases for the ordinary courts to exercise an appellate function, or for the substance of many administrative decisions to be subject to review, there is a great mass of administrative decisions which are or ought to be made on objective grounds and where policy as such does not or ought not to dictate the particular decisions. It is in this area that the law has not yet developed in a way which would satisfy the expectations of the ordinary citizen. Whilst Miss Karen Green and her supporters secured from the High Court a declaration that the Director-General of Social Services was not entitled to allow policy considerations to divert him from his statutory duty,[3] they would

[3] *Green* v. *Daniels* (1977) 51 A.L.J.R. 463; 13 A.L.R. 1.

no doubt have been happier to have had the Court rule on the question whether there was evidence on which the Director-General ought reasonably to have been satisfied that Miss Green had made appropriate efforts to obtain work. Indeed, it is on the question whether "no evidence" is a separate ground of judicial review in Australia that the authors expressly part company (pages vi-vii). To fill this gap administrative courts such as the Administrative Appeals Tribunal and administrative not-quite-courts (one refrains from saying quasi-courts!) such as the Ombudsman are being established. It is to bodies such as these that the next generation of administrative lawyers must turn their attention.

Flick does not set out to cover the whole field of administrative law. Instead, he concentrates on aspects of natural justice, treating them at rather more length than does the usual text on administrative law. He explores in depth the content of the duty to ensure that a party has a proper opportunity to put his case and to controvert what is alleged against him. The detailed exposition of the content of a duty to give reasons is particularly valuable having regard to the obligation to do so imposed by sections 28 and 35 of the Administrative Appeals Tribunal Act 1975 (Cth), section 13 of the Administrative Decisions (Judicial Review) Act 1978 (Cth), and section 8 of the Administrative Law Act 1978 (Vic.). That the chapter is substantially a reprint of Dr Flick's earlier article in [1978] Public Law in no way derogates from its value. Indeed, its place in the present work highlights the failure of our courts to appreciate that the giving of reasons is essential to achieving administrative justice, and that rights of appeal and of judicial review are of limited value unless adequate reasons are given. In particular, good use is made of the many decisions of the United States courts—there is a substantial similarity between the statutory provisions of the Commonwealth and Victorian Acts referred to above and the equivalent provisions of the Federal Administrative Procedures Act in the United States of America and the State legislation which has been modelled on that Act. The use of the American case law has produced a rather more realistic treatment of the content of a statement of reasons than the somewhat stilted approach of the Administrative Review Council, which does not seem to have had regard to this case law. It is to be hoped that works such as Flick will assist in opening up that case law to our own tribunals and courts as they approach the task of construing parallel statutory provisions.

One subject is, however, somewhat surprisingly omitted. That is the question of the circumstances in which the rules of natural justice will be held to apply. The author says in the preface that this preliminary question has been left to other writers. Yet, in its absence, any work on natural justice must be only a partial treatment of the matter. Given the sharp division of opinion in *Salemi* v. *Mackellar* [*No. 2*][4] in which Gibbs J. and Stephen J. came to opposite conclusions although each started with the tests suggested by the Privy Council in *Durayappah* v.

[4] (1977) 137 C.L.R. 396; 14 A.L.R. 1.

Fernando[5] the subject is most important, and therefore it is to be regretted that it has been omitted from a book treating the topic of natural justice.

Finally, two sentences in Flick highlight the main task confronting public administrators and administrative law reformers. On page 9 he writes: "The recognition of the need to improve, by means other than judicial review, the process by which a discretion is exercised is new to both English and American administrative law. There is nothing fair in an administrative process that permits an unfair administrative decision to be remedied by a fair judicial review of the decision-maker's action."

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Cases and Materials on Taxation by R. BAXT, B.A., LL.B. (Syd.), LL.M. (Harv.); Professor of Law, Monash University; R. GELSKI, B.A., LL.B. (Syd.), LL.M. (Lond.); Senior Lecturer in Law, University of New South Wales; Y. GRBICH, LL.B., LL.M. (Wellington) PH.D. (L.S.E.); Senior Lecturer in Law, Monash University; B. MARKS, LL.B. (Syd.), LL.M. (Illinois), M.C.L. (Wash.); Senior Lecturer in Law, University of Adelaide; and K. POSE, B. JURIS., LL.B. (Mon.), B.C.L. (Oxon.); Senior Lecturer in Law, University of Melbourne. (Butterworths, 1978), pp. i-xxx, 1-790. Cloth, recommended retail price (with 1979 supplement) $33.00 (ISBN: 0 409 34300 5). Paperback, recommended retail price (with 1979 supplement $27.50 (ISBN: 0 409 34301 3).

This casebook is a most useful addition to the range of treatises, casebooks, services and manuals on Australian income tax law, practice and policy. It is the joint product of no fewer than five learned authors, which is remarkable in itself for a volume containing only 117 pages of original writing—a productivity record that would make a shop steward sob with envy.

According to the preface, the goal of the book is to bring more "depth and rigour" to the study of revenue law. The works already available, the authors suggest (perhaps a trifle harshly), are a "vacuum" as far as depth and rigour are concerned, which the present work is to "fill". The jacket notes declare that the casebook is intended both for the practitioner and for the student, but its value to the practitioner must be reduced by its lack of an index and by the fact that the table of cases lists judgments by the initial of the first party only: thus, *F.C.T.* v. *Mitchum* is mentioned only under F, not under M. At least one case which is reproduced at length, *Charles Moore & Co.* v. *F.C.T.*, is not shown in the table of cases as having been reproduced at all, but only as having been cited.

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[5] [1967] 2 A.C. 337.

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