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Parliament and Administrative Law



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Parliament and Administrative Law

The Vision in Hindsight: Parliament and the Constitution: Paper No. 11

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the eleventh

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.



Centenary of Federation 1901-2001

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Major Issues

The framework for law and government in Australia is marked by the presence of a comprehensive system of administrative law that has largely developed over the last three decades. The key elements of the system are judicial review by the courts, merit review by administrative tribunals, investigation of administrative action by the Ombudsman and human rights agencies, and the conferral of information and privacy rights under freedom of information and privacy legislation.

The discussion of administrative law in Australia typically looks at its implications for the citizen, the Executive or the courts. Those three groups are involved directly in each administrative law dispute, as plaintiff, defendant or adjudicator. This paper takes a different standpoint, looking at administrative law from the perspective of the Parliament. The analysis adopts an historical time-frame, by tracing the themes that have emerged over the last century concerning the relationship between Parliament and administrative law. Three broad themes are examined.

The **first theme** has to do with the development of administrative law in Australia. The origins of administrative law are located strongly in the common law, supplemented by s. 75(v) of the Constitution which confers an original jurisdiction upon the High Court to grant three administrative law remedies against the Commonwealth. Nowadays, however, the common law and constitutional underpinnings have been overshadowed in importance by the rights and review mechanisms created by Parliament in the last three decades. The protection of the public against executive error or abuse now has a firm legislative foundation.

This acknowledgment, of the role played by Parliament in creating and safeguarding the framework for resolving disputes between citizen and government, prompts the need for a deeper analysis of the role played by courts and tribunals in the further development of administrative law. It is difficult, jurisprudentially, to sustain a philosophy of judicial leadership in administrative law expansion in a context of active legislative oversight of that body of legal principle. It is questionable, even, whether courts have truly played a leadership role in recent decades, or have instead responded to initiatives that can be traced to Parliament. If so, there is a corresponding difficulty in justifying any action by the courts that oversteps the legislative initiatives. The development of judicial review principles in two areas, immigration control and recognition of international human rights norms, are used as case studies to illustrate this point.

The **second theme** in the paper has to do with the tension and conflict that arises between Parliament and the courts in the development of administrative law. A degree of tension is inevitable, arising from the doctrines of separation of powers and responsible government. At times, however, the relationship between Parliament and the courts is marked more by collision and divergence.

One area in which this has occurred is in relation to the principles and presumptions of statutory interpretation. While those principles, on the surface, are designed to elicit Parliament's intention, at times they can operate to undermine Parliament's objectives by safeguarding common law principles or judicial values against legislative intrusion. This has happened as a result of the narrow interpretation given to privative clauses, which are enacted from time to time to preclude judicial review of administrative decision-making in particular areas. A similar conflict, between legislative intention and judicial inclination, can occur when there is narrow interpretation of statutory provisions that are designed to facilitate ministerial control or oversight of administrative decision-making. Lastly, tension has been developing between Parliament and the courts concerning the harmonisation of international norms and domestic legal principles. After the *Teoh* decision of the High Court, legislation was introduced to reassert what was claimed to be a traditional legal principle, namely, that it is the role of Parliament to implement treaty obligations.

In many different ways the development of administrative law has impinged on the functioning of Parliament and its members, and this constitutes the **third theme** in the paper. Firstly, on matters of detail, the work of the Commonwealth Ombudsman in complaint handling and grievance resolution has overshadowed the similar function traditionally discharged by members of parliament on behalf of constituents. It was expected, in the design of the administrative law system in the 1970s, that members of parliament would welcome the inauguration of the office of Ombudsman, and would work in partnership with the office in developing the standards of public administration. In practice, however, the integration of both functions has not been strong, leading to frequent complaints by Ombudsmen over the last two decades that the office has received poor support from members of Parliament.

Another point of overlap between Parliament and administrative law has to do with the equal concern of both to compel disclosure of government information, in the interests of executive accountability. In this area, the courts have been more forthright than Parliament, and for over two decades have followed a principle that a claim of executive privilege is not conclusive and can be overridden by a court in a situation where executive documents are required for the due administration of justice. The Houses of Parliament, on many occasions, have made a similar assertion, but have not pressed the claim any further. This situation may change, as a result of two recent court decisions which confirm that both Houses of the Parliament have the right to compel the disclosure of documents by the Executive.

Lastly, Parliament and the courts share a similar function of being forums in which executive accountability can be put to the test. Most executive activity and decisions are

subject to review in both forums, but in some situations political accountability may be the more appropriate mechanism. There is a danger, in those situations, that the imposition of legal accountability can undermine or diminish the role that political judgment and parliamentary accountability should play in the incremental development of public policy in individual cases. There are signs of that danger, in judicial review cases that have reviewed the legality of ministerial decision-making without adverting to the Parliamentary options for executive accountability.

Australia's Administrative Law System

The growth of administrative law in Australia has been a theme of the present age. The institutions that embody the Commonwealth Government's commitment to administrative law—the Ombudsman, the Administrative Appeals Tribunal, the Federal Court, and numerous other review bodies—were established by Parliament mostly in the 1970s, at a time of concern about the development of big government in Australia and its impact on the citizen.¹ The parliamentary reform agenda broadened quickly in the 1980s to incorporate an additional premise for government accountability to the citizen, public disclosure of government documents and the control of government information handling. That broader theme was implemented by the enactment of the *Freedom of Information Act 1982* (Cwlth) and the *Privacy Act 1988* (Cwlth). In the 1990s there has been a different reform emphasis but with similar objectives, best reflected in the development by government agencies of customer service charters and complaint procedures.²

Administrative law is not, however, a concept that was unknown in Australia in earlier days. The idea that there should be a legal process to constrain unlawful government activity was a concept that was well-established in English common law, and transported to the new colonies. The legal foundation was consolidated in 1824 when the Supreme Court of New South Wales was vested with all the 'Jurisdiction and Authority' of the three English common law courts.³ An administrative law implication, spelt out the following year by the Chief Justice Sir Francis Forbes in a case brought by emancipated convicts against court officers who had failed to empanel them in jury lists, was that:

every court has of necessity a power to compel [the Executive] to execute its process. This is a power necessarily incident to the creation of courts.⁴

At the turn of the century there was a defining moment in Australian acceptance of the notion of administrative law review. The new Constitution included a provision, s. 75(v), which conferred upon the High Court a jurisdiction to grant three administrative law remedies against the Commonwealth.⁵ This section amounted to a constitutional guarantee of judicial review, an assurance that it would be:

constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.⁶

The constitutional and common law foundations for administrative law have been important throughout the last century, but their significance is nowadays overshadowed by the developments introduced by Parliament in the last three decades. Those developments have recast the relationship between citizen and government, by establishing a comprehensive legal framework in which specific legal rights are conferred upon people to challenge government decisions and to scrutinise government processes. The enshrinement of those principles in the Australian legal order, and more so at the initiative of Parliament and the executive government, was evidence in itself of the maturation of the legal and political system. Together the developments have given rise to a system of administrative

law that on any world comparison is comprehensive, advanced and effective. It is a system that is now underpinned by three broad principles:

- *administrative justice*, which at its core is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded
- *executive accountability*, which is the aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and to justify the way in which they have gone about that task, and
- *good administration*, which is the principle that administrative decision-making should conform to universally accepted standards, such as rationality, fairness, consistency, and transparency.

The essence of administrative law is that it falls to courts, tribunals and independent review bodies to adjudicate disputes between individuals and corporate entities (as plaintiffs) and government agencies and officials (as defendants). Viewed in that sense, the review bodies play a neutral and disinterested role, of resolving each individual dispute according to law. The structural dynamic, however, is that the review bodies and the government face each other every time an action is commenced. Their relationship, accordingly, is ongoing and lively. There is tension inherent in the relationship and, in nearly every age, that tension has given rise to conflict.

Parliament is often touched by administrative law tensions, most controversially when judicial autonomy poses a challenge to legislative prerogative. In other ways too the development of administrative law has implications for Parliament and its members. The constituency and review roles played by members of Parliament have become less significant in the overall functioning of government as, correspondingly, the importance of the role played by courts, tribunals and other review bodies has increased. An impact of a different kind has been felt by the parliamentary executive, as judicial doctrines have emphasised the legal accountability of ministers within the judicial arena, without full regard to the alternative of political accountability in the Parliamentary arena.

This paper takes up those three themes—the role played by Parliament in the development of Commonwealth administrative law; the tensions and conflict that arise between courts and the Parliament; and the impact of administrative law on the role of Parliament and its members.

The Role of Parliament in Developing Administrative Law

Creating the Legislative Framework

A pivotal stage in the development of Commonwealth administrative law was the tabling in Parliament in 1971 of the Report of the Commonwealth Administrative Review Committee, commonly known as the Kerr Committee after its Chairman, Sir John Kerr, then a judge of the Commonwealth Industrial Court.⁷ The Kerr Committee had been appointed in 1968 by the Gorton Government with restricted terms of reference that envisaged a limited and catch-up phase of law reform. Three years later the Committee presented a plan for an entirely new system of administrative law that rested upon a fresh vision of the role that external review agencies should play in safeguarding the rights of the public in relation to executive decision-making. The aspiration of the Committee was 'the evolution of an Australian system of administrative law'.⁸

The Kerr vision was subsequently endorsed in a modified form by two committees appointed by the McMahon Government in 1971, and which reported in 1973.⁹ The elements of the scheme proposed in the Kerr report were then largely implemented by Parliament in three Acts. The *Administrative Appeals Tribunal Act 1975* (Cwlth) (AAT Act) established two bodies—an Administrative Appeals Tribunal to undertake merit review of a general range of Commonwealth decisions, and an Administrative Review Council to perform a research, advisory and coordination function. The *Ombudsman Act 1976* (Cwlth) established an Ombudsman to investigate complaints of maladministration by Commonwealth government agencies. The *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) conferred upon the newly-created Federal Court¹⁰ a reformed jurisdiction to undertake judicial review of Commonwealth decision-making. Each of those Acts also affirmed the existence of a new legal right, that a person aggrieved by a government decision should be entitled upon request to be given a written statement of the reasons for the decision.¹¹

The far-reaching scope of those changes was recognised abroad at the time by the Canadian Law Reform Commission, which observed that the Commonwealth had taken 'an awesome leap towards changing its whole legal structure with regard to public administration'.¹² In Australia, too, there was an appreciation of the magnitude of the change. Mr Whitlam, while Leader of the Opposition, described the Kerr Report in 1971 as 'pioneering and comprehensive'.¹³ Mr Howard, speaking also from the Opposition benches in 1975, observed that the implementation of the Kerr report had given rise to a 'momentous event in the evolution of our system of government'.¹⁴ Another Member felt that the reforms would place Australia 'in the forefront of democratic countries in regard to administrative appeals or review'.¹⁵ There was a similar evaluation from the judiciary, with Justice Brennan noting in 1987 that:

the new administrative law ... blew the winds of legal orthodoxy through the previously closed doors of administration. ... [It] has helped to ensure that hypocrisy is taken out of politics.¹⁶

In evaluating the role of Parliament in developing the system of administrative law in Australia, a few points stand out. An obvious point—but the most important—is that the rights that people can now exercise against government administration are rights that were largely created by legislation. Indeed, the main impetus for administrative law reform in Australia was a dissatisfaction with the common law system of judicial review developed by the courts—a system described by the Kerr Committee as 'technical and complex and in need of reform, simplification and legislative statement.'¹⁷

The major package of legislative reforms implemented in the 1970s has been supplemented and extended by Parliament many times since. New administrative tribunals have been created to undertake merit review of decisions, among them, the Social Security Appeals Tribunal, the Veterans' Review Board, the Migration Review Tribunal, the Refugee Review Tribunal, and the Small Taxation Claims Tribunal.¹⁸ The mechanisms for review and investigation have been extended into other areas of government—by the creation, among others, of the Defence Force Ombudsman, the Inspector-General of Security, the Merit Protection and Review Agency, and the Internal Investigation Division of the Australian Federal Police.¹⁹ Additional procedural reforms have been implemented, examples being the creation of a class action procedure in the Federal Court,²⁰ and the imposition upon agencies of an obligation to notify people of their rights to administrative review.²¹ An entirely new package of information rights has been enacted by freedom of information, archives and privacy laws.²² A scheme for the protection of human rights has been enacted: a complaint alleging sex, race or disability discrimination, or a human rights violation, can be the subject of investigation and conciliation by the Human Rights and Equal Opportunity Commission, followed (in the case of unresolved unlawful discrimination complaints) by adjudication in the Federal Court.²³ There has also been an extension of the principles of administrative law into the private sector, for example, by the adoption by Parliament of the Private Health Insurance Ombudsman, the Superannuation Complaints Tribunal, and the Telecommunications Industry Ombudsman.²⁴ A proposal to extend the Privacy Principles to personal information records held by private corporations is before Parliament at the time of writing.²⁵

That comprehensive legislative reform program has largely been implemented within Parliament on a bipartisan political basis. A strong foundation for this broad-spectrum political commitment to administrative law reform was first laid at the time of reception and implementation of the Kerr Report. The Kerr Committee was established during the term of the Gorton Coalition Government; its report was tabled during the term of the McMahon Coalition Government; legislation to implement the reforms was first introduced by the Whitlam Labor Government; and much of the package was later enacted during the term of the Fraser Coalition Government.²⁶ The bipartisan commitment was carried through in the subsequent extension of the administrative law system during the 1980s and 1990s. So, too, has the transformation and confinement of the system been

initiated by each of the major parties. For example, the option of re-establishing the administrative tribunal system by creating a new Administrative Review Tribunal in place of most existing tribunals was floated initially by Labor's Minister for Justice, and the discussion was carried forward and legislation introduced by the Howard Coalition Government.²⁷ Similarly, both Labor and Coalition Governments have each introduced legislation to curtail in a significant way the judicial review of immigration decision-making.²⁸

An interesting departure from that tradition—of parliamentary initiation of reform, and bipartisan adoption of the reform proposal—occurred with the enactment of freedom of information legislation. Shortly after its election in 1972, the Whitlam Labor Government established an interdepartmental committee of public servants to prepare legislation to grant public access to government documents. The Committee took nearly two years to prepare a report of eighteen pages—widely represented at the time as a sign of shrewd bureaucratic resistance to open government. Progress was equally slow in the following stages, which included the preparation of a second interdepartmental committee report in 1976, the introduction of a draft bill in 1978, and the eventual enactment of the bill four years later in 1982.²⁹

In the early stages of the process a vocal public campaign for open government developed as a counter to official lethargy and resistance. The impact of the campaign was reflected in the difference between the first and the second interdepartmental committee reports, both as to the length of the reports, and as to the character of what was recommended. The public campaign had further success in seeking the referral of the 1978 Bill to the Senate Standing Committee on Constitutional and Legal Affairs, constituted by three Liberal Party and three Labor Party Senators, some of whom were known to be supporters of a stronger public disclosure law. After receiving submissions in support of a stronger law from over 125 individuals, public interest groups, and unions and professional associations, the Committee delivered an extensive report of over 500 pages with recommendations for change to nearly every aspect of the proposed legislation.³⁰ Many of the Committee's recommendations were taken up by the Government, but many that were not were later enacted by Parliament after Government Senators crossed the floor to adopt Opposition amendments.³¹ Their stance culminated a phase of administrative law reform that was ushered in by government, though not propelled by it as convincingly as were the other aspects of administrative law reform.

Follow the Leader—Parliament or the Courts?

Legislative reform of administrative law has gone hand-in-hand with a judicial transformation of legal standards. The criteria for lawful decision-making—such as the obligations borne by decision-makers to observe natural justice, and to give consideration to relevant matters—have been expanded and applied more rigorously by courts over the last two decades. The consequence for government is that legal standards have been

elevated in importance as a tool for measuring the propriety of government decision-making. Administrative action that, in an earlier age, would have been accepted as lawful is now more likely to be declared to be unlawful. Examples are given later in this paper.

In part this change was to be expected. The conferral upon the public of new and improved rights against government administration was a pronouncement as well that decision-making standards should improve. It is also part of the social dynamic of law that courts can adapt legal doctrine to conform with their own appreciation of the public's contemporary expectations of government. Whether courts overstep that role, such that judicial elaboration becomes judicial legislation, is a theme touched on below. For the moment, however, there is a prior issue to be discussed, concerning the comparative importance of the roles played by Parliament and the courts in developing administrative law and the standards of good administration.

There can, on the one hand, be no gainsaying the significant and independent role which courts have played over the last century. Mention has already been made of the common law foundation for judicial review, which dominated the system of administrative law for much of this century in the absence of any parliamentary activity. One can point as well to a series of influential English court decisions between 1964–1969, which were followed in Australia and became the wellspring for many contemporary themes in judicial review of administrative action. The decisions included *Ridge v Baldwin*,³² which re-instated the application of the doctrine of natural justice to administrative decision-making; *Padfield v Minister of Agriculture, Fisheries and Food*,³³ which subjected broad ministerial discretions to administrative law review; and *Conway v Rimmer*,³⁴ which rejected the notion that the Executive could decide conclusively whether documents were to be produced for the purpose of court proceedings.

The trend of judicial innovation that was ushered in by those cases continued—indeed, accelerated in Australia³⁵—but it would be mistaken to view the trend in isolation. In a subtle way, many of the legal standards and trends that are ascribed to courts can be traced to a Parliamentary initiative. The period of most pronounced change was in the immediate aftermath of the commencement of operation in 1980 of the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (ADJR Act). Immediately there was a sharp increase in the volume of judicial review cases, seemingly in line with the principal objective of the ADJR Act to reform the procedure for commencing a judicial review action. For example, between federation and 1979 there had been 23 reported cases of judicial review of Commonwealth Public Service personnel decisions, yet in the five-year period 1980–1984 the figure rose to 39.³⁶ More surprising, however, was an accompanying change wrought by courts in the nature of judicial review—a development not altogether expected, since the central purpose of the ADJR Act was to change the procedural aspects of judicial review and not, except in a few minor respects, the substantive criteria applied by courts to demarcate lawful from unlawful administrative activity.³⁷ The judicial transformation in legal principle that occurred in the 1980s³⁸ included the extension of judicial review to decisions of the Governor-General,³⁹ of security intelligence agencies,⁴⁰ and perhaps even

of Cabinet;⁴¹ the doctrine of standing was progressively liberalised;⁴² the principles of natural justice were extended;⁴³ and the obligation of a decision-maker to consider relevant matters was applied in a more demanding fashion.⁴⁴

The interaction of legislative followed by judicial change can best be illustrated by two examples from the period. Those to be discussed are the judicial review of immigration decision-making (the dominant field of administrative law activity in recent times), and judicial implementation of international human rights norms (probably the most talked-about aspect of contemporary administrative law).

In cases that arose before the creation of the present administrative law system in the late 1970s, courts showed little readiness to extend legal protection to people who did not already have Australian legal status as a citizen or permanent resident. Statutory discretions conferred upon the Minister to exclude, detain or deport aliens were construed broadly in favour of the Minister, leading one commentator to observe that:

the judiciary appear to have been philosophically and juridically in tune with the policy initiatives of the government.⁴⁵

A leading illustration of the judicial reluctance to extend legal protection to onshore applicants was the decision of the High Court in 1977 in *R v Mackellar; Ex parte Ratu*.⁴⁶ The Court ruled 5:1 that the Minister, in ordering the deportation of a person who had overstayed a visitor's visa, was not required to observe the principles of natural justice. In short, a person could be deported without being told why they were being deported, and without being given the opportunity to make a submission to stay in Australia. This conclusion rested on the scope of the Minister's statutory discretion, which Barwick C. J. observed:

did not permit of judicial formulation of principles upon which persons should be admitted to Australia or their entry refused.⁴⁷

The Court's reluctance to encumber the Minister's immigration control powers, even where the taint of procedural unfairness was strong, was apparent in another decision in the same year, *Salemi v Mackellar (No. 2)*.⁴⁸ The Minister for Immigration had declared an amnesty that promised resident status to any prohibited immigrant who came forward and who met requirements of good health, good character and lack of serious criminality. Mr Salemi, an Italian journalist who came forward but was refused resident status, argued that natural justice required at least that he be told the reason for the refusal and be given an opportunity to contradict any allegation or adverse finding against him. The High Court split evenly, 3:3. Three justices held that Mr Salemi had a right to be heard, stemming from the Government amnesty and the legitimate expectation it thereby gave him that he would be granted lawful resident status. The other three justices (including the Chief Justice, whose ruling prevailed)⁴⁹ held that the Minister was not under a legal obligation to observe natural justice, emphasising Mr Salemi's status as a prohibited immigrant and the unconditional scope of the Minister's statutory discretion to deport people in his position.

There can be no doubt that both *Salemi* and *Ratu* would be decided differently today. Not only is it clear that there is an obligation in principle to observe natural justice in relation to decisions on immigrant status,⁵⁰ more generally the legal standards to be observed in those decisions are far-reaching. Since *Salemi* and *Ratu*, a string of Federal Court and High Court decisions have imposed demanding legal requirements on immigration decision-makers, concerning their duties to observe natural justice, to heed international treaty principles, to consider the adverse impact of decisions on immigration applicants, to initiate inquiries into the unclear aspects of cases, and to prepare comprehensive statements of reasons to explain adverse decisions.⁵¹ The immigration caseload of the Federal Court has also climbed steadily, from a handful of applications for review in the 1970s, to 84 in 1987–88, 320 in 1993–94, and to 871 by 1998–99.

The role that legislative changes may have played in instigating the transformation of judicial attitudes cannot be overlooked. Three changes stand out. One was the creation in the ADJR Act of a statutory right to the reasons for a decision. In *Kioa v West*,⁵² the first decision of the High Court to decide unequivocally that natural justice applied to immigration decision-making, a majority of judges referred to this change as the most important development that warranted a change to the common law principles as to when natural justice applies. The second legislative initiative was the substantial rewrite in 1989 of the *Migration Act 1958* (Cwlth), most particularly to replace the Minister's unfettered discretionary powers of immigration control with a specific and detailed code of criteria to be met by those making decisions under the Act.⁵³ The third change to underpin the developments was the creation by Parliament of the Immigration Review Tribunal and the Refugee Review Tribunal.⁵⁴ The recognition in that way by Parliament that an administrative law process should be followed in immigration decision-making has coincided with an intensification by the judiciary as to what that process entails.

The same pattern, of parliamentary initiative followed by judicial reversal of established doctrine, can be detected in the commingling of domestic and international law. In 1995 in *Minister for Immigration and Ethnic Affairs v Teoh*,⁵⁵ the High Court held that an official who makes a discretionary administrative decision that is at variance with the terms of an international convention ratified by Australia is under an obligation to inform the person affected and to invite them to make a submission in reply. In the Court's mind, this obligation rested on two postulates: that ratification by Australia of an international convention gives rise to a legitimate expectation that administrative discretionary powers will be exercised in conformity with the terms of the convention; and that the act of ratification should not be treated 'as a merely platitudinous or ineffectual act'.⁵⁶

The *Teoh* decision contrasted markedly with other decisions in the 1980s that were unfriendly, to the point of dismissal, of legal submissions that sought to align administrative decision-making with Australia's international treaty commitments. The long-standing principle, applied by the High Court in 1982 in *Simsek v Macphee*,⁵⁷ was that treaties, until adopted by Parliament, 'have no legal effect upon the rights and duties of the subjects of the Crown'.

What explains the change in judicial attitude? It is difficult to overlook the fact that, during the period intervening between *Simsek* and *Teoh*, there were profound changes instigated by Parliament and the Executive to give greater domestic recognition to international conventions. Pivotal events (all of which stimulated an ongoing parliamentary and public debate⁵⁸) included the increased reliance by the Parliament on the external affairs power of the Constitution to implement international treaties, most controversially to protect wilderness areas in Tasmania and Queensland⁵⁹ and to override a Tasmanian law prohibiting homosexual conduct;⁶⁰ the conduct by a Commonwealth parliamentary committee of a broad-ranging enquiry into the implementation of treaties;⁶¹ the legislative recognition of various human rights instruments by their annexation to the *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth); Australia's accession in 1991 to the First Optional Protocol to the International Covenant on Civil and Political Rights;⁶² and the regularisation of the treaty process by the adoption at a Premiers Conference in 1992 of a statement of 'Principles and Procedures for Commonwealth-State Consultation on Treaties'.

Leadership in Developing Administrative Law

There is doubtless an element of historical coincidence in those legislative and judicial changes—a similar pursuit by Parliament and courts of the underlying objectives of administrative justice, executive accountability and good administration. Both institutions could be seen as responding more assertively to a perception that the rights of individuals were in need of greater protection in an era dominated by the growth of government discretion and regulation. To that extent at least, the pursuit of similar objectives was in harmony, not in conflict.

Nevertheless, the coincidence of legislative followed by judicial change invites a deeper level of analysis. It has long been central to the common law tradition that courts can mould and develop, and at times extend, the law to deal with new problems. Many of the doctrines and remedies of administrative law owe their creation to that process—notably, the prerogative writs, and the doctrines of ultra vires and natural justice. Inasmuch as administrative law was the law relating to the control of government power, in earlier times it was the product of a judicial assessment of what controls were needed. The jurisprudential foundations were firmly rooted in the common law. In a sense, judicial development of the common law principles of judicial review provided a linkage between democratic tradition, the control of government and the protection of individual rights.⁶³

But the context for law reform has now changed. Nowadays, jurisprudentially, it is more difficult to sustain a philosophy of judicial leadership in administrative law expansion, at least in a pure form in the sphere of Commonwealth administrative law. Not only has the system of judicial review been given a legislative footing, it has been re-set in a newly-designed accountability matrix that attaches comparatively less weight to judicial control of administrative decision-making. Other elements in that matrix are specialist merit

review tribunals, human rights and anti-discrimination agencies, Ombudsman agencies, and open government and privacy laws. Revision and extension by Parliament of the accountability framework has been a continuing process. Recent legislative additions include the *Financial Management and Accountability Act 1997* (Cwlth), to establish a comprehensive control framework for government financial management; the *Commonwealth Authorities and Companies Act 1997* (Cwlth), to apply an accountability regime to statutory authorities and government companies; and the *Public Service Act 1999* (Cwlth), which includes a definition of the core values and ethical duties of the public service. Parliamentary committees have also been continually active in reviewing the system.⁶⁴ Nor can it be overlooked that a function of the Commonwealth Ombudsman is to draw attention to areas in need of law reform.⁶⁵

These developments pose the question of whether the increased parliamentary oversight and initiative provide a new benchmark for evaluating the legitimacy of judicial development of administrative law principles. One point of view is that this question is of theoretical interest only, since Parliament can take legislative action to override a judicial ruling or trend that it disagrees with. Periodically, too, Parliament—or, at least, one House of it—has declined the opportunity to reverse a court ruling or to block a tide of litigation: recent examples include the failure of the Senate to approve Bills to limit ADJR Act litigation, to limit judicial review of migration decisions, and to overturn the High Court's *Teoh* ruling.⁶⁶ In short, if there is a game of legal cat-and-mouse between legislature and courts, it is at least being played unhindered on a level constitutional playing field.

The question remains, nevertheless, as to whether the game should continue to be played, either in the fashion or with the frequency that it has been. It was pointed out earlier in this paper that legislative reform has at times given rise to a phase of judicial expansion, which the legislature has then seen the need to contain. This has been the evolving pattern in relation to immigration regulation, where there has been a successive restriction of judicial review on the basis that it was undermining the integrity of other legislative reforms, particularly the system of merit review by administrative tribunals.⁶⁷ There was a similar legislative response to a phase of court decisions in the 1980s that were criticised for having imposed an adversarial construct on personnel management, especially upon the established system of promotions appeals committees.⁶⁸ In other areas too (such as broadcasting regulation, and Aboriginal heritage protection) the impact of litigation has been cited as a factor that warranted the legislative diminution of existing schemes that had been designed to facilitate public participation in government decision-making.⁶⁹

A contentious topic, that encapsulates some of the issues in this debate, has been the scope of the administrative obligation to provide a written statement of the reasons for a decision. In origin this was a statutory obligation, one of the important reforms introduced by the ADJR Act and the AAT Act.⁷⁰ It was not long before there was a serious judicial attempt to extend the reform, and to formulate a broader common law obligation upon administrators to provide written reasons.⁷¹ This attempt was rejected by the High Court in *Public Service Board (NSW) v Osmond*,⁷² which stressed that the introduction of a far-

reaching obligation of that kind was more appropriately a legislative task. Later cases, however, have chipped away at the *Osmond* principle by holding that a duty to provide reasons can arise by implication from the context in which a decision is made.⁷³ There is support in the academic literature for the courts taking this leadership role a step further, and extending the obligation to provide reasons.⁷⁴ More generally, the existence of a statutory right to reasons has been cited by courts as a justification for extending other administrative law principles. An example given earlier was the decision of some judges in *Kioa* that the new ADJR right to reasons transformed the deportation power, by subjecting it to an obligation to accord natural justice. Similarly, the obligation of the immigration tribunals to provide reasons has increasingly been used by courts as a basis for invalidating tribunal decisions, notwithstanding an earlier legislative contraction of the scope of judicial review of immigration decision-making.⁷⁵ In summary, the statutory creation of a right to reasons ushered in a period of substantial change in administrative law—though a change that was not foreshadowed or expected in either the reports that initiated the ADJR Act or the parliamentary debates on the Act.⁷⁶

The same issue of demarcating the responsibilities of Parliament and the courts arises in defining the scope of the legal criteria for lawful decision-making (also called the grounds for judicial review). Those criteria have an imprecise penumbra, reflecting their history as evolving common law concepts designed to facilitate judicial control of government action. For example, among the grounds defined in s. 5 of the ADJR Act (which adopts the common law criteria) are that 'the decision involved an error of law', that 'an exercise of power [was] so unreasonable that no reasonable person could have so exercised the power', and that there was an 'exercise of power in a way that constitutes abuse of the power'. The legislature has chosen to adopt those elastic standards, but there is still an issue as to how far those concepts should be extended—or stretched? To take a current issue, should courts—as many have urged them to do—show leadership in evolving a principle of 'proportionality', such that a court could declare executive action to be invalid if the burden imposed by a decision is excessive or a disproportionate method of administering a statute?⁷⁷ A common justification given for this step in the academic literature is that it would align Australian administrative law with European administrative law, which does contain such a principle.

There are, in a sense, few hard boundaries in administrative law concerning the concept of legality and the scope of its application. Courts, in the absence of legislative impediment, have an almost boundless discretion to define the limits of legal regulation. It is perhaps inevitable, therefore, as Chief Justice Doyle of the South Australian Supreme Court foreshadowed, that:

we are going to see much more debate in the courts about the nature of our society, about its values and aspirations.⁷⁸

But in what context, and according to what philosophy, should that role be discharged? One view, with strong support, is that:

a theory of judicial review ... must reunite legal and political theory, by incorporating values that express a rich conception of democracy.⁷⁹

That theme resonates in judicial trends of the last decade, a point well-captured in the following two quotes from former Chief Justices of Australia, Sir Anthony Mason and Sir Gerard Brennan:

Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the democratic process.⁸⁰

In the long history of the common law, some values have been recognised as the enduring values of a free and democratic society and they are the values which inform the development of the common law and help to mould the meaning of statutes. ... To ensure that effect is given to these values when they stand in the way of an exercise of power, especially the power of governments, a judiciary of unquestioned independence is essential.⁸¹

Any theory of administrative law must take account of the plasticity of the legal principles and the discretion thereby reposed in courts. The time-honoured role of courts in safeguarding individual rights against the oppressive use of executive power is significant too. There is, nevertheless, a certain irony in the view that the law-making role of courts can be justified by democratic tradition. How suitable, too, are courts as a forum for identifying and formulating community values regarding the obligations of government?⁸² There is, of course, no single answer to those questions, and the answers vary in time and context. Presently, however, an important part of that context must be the role played by Parliament since the 1970s in providing a legislative foundation for administrative law, for periodically reviewing and redefining its parameters, and (especially through the committee system)⁸³ for being an open forum in which the suitability of existing standards can be publicly debated.

Tension and Conflict Between Courts and Parliament

The prospect of tension and conflict between judiciary and legislature is inherent in the Australian constitutional system. The Constitution was decreed as a law-above-government, to be safeguarded ultimately by the exercise of judicial power in preventing any subversion of the constitutional order by legislative or executive action. Inevitably, the separation of governmental power between legislature, executive and judiciary would

operate—together with other features of the constitutional order—as 'a harmonious system of mutual frustration'.⁸⁴

Responsible government, another cardinal feature of the Australian constitutional system, also contains a seed of tension. There is a close integration of legislative and executive roles, by reason that the political leaders who command majority support in the lower house of the Parliament also constitute the federal Executive. In their hands is the control of both the legislative agenda of the Parliament and the administration of the law within government agencies. It is natural in that setting, when talking of accountability, to think of the two roles as being fused. In practice, the focus of administrative law on control of executive discretion is manifested at times as a challenge to legislative sovereignty.

The following analysis looks at three areas of administrative law in which the tension between courts and Parliament has been at its strongest. Two of the areas deal with matters of statutory interpretation: the presumptions of statutory interpretation that limit the breadth of public sector power; and the effect given by courts to ministerial powers of direction and control. The third area deals with the introduction of international norms into domestic law, as to which there has been signs of a struggle between courts and Parliament.

Presumptions of Parliamentary Intention

The common law has been the source of many rights and freedoms in the Anglo-Australian legal tradition. Long before there was any parliamentary action to protect individuals, the courts had developed a formidable body of doctrine to protect property, employment, physical security, personal autonomy, reputation, and rights of public protest. The juridical threads which provided that protection included common law doctrines of real property, trespass, assault, defamation, freedom of association, and freedom of movement. Those doctrines were supplemented in the public law sphere by the rule of law. The heart of that maxim is that individuals are free to engage in any activity which is not specifically prohibited by law, by contrast with the executive government, which is limited to activities that are authorised by law and, in particular, has no inherent authority to impose taxation, to interfere with private property, or to take coercive or punitive action against members of the public.

The age of legislative supremacy later arrived, and nowadays the community looks primarily to legislation as the source of rights and protections. It was, however, a natural consequence of the legal heritage that courts would jealously shield the common law principles which they had developed. Their determination to do so has been a major theme of administrative law, especially in an era of large government wielding coercive and regulatory powers. Of special significance to administrative law has been the defence by courts of the doctrine of natural justice, which has been safeguarded by the principle that 'express words of plain intendment' are required before a statute will displace the:

deep-rooted principle of the common law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard.⁸⁵

Over time that presumption, in support of natural justice and against its legislative displacement, has been extended beyond the quasi-judicial sphere to apply to nearly all administrative decision-making. It has become a bedrock principle of public law and public administration in Australia.

Parliament's legislative function is nowadays discharged against a background of similar statutory presumptions and approaches—so much so that courts often reason that it is 'parliament's intention' that is being implemented. Whether one regards that approach as a pragmatic fiction, it is a fiction that most observers are probably comfortable in upholding—as an attribute, in a sense, of 'harmonious frustration' at work. Nonetheless, at times the fiction can be strained, and the interface between legislative intention and judicial method can be marked more by collision than by concord. Two examples will be discussed here, the first concerning the statutory presumption in favour of preserving common law rights, and the second concerning the narrow interpretation of statutory provisions designed to restrict the opportunity for judicial review.

Throughout the century the High Court has clung steadfastly to a presumption, enunciated in one of its earlier cases in 1908, that:

the legislature does not intend to make any alteration in the law beyond what it explicitly declares ... It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.⁸⁶

Re-affirming the principle in 1994 in *Coco v R*, the High Court was similarly forthright:

an abrogation or curtailment of a fundamental right, freedom or immunity ... must be clearly manifested by unmistakable and unambiguous language.⁸⁷

A justification offered by the Court for this 'very stringent' test is that it would:

enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.⁸⁸

In this analysis we can put to one side the Court's supposition that the Parliament would welcome its assistance in enhancing the legislative process.⁸⁹ The other question arising is whether the judicial test has an undesirable propensity to quarantine the common law and human behaviour against legislative intrusion. Problems chiefly arise from the elasticity of the test, both as to what qualifies as a fundamental interest, and as to what constitutes an unmistakable legislative intention to override it.

Some common law rights, though understandable as the legacy of a common law history, do not indisputably have intrinsic worth. That may be said, for example, of the possessory title of a person at common law to retain the proceeds of an illegal activity, such as narcotics or gambling.⁹⁰ Is there a public interest in preserving that right against legislative intrusion unless it is 'unmistakable and unambiguous'? Is it 'in the last degree improbable' that the legislature would abolish the right? To take a case in point, should courts lean towards a narrow interpretation of the forfeiture and confiscation provisions in legislation such as the *Proceeds of Crime Act 1987* (Cwlth)? Doubtless it could be said, in answer, that some common law rights and human freedoms are more important than others, and more easily yield to a contrary legislative intention. But to answer along those lines is to concede a value judgment. Should that prerogative belong to the legislature: in other words, should legislation be given its plain and natural meaning, unhindered by any prior axiom about common law rights and freedoms that should survive a legislative override?

The underlying tension is aptly illustrated by *Coco*, quoted above for its recent affirmation of the presumption of interpretation. In that case the defendant's conviction for attempted bribery of a Commonwealth official was quashed by the High Court, when it ruled as inadmissible the evidence obtained from a telephone interception which had been installed by police at the defendant's business premises. The installation of the interception device had been authorised by a Supreme Court judge under an Act entitled the *Invasion of Privacy Act 1971* (Qld), which established a comprehensive code for permitting telephone interception. Acting on that warrant, the officers installed the device after pretending that they were investigating a fault in the telephone. However, the Act did not specifically—'unmistakably and unambiguously'—provide that private premises could be entered in order to install a device. The Court held, accordingly, that the interception warrant granted by the judge was invalid, and so too the evidence collected from the interception.

The contrast—or clash—between legislative intention and judicial values has been greater still in the construction of 'privative' or 'ouster' clauses. Situations arise in which, in the legislature's view, it is inappropriate to permit judicial review of a sphere of administrative or tribunal decision-making. A common reason for imposing a restriction is the worry that judicial review will be used by parties to a dispute to prolong the process and forestall the implementation of an adverse decision. A statute will provide accordingly that decisions made under it cannot be called into question in a court or be the subject of a judicial review proceeding. An alternative is sometimes provided by the statute, such as review of the decision by an administrative tribunal. Yet, regardless of whether an alternative exists, and how efficacious it is, the view of the courts has been that the denial of judicial review contains the seeds of a contradiction. In the words of Justice Dixon:

There is necessarily an appearance of inconsistency between a provision which defines and restricts the power of a [body] and prescribes the course it must pursue and a provision which says that the validity of its decrees shall not be challenged or called in question on any account whatever.⁹¹

Courts have employed a rich variety of techniques for resolving that contradiction, all of them sharing in common a narrow reading of privative clauses. Aronson and Dyer have characterised the judicial trend as 'a mixture of incredulity, disingenuous disobedience, and downright hostility', which is 'thinly disguised as an attempt to reconcile two apparently conflicting parts of a statute'.⁹² One judicial approach has been to focus precisely on the words of the privative clause—and to conclude, for example, that a denial of review of a 'decision' will not preclude review of an interim procedural step, nor prevent proceedings being instituted prior to the decision being made.⁹³ In the same vein, denial of a specific remedy—such as certiorari—will not prevent an alternative—such as a declaration—being sought.⁹⁴ Unless it states otherwise, a privative clause will preclude judicial review only of 'non-jurisdictional' but not 'jurisdictional' errors, that is, errors which go to the heart of a decision or proceeding.⁹⁵ Another approach—and the closest to conceding some effect to privative clauses—is to construe them as provisions that are designed not to contract the review jurisdiction of courts, but to enlarge the ambit of the power conferred on decision-makers.⁹⁶ In that way, the opportunity for judicial review is preserved, albeit the prospects of success might be diminished.

In the Commonwealth domain the two fields in which governments have most often been disposed to seek enactment of privative clauses are to shelter industrial arbitration and immigration regulation from judicial review. The industrial arena was marked in the early years of federation by heated accusations of inappropriate High Court intrusion into the proceedings of the Commonwealth Arbitration Court. Among the criticisms were those of the President of the Court, and former Attorney-General, Justice Higgins, complaining of 'a gradual paralysis of the functions of the court';⁹⁷ and those of Attorney-General Hughes, and later Prime Minister, decrying 'a public scandal':

We throw the High Court an amending Act, and they hurl back its shattered remains.
Then, spurred on by the demon of eternal hope, we pass another, again it is thrown
back.⁹⁸

Over a period of nearly fifty years there were successive amendments by Parliament to a privative clause designed to quarantine industrial arbitration against judicial review.⁹⁹ The effect of that privative clause is still an unresolved issue.

At the close of the century there is a similar debate underway in relation to immigration determination. The Government, concerned by a rapid escalation in judicial review challenges brought by unsuccessful immigration applicants—for example, a rise from 84 cases filed in the Federal Court in 1987–88, to 871 filed in 1998–99—has introduced legislation to preclude judicial review of immigration decisions by the Federal Court.¹⁰⁰ If enacted, the legislation is sure to ignite another phase of disputed interpretation of the scope and effect of privative clauses.

Ministerial Control of Administrative Decision-Making

Legislation enacted earlier in the century by the Commonwealth Parliament bore the hallmarks of the system of responsible government within which it would be administered. It was anticipated that the administration of legislation would be undertaken by departmental officers, with the minister being responsible administratively and accountable politically for the way that function was discharged. Thus, for example, many of the decision-making functions under the *Immigration Restriction Act 1901* (Cwlth) were conferred upon 'officers', defined sweepingly by the Act to include any officer appointed by the Governor-General to carry out the Act and all officers employed in the service of the Customs.¹⁰¹ The generic concept of 'authorised officer' was a common statutory phrase that provided a legal backbone for the executive branch of government. Functions were still conferred specifically upon ministers and office-holders, but there was no necessary implication that those functions would be exercised personally by the designates. The prevailing presumption of Anglo-Australian public law, articulated in the *Carltona* case by Lord Greene MR in 1943, was that:

[t]he duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case.¹⁰²

Increasingly, that assumption about how government would be conducted ran up against an administrative law principle, which viewed decision-making as an individual rather than an institutional responsibility. A consequence of that view was that the statutory conferral of power specifically upon a minister was less likely to be treated as a legal fiction or as a convenient drafting device, but regarded instead as a presumptive indication that the decision was to be made by the minister personally. Other officials could step into the shoes of the minister only if the minister had delegated the function in the exercise of an express power conferred by the statute to do so. A sign of this changed attitude can be found in the transformation of s. 19 of the *Acts Interpretation Act 1901* (Cwlth). In 1901 it provided in disarmingly simple terms that any reference in an Act to a minister:

shall unless the contrary intention appears be deemed to include any Minister for the time being acting for and on behalf of such Minister.

By 1998, and partly in response to judicial narrowing of those words, s. 19 was supplemented by another eight pages of highly-specific rules about the transfer and interchange of ministerial and departmental functions.¹⁰³ Generally, there has been an outgrowth in legislation of detailed provisions to facilitate and control the delegation of decision-making powers.

Two cases from the last two decades can be noted briefly to illustrate how legal pressures overrode traditional administrative practice.¹⁰⁴ *Din v Minister for Immigration and Multicultural Affairs*¹⁰⁵ concerned a provision in the *Migration Act 1958* (Cwlth) requiring that a prospective immigrant should undertake, 'at a time and place nominated by the

Minister, a test of proficiency in English nominated by the Minister'. The Minister had given approval to a particular test, time and location, but a further round of testing was conducted to accommodate an overflow of applicants. The Court held that this further round also needed the specific approval of the Minister, and without it, the results of tests sat by numerous applicants under Departmental arrangements were invalid. In *Re Reference under the Ombudsman Act*,¹⁰⁶ a decision was made by an authorised delegate of the Director-General of Social Services who signed the decision in the name of the Director-General. This alone caused the decision to be invalid, on the principle that:

[t]he attempted exercise by a delegate of his own power miscarries when the very act of exercise purports to deny the power which gives validity to his act.

The new legal paradigm for decision-making had the advantage of certainty. It would be simpler to identify which official was legally responsible for making a decision. There were drawbacks, however. A corollary of the principle that a power was to be exercised by the person upon whom it was conferred was that the judgment and discretion of that decision-maker could not be overawed by dictation or pressure exerted by other officials. In short, thereafter it would be more difficult to ensure that the various decision-makers within a department took a consistent approach in all aspects of decision-making, such as the procedure followed in making decisions, the range of factors taken into consideration, the weight given to those factors, and the importance attached to implementing government policy.

The strength of the legal obstacle to central political direction was illustrated by two High Court decisions in 1965 and 1977 that addressed but did not resolve whether a minister, in pursuance of a Cabinet decision, could direct the head of his department to exercise a statutory power to consent to the importation of aircraft consistently with maintaining Australia's two airline policy.¹⁰⁷ Among those who opted in favour of ministerial control were two former ministers, Barwick C. J. and Murphy J., who both relied on the duty of an agency head in a system of responsible government to carry out the policies and directions of the government.¹⁰⁸ The opposing view, held principally by those from a more traditional legal background, laid stress on the fact that the function had by statute been conferred on the agency head, who could not abdicate his independent legal responsibility by acting at the direction of the minister.¹⁰⁹

The contest between those philosophies has now taken on a different complexion. In the 1980s and 1990s it became increasingly common for legislation to give statutory backing to ministerial directions and policy statements. In some Acts it is framed simply as an obligation cast upon delegates and decision-makers to comply with any written directions of a minister. In other Acts a more elaborate scheme is defined, providing that ministerial policy statements and directions are to be tabled in Parliament and can be disallowed by either House; in effect, the statement or policy is treated as a form of subordinate legislation.

A factor which contributed to this trend was the growth through the period of statutory authorities.¹¹⁰ The purpose in part for creating statutory bodies has been to make them independent of routine government control. Nevertheless, the authorities are a branch of government, shouldering an expectation of playing a role compatible with the implementation of a government's mandate. Accordingly, the statutes creating those authorities often declare that the governing board is to comply with any directions of the minister and is to exercise its functions consistently with the policies of the government.¹¹¹ More generally, the *Commonwealth Authorities and Companies Act 1997* (Cwlth) now provides that the directors of all Commonwealth statutory authorities and government companies must ensure that any 'general policies of the Commonwealth Government' that have been notified in writing by a minister to the directors 'are carried out in relation to' the authority or company.¹¹²

The legal significance of giving statutory backing to ministerial directions and policy statements remains a vexed issue.¹¹³ There are, on the one hand, cases which manifest the orthodox legal suspicion of any fetter or intrusion upon the individual statutory discretion of a decision-maker. For example, in *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs*,¹¹⁴ it was held that a power conferred on the Minister to give 'general directions' to the Aboriginal and Torres Strait Islander Commission would not support a direction to the Commission not to provide funding to any organisation against which an adverse report had been issued by a specially-appointed auditor. By contrast, in *New South Wales Farmers' Association v Minister for Primary Industries and Energy*,¹¹⁵ it was held that a power conferred on the Minister in 'exceptional circumstances' to give directions to safeguard 'major government policies' enabled the Minister to dictate a price band for wool to the Australian Wool Corporation. Even the device of requiring that a direction or policy statement be tabled in the Parliament as a disallowable instrument has not yielded a consistent result. While directions of that kind have usually been accepted by courts as binding upon decision-makers,¹¹⁶ a contrary ruling was given by the Full Federal Court in *Riddell v Secretary, Department of Social Security*¹¹⁷ concerning a ministerial direction to the Secretary on recovery of social security overpayments. Notwithstanding the requirements of the Act—that 'the Secretary must act in accordance with [the] directions', and that the directions be tabled in Parliament as a disallowable instrument—the Court held that the Secretary must remain:

free, in any particular case, to depart from the guidance provided by the Minister's directions if the circumstances of the individual case warrant such a departure.¹¹⁸

It is possible that the next phase in this conflict, between parliamentary intention and legal inclination, will arise from the enactment of a Legislative Instruments Act. Such an Act, if it follows the lines of a Bill first introduced into the Parliament in 1994,¹¹⁹ would lay down a comprehensive framework for the drafting, publication, parliamentary scrutiny and adoption of legislative instruments. Many of the directions and policy statements currently made by ministers under powers delegated by Parliament would be subject to the proposed scheme. Issues would no doubt arise, both within Parliament and the courts, as to the legal effect of legislative instruments made under such a scheme.

Recognition of International Norms

The contest between the maintenance of national sovereignty and the impelling force of globalisation has long been a theme of politics, business and, increasingly, of law. The orthodox stance of the courts was to give muted recognition to international law, accepting that it was for the legislature to decide whether to harmonise domestic and international law. Only in three limited ways would there be an intrusion on that prerogative: legislation that was indeterminate in meaning would be construed in accord with Australia's international treaty obligations and with established principles of international law; international law could influence the development of the common law in Australia; and rules so notorious as to be part of the custom of nations (such as the prohibition of slavery, torture and genocide) acquired the status of customary international law that was binding on all States. Otherwise, international obligations agreed to by the Executive would not by that action alone give rise to rights or obligations that were enforceable in Australian courts.¹²⁰

Those techniques for giving judicial recognition to international law were enlivened during the 1990s. There was a steady growth in the number of cases, especially cases with a public law element, in which the courts referred to the terms of international treaty commitments in the course of elucidating domestic legal standards.¹²¹ The international law element of the reasoning was rarely decisive, but its inclusion was notable for the shift in legal method that it entailed. A leading example of this trend was the decision of the High Court in 1992 in *Mabo v Queensland (No. 2)*.¹²² In rejecting the *terra nullius* doctrine and recognising the survival of Aboriginal native title, the Court made reference to the similar trend in international law, observing that:

international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.¹²³

A new method for giving added weight to international law emerged in the decision of the High Court in 1995 in *Minister for Immigration and Ethnic Affairs v Teoh*.¹²⁴ The gist of the *Teoh* ruling, noted earlier in this paper,¹²⁵ was that ratification of an international convention, in the absence of any legislative or executive indication to the contrary, creates a legitimate expectation for Australians that rights envisaged by the convention will be safeguarded in domestic decision-making. In the result, the Court held that a deportation decision made against Mr Teoh was invalid, due to the failure of the decision-maker to observe natural justice by bringing to Mr Teoh's attention that his separation from his children would clash with the *Convention on the Rights of the Child*.

The decision in *Teoh* has attracted both supporters and detractors.¹²⁶ The arguments have focused on two broad areas of concern. One area of concern has had to do with whether the *Teoh* ruling creates a practicable standard for ascertaining the validity of administrative decision-making. While some argue that it is salutary to require decision-makers to become more aware of Australia's international obligations, others claim that the

indeterminate concepts of 'legitimate expectation' and 'natural justice' that were relied upon by the High Court are not the appropriate way of meeting that objective. Of some bearing on this debate is that the High Court has itself remarked in a later case that:

many international conventions and agreements are expressed in indeterminate language ... Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed.¹²⁷

For the moment, the *Teoh* principle continues to result in the invalidation of decisions, mostly in a similar fact situation concerning the imminent separation of children and parents by the deportation of the latter.¹²⁸

The other broad area of concern in the post-*Teoh* debate has had to do with demarcating the respective roles of Parliament and the courts in giving effect to Australia's international obligations. That concern was taken up in a Bill to overturn *Teoh* that has been introduced three times into the Parliament, firstly by the Labor Government two months after the High Court's decision, and subsequently (after the lapse of the Bill when an election was called) in 1997 and 1999 by the Coalition Government. The similar design of each Bill was to leave in place the established methods by which the judiciary may take cognisance of international law, but to overturn *Teoh* with the following declaration:

The fact that Australia is bound by, or a party to, a particular instrument ... does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative decision.¹²⁹

The impetus for the Bill, as spelt out in the Preamble, included the statement that:

It is the role of Commonwealth, State and Territory legislatures to pass legislation in order to give effect to international instruments by which Australia is bound or to which Australia is a party.

That sentiment was endorsed twice in majority reports of the Senate Legal and Constitutional Legislation Committee that supported the enactment of the Bill. The Committee's report in 1997 argued that the Bill:

confirms the fundamental role of the Parliament to change the law to implement treaty obligations and to decide whether entry into a treaty gives rise to domestic rights, be they procedural or substantive.¹³⁰

The Bill has not yet been enacted, and its future remains uncertain.¹³¹ In the meantime, other steps have been taken within the Parliament to assert its role in the governmental processes for giving domestic effect to international legal obligations.¹³² The steps include the tabling in Parliament of all treaties at least 15 days before ratification, together with a National Interest Analysis; and the reference of those documents to a Joint Standing Committee on Treaties that was created in 1996, and which periodically holds public hearings. A Treaties Council has also been created, comprising the Prime Minister,

Premiers and Chief Ministers. It is foreseeable that these steps, in addition to enlivening Parliament's role in treaty adoption, will at the same time give added emphasis to the harmonisation of domestic and international law. If so, paradoxically, Parliament may have given reinforcement to the judicial trends that have caused it concern. We may yet enter an age, foreshadowed by Justice Kirby, in which courts, by taking account of fundamental human rights principles in international law, carve out a broader role of:

assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is understood today.¹³³

The Impact of Administrative Law on the Functioning of Parliament and its Members

In many different ways Parliament has taken heed of common law developments in administrative law and incorporated them into parliamentary practice. The criteria adopted by parliamentary committees for recommending the disallowance of delegated legislation—that it 'trespass[es] unduly on personal rights and liberties', or 'unduly make[s] the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal'¹³⁴—borrow heavily from the legal inventory. Nowadays, too, it is the practice of parliamentary committees to accord to witnesses a code of procedural fairness that is modelled on the doctrine of natural justice.¹³⁵ This contrasts starkly with earlier practice, most famously illustrated by the actions of the Committee of Privileges and the House of Representatives in 1955, when both took action to gaol Browne (a journalist) and Fitzpatrick (a newspaper proprietor) without extending to them the rights normally given to accused persons.¹³⁶

There are other ways too in which administrative law has impinged more deeply on the role of Parliament and its method of functioning. This section looks at that theme, in three ways. The topics examined, in progressive generality, are the impact of administrative law on the role of individual members of Parliament, its impact on Parliament's access to executive information, and its impact on Parliament's role as an accountability forum.

The Constituency and Advocacy Role of Parliamentarians

Prior to the development of administrative law in the 1970s the member of parliament played a key role in facilitating the review of executive decisions. Beyond the member, there were few formal options available to the public to seek the investigation of a grievance against a government agency. Political science texts of that era capture the importance of the members' role. Writing in 1965, Professor Crisp observed that the two major functions of the private member were to popularise the policies of the party, and to perform 'the ancient [function] of making representations about and seeking redress of his

constituents' grievances'.¹³⁷ Another estimate in the mid-1970s by political commentator, Mr David Solomon, was that a federal member of Parliament in a marginal electorate could expect to deal with the problems of as many as 10 000 constituents each year.¹³⁸ Mr Gordon Bryant, a parliamentarian in that era, in an essay on 'The Work of a Federal Member', spoke of Parliament's function of being:

the last repository of the rights of the individual. Through his member a citizen can appeal to the highest authority.¹³⁹

That sentiment was given some endorsement when, in 1971 in tabling the Kerr Report, Prime Minister McMahon foreshadowed in a cautionary tone that any steps taken to implement the Kerr vision of a new administrative law system should bear in mind 'the significant role in the review and criticism of the administrative processes' played by members of the Parliament.¹⁴⁰

The importance of the constituency role of members has never diminished (the annals of Australian electoral success and misfortune provide a constant reminder), but even in its heyday the effectiveness of this method of executive review was known to be patchy.¹⁴¹ Not surprisingly, the Kerr Committee had singled out the inability of the parliamentary system to provide administrative justice for all aggrieved individuals as a prime reason for the development of a comprehensive system of administrative law in Australia.¹⁴²

Developments in the intervening years have borne out the wisdom of the Committee's insight. In numerical terms alone the achievement annually of the administrative law review agencies is significant. The Commonwealth Ombudsman receives around 40 000 complaints and inquiries each year, roughly 8000 of which proceed to an investigation. A similar number of applications for review of decisions, 40 000, are made each year to the major Commonwealth administrative tribunals. This review activity is supplemented by a system of internal review mechanisms and customer complaint procedures that is both extensive and active. An interesting contrast can be drawn also between the caseload of the Commonwealth Ombudsman, and the caseload of the United Kingdom equivalent, the Parliamentary Commissioner, who can investigate only those complaints referred by a member of Parliament, which number only about 1000 per year.¹⁴³

The work of the Ombudsman and other review mechanisms also ushered in an age marked by a re-definition of the relationship between citizen and government. For a complainant, the heightened prospect of a favourable outcome after investigation of a complaint has alone been significant: the pattern in Ombudsman investigations is that roughly two-thirds of complaints that are investigated to an outcome are classified as being resolved substantially or partially in favour of the complainant. Changes and improvements in administrative practice and procedure are documented extensively in each annual report of the Ombudsman.¹⁴⁴ As well, the Ombudsman's focus on systemic problems in administration has been accentuated in recent years, as increasingly the Ombudsman undertakes own-motion investigations into prevalent administrative problems. In the last couple of years, for example, the Ombudsman has published reports with indicative

titles—*Issues Relating to Oral Advice: Clients Beware*, 1997; *A Good Practice Guide for Effective Complaint Handling*, 1999; and *Report on Investigation of Administration of FOI in Commonwealth Agencies*, 1999.

An approving, but subdued evaluation of the Ombudsman's role was given in 1991 by the Senate Standing Committee on Finance and Public Administration in its report, *Review of the Office of the Commonwealth Ombudsman*: 'the Committee concluded that the Ombudsman had made a positive contribution to Australian public administration'.¹⁴⁵ A more glowing appraisal was given by Prime Minister Howard a few years later in 1997, in a retrospective look at the first twenty years of the office:

The Ombudsman's Office has given Australians increased power to challenge official actions that they consider unjust or unreasonable; with the Ombudsman as referee, imbalances of resources and influence have been removed and unnecessary, unwieldy and at times unfeeling bureaucracy has been challenged.¹⁴⁶

What bearing do these developments in administrative review have for members of Parliament? A former Ombudsman, Professor Dennis Pearce, has observed that:

The greatest disappointment in relation to the office of Ombudsman in Australia has been the poor support it has received from members of Parliament.¹⁴⁷

Criticism of Parliament, both muted and vocal, has also come from other former Ombudsmen, Professor Jack Richardson,¹⁴⁸ Mr Geoff Kolts QC,¹⁴⁹ Mr Alan Cameron,¹⁵⁰ and Ms Philippa Smith.¹⁵¹

The first thread to the criticism by Pearce is that parliamentarians see the Ombudsman as a rival who undermines the importance of their constituency function. Perforce that is a matter of speculation—though it is given some credence by the observation of Reid and Forrest in their landmark Bicentennial history of the Commonwealth Parliament in 1989, that administrative law:

isolates the local member of Parliament from his constituency. ... For that citizen's gain there is a significant parliamentary loss.¹⁵²

This criticism by Reid and Forrest contrasts interestingly with the speculative contention made in the 1960s by commentators such as Crisp that if parliamentarians could be relieved of the burden of their constituency grievance work they could contribute more to national debate and policy formulation.¹⁵³ Ultimately it is for each member to define their own focus and time allocation, but the option of working in partnership with the administrative law review agencies cannot be ignored.

The second thread in the criticism of Parliament is that it has shown little institutional interest in the work of the Ombudsman, largely foregoing the opportunity to work in partnership with the Ombudsman in developing the standards of public administration. The final remedy of the Ombudsman, when a report or recommendation is not accepted by an

agency, is to make a special report to the Parliament.¹⁵⁴ Only two such reports have been made to the Parliament, in 1985 and 1986.¹⁵⁵ As to those, Professor Richardson has complained that it was 'a futile exercise. ... Parliament has let the Ombudsman down'.¹⁵⁶ A proposal was put to the Senate inquiry in 1991 for a new procedure by which an Ombudsman recommendation in a report to Parliament would be enforceable unless a motion of disallowance was approved by either House of the Parliament. The Senate Committee did not support that approach, believing that it would put at risk the informality and non-adversarial approach of the Ombudsman which were the strengths of the office.¹⁵⁷ Instead, the Committee proposed that the Government be required to respond in Parliament to any report on an unresolved investigation, within three months of the tabling of the report.¹⁵⁸

The Ombudsman is also required to present an annual report to the Parliament, and can choose to make a special report at any time on any relevant issue.¹⁵⁹ This, too, has been the subject of criticism, as there is no special committee to receive these reports akin, for example, to the NSW Parliamentary Committee on the Office of the Ombudsman. In the Commonwealth the function is shared by three standing committees, which incorporate this role within their other responsibilities.¹⁶⁰ In response to the criticism that Ombudsman reports will thereby be submerged or forgotten, the Senate Committee proposed that the existing House and Senate committees responsible for public administration should hold occasional joint meetings as an 'Ombudsman committee'.¹⁶¹ No steps have yet been taken to implement that proposal, although the Ombudsman has since commented approvingly that a number of themes and issues in Ombudsman reports had been taken up and considered by committees.¹⁶²

In addition to the annual and two case reports which the Commonwealth Ombudsman has made to the Parliament, an additional twenty reports have been made to the Prime Minister. Most have recommended the voluntary payment of compensation, some recommendations being accepted and others being rejected. As that suggests, an ongoing challenge for the Ombudsman has been a struggle with the Department of Finance, a struggle which the Ombudsman has felt the office has waged alone without adequate support from the Parliament.¹⁶³ The dispute over money has extended as well to the Ombudsman's operating budget. This has been the subject of regular complaint,¹⁶⁴ becoming more vocal after a 19 per cent budget reduction in the two years 1996–97.¹⁶⁵ There was, again, lukewarm support for this complaint by the Senate Committee in 1991. It supported 'a relatively small increase in the resources available to the Ombudsman', to enable 'a modest increase in investigative capacity and a new computer system'.¹⁶⁶

In Western Australia and Queensland the Ombudsman has the formal designation of Parliamentary Commissioner, but is otherwise constituted in much the same way as other Ombudsmen.¹⁶⁷ Proposals have been made in the Commonwealth (most strongly by Pearce) for taking this model a step further, by designating the Ombudsman as an officer of the Parliament.¹⁶⁸ A possible model would be for the Ombudsman's appointment to be approved by the Parliament, and for the Ombudsman to have a special administrative and

budgetary relationship with the Parliament. Internationally the prevalent model for creating the Ombudsman is to make it an officer of the Parliament. In Australia, by contrast, the Commonwealth Ombudsman has been located in an administrative law setting within the executive branch, and associated with the review role performed by courts and tribunals. It is contended that both Parliament and the Ombudsman would benefit from a change. Parliament, 'in its struggle to retain its standing as the protector of the people',¹⁶⁹ would be assisted in two ways, in its grievance work by the Ombudsman's investigative ability, and in its oversight work by the Ombudsman's intimate knowledge of the workings of agencies. The Ombudsman, on the other hand, would acquire an appearance of greater independence of the Executive, could call on the assistance of Parliament in placing pressure on agencies and ministers to give effect to Ombudsman recommendations, and could rely upon parliamentary assistance in securing a better allocation of resources.

This proposal has not found strong support within the Parliament, neither when it was put to the Senate Committee in 1991,¹⁷⁰ nor after it was raised again by the Ombudsman in the Annual Report in 1995–96.¹⁷¹ For the present, the formal relationship between the Ombudsman and Parliament will remain as it has for 25 years. A question arising is whether the informal relationship will also remain unchanged.

Parliamentary Control of Executive Privilege

Information, it is often remarked, is the lifeblood of democracy. That maxim is reflected strongly in parliamentary practice, which is modelled on the notion that public disclosure of information about the deliberations of Parliament and the Executive is the precondition for the public accountability of both. Thus, the practice is adopted without deviation that debate within Parliament should be open and that all members have the right to speak and to enjoy an absolute freedom of speech. Many other practices of the Parliament are also designed to facilitate public access to information, notably question time and the tabling of papers.

Ultimately, the opportunity for Parliament to obtain information comes up against the majority strength of a government to deny access. This discretion was tempered in the executive domain by the *Freedom of Information Act 1982* (Cwlth), which replaced the principle of discretionary executive secrecy with a new philosophy of the public right to know. The scheme of the Act is that disputes about disclosure have largely been taken away from the hands of ministers, and are assigned instead to an independent administrative tribunal that resolves disputes by applying defined criteria (or exemptions).

Should Parliament's right of access be any less? Parliament has never adopted any criteria for defining the scope of the obligation of a government to provide information to either House or to a parliamentary committee. It has chosen instead to let each chamber resolve disputes as they arise.¹⁷² For many years the practice followed in both Houses was modelled on the position which applied at common law. Until 1978, a certified claim by a

minister to a court that the disclosure of documents would be injurious to the public interest would ordinarily be accepted by the court. In effect, a claim of executive privilege (also called Crown privilege, and public interest immunity) was binding and conclusive.¹⁷³

The question of executive immunity is only likely to arise within Parliament in a situation in which a government does not have control of the Senate or a parliamentary committee. This arose a number of times from the 1950s onwards, when the government of the time was confronted by a resolution calling upon it to produce documents or to allow the attendance of a public official at a committee hearing to give evidence. On several occasions the government refused to comply, citing the doctrine of executive privilege and the practice of courts.¹⁷⁴ There were occasional remonstrations from the other side of the chamber, but little more. A celebrated incident occurred in 1975 when the Senate summonsed eleven senior public servants to the Bar of the Senate to answer questions at the height of the overseas loans dispute. Each declined on ministerial instruction to give a reply other than of a formal nature.¹⁷⁵ A later inquiry into their refusals by the Privileges Committee led to a report that was split along party lines,¹⁷⁶ and the issue was never taken further by the Parliament. Thus, for example, a report the following year by the Joint Committee on the Parliamentary Committee System noted merely that executive privilege was 'one of the most vexed questions of committee procedure' and that the Committee was itself 'unable to offer any clarification of the rules'.¹⁷⁷ Nor has Parliament disapproved the Executive-drafted 'Guidelines for Official Witnesses Appearing before Parliamentary Committees', first tabled in 1978, which recognise a minister's right to claim privilege in respect of a witness's evidence.¹⁷⁸

Since 1978 the practice of Parliament has diverged from the practice of the courts. In that year, in *Sankey v Whitlam*,¹⁷⁹ the High Court rejected the principle of conclusive ministerial certificates as it applies to court proceedings. Instead, the Court ruled, it is for a court to decide whether documents should be produced for the purpose of its own proceedings. The situation which gave rise to that ruling was an action in 1975 brought by Mr Sankey, a private citizen, against four former Ministers in the Labor Government alleging a conspiracy to breach the law in relation to foreign loan negotiations. The defendants were the Prime Minister, Mr Whitlam, the Treasurer, Dr Cairns, the Minister for Minerals and Energy, Mr Connor, and the Attorney-General, by then Justice Murphy. In order to prove his allegations Mr Sankey sought production of a number of official documents that recorded the deliberations and decisions of the Government. Among the documents were some that recorded the deliberations of the Executive Council and the advice given to Ministers by senior officials. A claim of privilege for those documents was made by the Coalition Government, which by then was in office.

The High Court held that it was for a court to decide the claim of privilege after balancing two aspects of the public interest: the public interest that harm should not be done to the nation or the public service by the disclosure of documents; and the public interest that the administration of justice should not be frustrated by the withholding of documents that must be produced in order that justice be done. The ruling of the Court was expressed to

extend to all documents of the executive government, including Cabinet documents and those for which privilege is claimed on national security grounds. In the event, the Court ruled that some of the documents sought by Mr Sankey had to be disclosed to the parties for the purposes of the litigation.¹⁸⁰

The High Court has since confirmed that approach to privilege claims in other similar cases. In *Alister v R*,¹⁸¹ the Court ordered that ASIO documents be produced for inspection by a court hearing the prosecution of three members of the Ananda Marga organisation prosecuted for conspiracy to murder. In *Commonwealth v Northern Land Council*,¹⁸² the Court confirmed that it could order the production of Cabinet notebooks, but would not do so other than in an exceptional case.

In an indirect sense the Parliament has been a substantial beneficiary of the liberal disclosure stance of the courts and of the Freedom of Information Act. Nowadays there is little to be gained by a government denying access to information which a member could obtain by one of those other means. Generally, too, the open government revolution of the last two decades has induced a substantial attitudinal change on the part of governments and the Executive. This has been reflected in a more liberal attitude concerning the appearance of official witnesses and the provision of documents and information to parliamentary committees.

Nevertheless, the formal position stands unresolved. On the one hand, since *Sankey v Whitlam*, the two parliamentary manuals—*Odgers' Australian Senate Practice*¹⁸³ and *House of Representatives Practice*¹⁸⁴—have maintained that a House can override a minister's claim of privilege and insist on the production of documents. But neither has ever risen to the challenge. As Reid and Forrest noted in their history of the Parliament in 1989,

[i]t remains uncertain what a house of Parliament should, or would, do if a minister refused to cooperate with a parliamentary enquiry in the name of crown privilege.¹⁸⁵

The confrontation which Reid and Forrest envisaged, and a partial answer to their query, was supplied by a dispute which arose in the upper house of the NSW Legislature in 1998, culminating in the decision of the High Court in *Egan v Willis*.¹⁸⁶ The Legislative Council, in which the Labor Government had a minority of members, directed a Minister situated in the Council, Mr Egan, the Treasurer and Leader of the Government in the Council, to produce documents relating to the Government's consideration of the report of a Commission of Inquiry into the Lake Cowal gold mine. After the Minister declined to cooperate in accordance with a Cabinet instruction, the Council resolved that the Minister was in contempt and should be suspended and removed from the House for the remainder of the day. The Minister refused to leave the House, and was thereupon removed by the Usher of the Black Rod. The Minister then commenced proceedings, for a declaration that the resolutions of the Council were invalid and that the manner of his removal from the Parliament constituted a trespass to the person.

The High Court upheld the authority of the Council to find the Minister in contempt, and to take the limited step of suspending the Minister for the day.¹⁸⁷ In reaching that conclusion the Court laid stress on the importance of the system of responsible government, under which the Executive's responsibility to the Parliament can be exacted by both Houses. A means by which a House can hold the Executive to account is to throw the light of publicity on its affairs, including by demanding the production of documents by the Executive. The Court went on to observe that:

In Australia, s. 75(v) of the Constitution and judicial review of administrative action under federal and State law, together with freedom of information legislation, supplement the operation of responsible government in this respect.¹⁸⁸

The dispute was soon back before the NSW Court of Appeal, in *Egan v Chadwick*,¹⁸⁹ to examine an issue left unresolved in the High Court proceedings. Did the Council's power to require production of documents extend to documents which the Minister claimed attracted the protection of either legal professional privilege or executive privilege? By now the dispute had also escalated, in three directions: the resolutions of the Legislative Council extended to a much larger range of documents relating to issues of political controversy; the Council resolved to suspend the Minister for the remainder of the session; and the Minister asserted that his most recent removal from the chamber constituted an assault for which damages were claimable. The Court of Appeal dealt only with the point of principle, concerning the Minister's claims of privilege.¹⁹⁰ As to those, the Court held that it was for the Council to resolve any claim of privilege, except where this would undermine another cardinal constitutional principle.¹⁹¹ In other words, the Council could override the claims both of legal professional privilege and of executive privilege, except in respect of documents that would reveal the deliberations of Cabinet. The reason for that overriding exception, to maintain Cabinet confidentiality, was to safeguard the principle of collective Cabinet responsibility and with it the doctrine of responsible government.

In applying the principles from both cases to the Commonwealth Parliament, it is necessary to take account of a constitutional difference. The powers of the Senate and the House of Representatives rest on a dual basis: s. 49 of the Constitution, which provides that each House enjoys the powers, privileges and immunities of the House of Commons as at 1901, until varied by the Parliament; and the *Parliamentary Privileges Act 1987* (Cwlth), which is a partial statement of the privileges of the Parliament. The powers of the NSW Legislative Council rested on the common law concerning the inherent powers of a legislative chamber, and were those reasonably necessary for the existence of the Council in the proper exercise of its functions.¹⁹² That difference could be material, but for the most part it seems there is similarity in the constitutional position of the legislative chambers of both parliaments, as representative bodies that function in the context of a system of responsible government.

That said, there is still a host of questions left unresolved by both Court decisions. There is firstly the question of jurisdiction. In both cases the issue of the validity of the Council resolutions arose in the context of them being relied upon as lawful authority for the

Minister's suspension and removal from the chamber. In the absence of that context it is doubtful that a court has jurisdiction to rule on the legal propriety of proceedings occurring within the Parliament.¹⁹³ There is also the question of penalty. The action taken by the NSW Legislative Council—a one day suspension of the Minister—fell within the test of 'reasonable necessity'. But would a longer suspension, or a punitive action such as expulsion of the Minister?¹⁹⁴ Or, in the case of the Senate, could it invoke the power conferred by the *Parliamentary Privileges Act 1987* (Cwlth) to impose a fine or imprisonment on a minister who is in contempt of an order of the Senate?¹⁹⁵ In what circumstances, too, will a resolution for production of documents conflict with the doctrine of responsible government? For example, which documents come within the category of Cabinet documents? Other permutations of the dispute are also possible. What would be the situation, for example, if the lower house contradicted the upper house by passing a resolution forbidding any minister from delivering documents to the upper house?¹⁹⁶

The implications of the two court decisions for parliamentary practice within the Commonwealth Parliament are also unclear. Within the Senate during the 1990s there were signs of a developing impatience at the refusal of ministers to provide information to Senate committees. On at least six occasions between 1992 to 1999 the Senate noted its disapproval at the failure of ministers to facilitate the provision of information or documents concerning the Loans Council, foreign ownership of the print media, commercial confidentiality, the Melbourne waterfront dispute, the Jabiluka uranium mine, and the welfare system.¹⁹⁷ Future developments are speculative, but it is at least clear that the spectre of the courts being involved in the battle between the Senate and the Executive over executive privilege has advanced another step. Yet, for the Senate to move further along that path would run counter to a principle it has endorsed repeatedly that it would be inappropriate to transfer to the courts disputes arising in the Parliament concerning executive privilege. That, for example, was the reason cited by the Senate Privileges Committee in 1994 for repudiating a bill introduced by the Australian Democrats, the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*.¹⁹⁸

Interestingly, the prospect of external involvement in resolving disputes over executive privilege takes us back to a point made earlier in this paper. In the discussion of the history of freedom of information laws in Australia, it was observed that the Commonwealth Parliament did not so much guide the change but responded to events occurring outside. It may be, once again, that in controlling executive secrecy we will see the Parliament in a responsive role.

Ministerial Accountability to Parliament

An abiding concern in the development of administrative law in Australia has been its perceived conflict with the precepts of parliamentary democracy. A decision which is made within the judicial branch of government is made by a person—the judge—who is

neither elected nor answerable to electors. The same can be said of tribunals that enjoy statutory independence of government control.

For the most part it has been easy to counter the democracy objection. Many of the issues dealt with by courts and tribunals are issues of law, as to which, in theory at least, there is a correct legal answer: democracy is enhanced by a dispute as to the correctness of the executive's answer being submitted to independent evaluation by a court or tribunal. There is the practical consideration too that the functions of government are too numerous and specialised for the parliamentary or electoral process to provide effective accountability for the myriad decisions that are made. Parliament itself has acknowledged as much by legislating to create an administrative law system, thus waiving any democratic objection which the Parliament could raise to the role of courts and tribunals in scrutinising executive action.

It is nevertheless the case that Parliament has not abdicated its function of calling the executive government to account. Parliament shares that role with courts and tribunals. The question arises, accordingly, of discerning the boundary between political and legal accountability. At what point, or by what principle, should the judicial branch defer to the role of Parliament in scrutinising or evaluating the propriety of executive decision-making?

This question permeates administrative law. In determining, for example, the meaning of a statutory phrase, the breadth of a statutory discretion, or the factual and policy considerations that are germane to a decision, a court or tribunal can have a marked impact on executive government choices and responsibilities. Periodically, and in every age, ministers have complained that review bodies have gone too far and have usurped the prerogative of the political branch.¹⁹⁹ That issue will continue to be debated, framed usually as a court *versus* executive conflict. But there is another dimension to the struggle, as to whether administrative law is intruding as well on the role of Parliament as an accountability forum. Two areas of contention will be discussed, concerning the accountability of ministers to Parliament, collectively and individually.

A pivotal role in parliamentary government is played by the Cabinet, which is collectively answerable to the Parliament for decisions that are made. The ultimate parliamentary sanction is the vote of no confidence, but routinely the decisions of Cabinet are the focus of Question Time and other political debate. Should Cabinet be legally as well as politically accountable, in particular, should Cabinet owe an enforceable legal obligation to observe administrative law principles such as the doctrine of natural justice?

The issue arose in two cases in 1987. *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*²⁰⁰ involved a challenge to the validity of a decision by the Cabinet to nominate Kakadu National Park Stage 2 for inclusion in the World Heritage List. Peko claimed that the effect of this decision would be to undermine the commercial value of its mining interests in the Park, and that it should have been given a hearing by the Cabinet conformably with the doctrine of natural justice. This argument was upheld at first instance in the Federal Court, the judge declaring the decision of Cabinet to be void.²⁰¹ On appeal,

the Full Federal Court held otherwise, pointing to the complex policy dimension of the decision and to the fact that, as a recommendation to the World Heritage Committee, the decision did not have a direct and immediate impact on Peko's commercial interests. The Court also accepted that judicial review of Cabinet decisions would bristle with problems, of a practical and a constitutional kind:

the sanctions which bind [Cabinet] to act in accordance with the law and in a rational manner are political ones.²⁰²

That said, the Court did not rule out the possibility that circumstances may arise in which a Cabinet decision would be justiciable, and instanced a Cabinet decision made under statute. In explaining that 'it is not possible to exclude the judicial review of a decision merely because it was one made by the Cabinet',²⁰³ the Court emphasised that the critical factor is the nature and effect of a decision, rather than the character of the decision-maker.

The issue arose again the same year before the High Court in *South Australia v O'Shea*.²⁰⁴ Legislation provided that the question of whether to release from prison a person committed to indefinite detention (such as O'Shea, a multiple child sex offender) should be heard initially by a Parole Board, but decided finally by the Governor in Council. By convention, recommendations to the Governor in Council were based on a Cabinet decision. The Court held by majority that O'Shea had been given an adequate hearing in the parole and release process, but was split on the issue of principle as to whether a natural justice hearing obligation could be imposed on the Governor in Council or the Cabinet. Wilson and Toohey JJ rejected that suggestion for the reason that the legislative scheme placed the final decision 'in the hands of the Government, which must accept political responsibility for his release'.²⁰⁵ Chief Justice Mason and Deane J expressed a contrary view. According to Mason CJ it may be appropriate to impose a natural justice hearing obligation upon the Cabinet in situations where it:

is called upon to decide questions which are much more closely related to justice to the individual than with political, social and economic concerns.²⁰⁶

Deane J., who thought it 'extraordinary' that Cabinet should be involved in such a process, held that a political body entrusted with such a role:

must make such adjustments to its proceedings as are necessary to permit observance of the minimum standards of procedural fairness.²⁰⁷

A similar cleavage of opinion can arise in relation to decisions made individually by ministers. It has been accepted for over three decades, and without contradiction, that ministerial decision-making should be subject to the supervisory judicial review jurisdiction of the courts.²⁰⁸ Ministers, as a matter of principle, should not be exempt from the obligation to interpret and apply legislation correctly and to observe procedural fairness. The rule of law should permeate all echelons of government. Yet that is only part of the picture. Ministers, individually as well as collectively, are accountable in the

Parliament for decisions which they personally make. The conferral of statutory functions upon ministers can occur as a matter of drafting convenience or convention, but as often it reflects that the decision of the minister may involve a political judgment on matters of public interest. When should accountability for that judgment occur in the parliamentary rather than the judicial forum? A number of sections of the *Migration Act 1958* (Cwlth) are overtly premised on that distinction.

The sections in question confer a non-compellable and non-reviewable safety net discretion on the Minister.²⁰⁹ For example, ss. 351 and 417 provide that the Minister may substitute a 'more favourable' decision than that of the Migration Review Tribunal or the Refugee Review Tribunal; the decision is to be made 'by the Minister personally' if persuaded 'that it is in the public interest to do so'; the Minister 'does not have a duty to consider whether to make a decision'; if a decision is made a statement of reasons is to be tabled by the Minister in the Parliament; and the exercise or non-exercise of the Minister's powers 'are not judicially-reviewable decisions' (s. 475(1)(e)). It was inevitable, perhaps, that attempts would be made in court to circumvent that scheme. Two early attempts were successful at first instance in the Federal Court—in one, for example, after the trial judge forged a distinction between the actions of the Minister (unreviewable) and the preparatory actions of the Minister's staff (reviewable).²¹⁰ Both decisions were reversed by the Full Federal Court as an erroneous interpretation of the statutory scheme.²¹¹ Interestingly, however, the issue was treated all along as a question of statutory interpretation, with no mention being made of a possible alternative approach that the Act established a scheme of an exceptional nature that purposely relied upon political rather than legal accountability.

The choice between legal and political accountability is germane also to the formulation of the criteria for lawful decision-making as they apply to ministers. A case in point is *Norvill v Chapman*,²¹² which involved a legal challenge to a decision by the Minister for Aboriginal and Torres Strait Islander Affairs to halt the construction of a bridge to Hindmarsh Island across the Murray River in South Australia. The Minister made a heritage declaration to prevent construction of the bridge after receiving a report from a special inquiry he had established. The Minister read the report, but not the 400 submissions that were attached to it. Nor did the Minister (a man) read a secret envelope describing the potential damage that construction of a bridge would cause to the traditions of the Ngarrindjeri women; instead, the envelope was read by a female staff member of the Minister, who then briefed him. The Full Federal Court held that the Minister, as decision-maker, bore a legal obligation to consider all relevant information, which in this case entailed reading the submissions and the envelope.

A ground of criticism of the Court's decision would be that it failed to give proper weight to the political and parliamentary dimension of the Ministerial decision. Where it is clear that all relevant factual information has been assembled and considered by a department as well as by an expert inquiry or tribunal, and the Minister has been briefed on that material and forthrightly accepts political responsibility for a decision within the Parliament,²¹³ should the law realistically demand any more? In particular, should a legal principle as

elastic and open-ended as the obligation to consider all relevant matters be applied as rigorously by a court in a context of this kind?²¹⁴ What, after all, is relevant in matters of public interest, and what constitutes adequate consideration of a relevant matter? The answer to those questions may simply involve the substitution of one set of values for another, legal values for political values, in circumstances where both should coexist within a constitutional system that comprises effective mechanisms for political as well as legal accountability. Interestingly, none of the judgments mentioned s. 15 of the Act, which provided that a heritage declaration by the Minister had to be laid before each House of the Parliament and could be disallowed by either House.²¹⁵ In fact, a motion of disallowance was moved in each House before the court proceedings were heard; after lengthy debate, the motion was defeated in both Houses.²¹⁶

One can point to many similar cases in which administrative law doctrine has been developed without express acknowledgment of the political and parliamentary context in which ministerial decisions are made.²¹⁷ In *Jia Le Geng v Minister for Immigration and Multicultural Affairs*,²¹⁸ the Full Federal Court held that a decision by the Minister to cancel Geng's permanent resident visa was affected by actual bias because the Minister had earlier foreshadowed publicly his opinion that a person (such as Geng) who had been convicted of rape would fail the 'good character' test in the *Migration Act*. The judgments of the Court discussed in general terms the application of the prejudgment principle to administrative decision-making, with no discussion of whether that principle should apply differently to a Minister, an elected official, with a declared policy agenda, and answerable to Parliament and the electorate for the management of that agenda. In a similar vein was the decision of the Full Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy*.²¹⁹ In the view of the Court in that case, unless steps were taken at a senior level within the department to insulate decision-makers from an outspoken remark by Prime Minister Hawke that many refugee claimants were economically motivated, refugee decisions made in the wake of that remark might be invalid by reason of apprehended institutional bias. Finally, in *Haoucher v Minister for Immigration and Ethnic Affairs*,²²⁰ the High Court held (by majority) that the Minister, in deciding to reject a recommendation of the Administrative Appeals Tribunal that a person not be deported, was required by the doctrine of natural justice to grant yet another hearing to that person. Once again, there was no discussion by the Court of whether the Minister's obligation to table a statement of reasons for his decision in the Parliament was a factor that should moderate the application of natural justice principles to him.

Many of the decisions made by ministers involve the interpretation and application of legislation and, as to those, there can be no doubt that the legal responsibility of the minister is no different from that of any other decision-maker. Legislation bears the same meaning in whosever hands it is being applied. But some of the administrative law standards, as noted, have a pliable content that is receptive to being adjusted to reflect the context in which a decision is being made. A question that hovers over administrative law is whether a failure by courts to take account of that context will diminish the role that

political judgment and parliamentary accountability should play in the incremental development of public policy in individual cases.

A Unifying Theme

The discussion of administrative law in Australia typically looks at its implications for the citizen, the Executive or the courts. Those three groups are involved directly in each administrative law dispute, as plaintiff, defendant or adjudicator. The involvement of Parliament is one-step removed, as the body that creates the legislative framework within which much of the disputation arises and is resolved. If Parliament is mentioned, it is commonly on the basis that Parliament and the Executive share the same interest and speak in a united voice.

The theme of this paper is that the Parliament does have a separate and immediate interest in administrative law, which can be disentangled from the interests of other parties. In creating the framework of administrative law, Parliament is both exercising and asserting its responsibility in a democratic system for creating a framework for resolving disputes between citizen and government. The operation and development of that framework is a process in which Parliament rightly has a continuing interest. Nor can it be forgotten that the rationale of the system of responsible government is that the Executive is answerable to the Parliament for the way in which government administration is undertaken. Parliament is therefore conceived as an accountability forum, a role which is exercised vigorously, particularly through the committee system and in the Senate.

To recognise Parliament's role in administrative law and executive accountability is to assert as well that the other parties to that system—the courts, tribunals and the Executive—should discharge their role in a fashion which fully heeds the role of the Parliament. Conversely, Parliament can itself be enriched—both as to its internal functioning and as to the exercise of its legislative authority—if it takes heed of the way in which administrative law principles are perceived and developed in other forums. The integration and mutual recognition of the roles played by different parties in the administrative law system provides a surer path towards fulfilling the underlying objectives of executive accountability, administrative justice and good administration.

Endnotes

1. See *Administrative Appeals Tribunal Act 1975* (Cwlth) (hereafter 'AAT Act'), *Ombudsman Act 1976* (Cwlth), and the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (hereafter 'ADJR Act'); the latter Act conferred a judicial review jurisdiction upon the Federal Court, which was itself established in 1976 by the *Federal Court of Australia Act 1976* (Cwlth). Other administrative law review agencies are referred to in the text to nn. 18–19 below.
2. e.g. see Department of Finance and Administration, *Client Service Charter Principles*, DOFA, Canberra, 2000; and Commonwealth Ombudsman, *A Good Practice Guide for Effective Complaint Handling*, Commonwealth Ombudsman's Office, Canberra, 1997.
3. *New South Wales Act 1824* (4 Geo IV, c 96) s. 2.
4. *R v Wentworth, Campbell and Dunn* (1825) <http://www.law.mq.edu.au/scnsw> (27 October 2000).
5. Section 75(v) provides that 'In all matters ... In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth the High Court shall have original jurisdiction'.
6. *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.
7. The other members of the Committee were Professor Harry Whitmore (a leading academic administrative lawyer); and the Commonwealth Solicitor-General, initially A. F. Mason QC (later Chief Justice of Australia), followed by R. J. Ellicott, QC (later Attorney-General and Justice of the Federal Court). The impact of the 'Kerr Report' is analysed in R. Creyke and J. McMillan, eds, *The Kerr Vision of Australian Administrative Law—At the Twenty-Five Year Mark* (hereafter 'Kerr Vision'), Australian National University Centre for International and Public Law, Canberra, 1998.
8. Commonwealth Administrative Review Committee, *Report*, Commonwealth Government Printing Office, Canberra, 1971 (Parliamentary Paper no. 144 of 1971), title to chapter 18.
9. The Committee on Administrative Discretions (chaired by Sir Henry Bland) issued two reports: an *Interim Report*, Government Printer of Australia, Canberra, 1973 (Parliamentary Paper no. 53 of 1973); and a *Final Report*, Government Printer of Australia, Canberra, 1973 (Parliamentary Paper no. 316 of 1973). The other report (from a committee chaired by Mr Ellicott) was: R. J. Ellicott et al, *Prerogative Writ Procedures: Report of Committee of Review*, Government Printer of Australia, Canberra, 1973 (Parliamentary Paper no. 56 of 1973).
10. Established by the *Federal Court of Australia Act 1976* (Cwlth).
11. See *Administrative Appeals Tribunal Act 1975* (Cwlth) s. 28; *Ombudsman Act 1976* (Cwlth) s. 15(2)(e); and *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) s. 13.
12. Law Reform Commission of Canada, *Seventh Annual Report*, Ottawa, 1977–78, p. 14.
13. House of Representatives, *Debates*, 14 October 1971, vol. 74, p. 2358.

14. House of Representatives, *Debates*, 14 May 1975, vol. 94, p. 2278.
15. House of Representatives, *Debates*, 5 May 1977, vol. 105, p. 1624 (Mr Neil).
16. Justice Brennan, 'Reflections', *Canberra Bulletin of Public Administration*, no. 58, April 1989, p. 32. See also Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years', *Federal Law Review*, vol. 18 no. 3, 1989, pp.122-133.
17. Commonwealth Administrative Review Committee, *op. cit.*, para 21.
18. See, respectively, the *Social Security Act 1991* (Cwlth) Part 7.3; *Veterans' Entitlements Act 1986* (Cwlth) Part IX; *Migration Act 1958* (Cwlth) Part 6, Div 1 (MRT), Part 6, Div 9 (RRT); and *Administrative Appeals Tribunal Act 1975* (Cwlth) Part IIIA.
19. See, respectively, the *Ombudsman Act 1976* (Cwlth) Part IIA; *Inspector-General of Intelligence and Security Act 1986* (Cwlth); *Merit Protection (Australian Government Employees) Act 1984* (Cwlth); and *Complaints (Australian Federal Police) Act 1981* (Cwlth).
20. See *Federal Court of Australia Act 1976* (Cwlth), Part IVA 'Representative Proceedings'.
21. *Administrative Appeals Tribunal Act 1975* (Cwlth) s. 27A.
22. *Freedom of Information Act 1982* (Cwlth); *Archives Act 1983* (Cwlth); and *Privacy Act 1988* (Cwlth).
23. *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth). Until amendment of the legislation in 1999 the Commission was constituted as a tribunal along administrative law lines for the adjudication of unlawful discrimination complaints.
24. See, respectively, the *National Health Act 1953* (Cwlth) Part VIC; *Superannuation (Resolution of Complaints) Act 1993* (Cwlth); and *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cwlth). Comparable industry Ombudsman schemes are described in Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper, Appendix D, ARC, Canberra, 1997.
25. See Privacy Amendment (Private Sector) Bill 2000 (Cwlth). See also the *Privacy Act 1988* (Cwlth) Part IIIA 'Credit Reporting'.
26. The legislative history (except for Bills which lapsed when the election was called in 1975) is set out in R. Creyke and J. McMillan, eds, *The Making of Commonwealth Administrative Law* (hereafter 'Making'), Australian National University Centre for International and Public Law, Canberra, 1996, pp. vi–vii.
27. Administrative Review Tribunal Bill 2000 (Cwlth). See also Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, ARC Report no. 39, AGPS, Canberra, 1995, para 1.2 and Appendix A. J. McMillan and R. Todd, 'The Administrative Tribunals System: Where to from here?' in S. Argument, ed., *Administrative Law: Are the States Overtaking the Commonwealth?*, Australian Institute of Administrative Law, Canberra, 1996, p. 4; and R. Creyke, 'The Administrative Appeals Tribunal: What's Happening?' Department of the Parliamentary Library, *Current Issues Brief*, no. 8, 1999–2000.

28. e.g. *Migration Reform Act 1992* (Cwlth); and *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cwlth). The similar views of both Labor and Liberal Ministers are referred to in Senate Legal and Constitutional Legislation Committee, *Report on the Migration Legislation Amendment (Judicial Review) Bill 1998*, The Committee, Canberra, 1999, chapter 1. See also the discussion, of the similar Bills introduced by Labor and Coalition Governments to overturn the decision in *Teoh*, in the text to n. 129 below.
29. The history is summarised in Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information*, AGPS, Canberra, 1979, chapter 2; Australian Law Reform Commission, *Freedom of Information*, Issues Paper 12, ALRC, Sydney, 1994, paras 2.3–2.9; G. Terrill, *Secrecy and Openness*, Melbourne University Press, Melbourne, 2000, chapter 6; and J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review*, vol. 8, 1977, pp. 379–434.
30. Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information*, AGPS, Canberra, 1979.
31. Senate, *Debates*, 8 April 1981, vol. 89, pp. 1230–1267; 28 April 1981, vol. 89, pp. 1394–1397; 7 May 1981, vol. 89, pp. 1761–1796; 29 May 1981, vol. 90, pp. 2350–2396; and 12 June 1981, vol. 90, pp. 3243–3251.
32. [1964] AC 40; approved in Australia in *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 233.
33. [1968] AC 997; approved in Australia in *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 186, 202–203, 223, and 234.
34. [1968] AC 910; approved in Australia in *Sankey v Whitlam* (1978) 142 CLR 1.
35. See also J. McMillan, 'Developments under the ADJR Act—the Grounds of Review', *Federal Law Review*, vol. 20 no. 1, 1991, pp. 50–82.
36. See N. Williams, 'The ADJR Act and Personnel Management', *Federal Law Review*, vol. 20 no. 1, 1991, pp. 158–164, at p. 159. Williams explains that some of the post-1980 cases that were under s. 39B of the *Judiciary Act 1903* (Cwlth) (rather than under the ADJR Act) are still best evaluated in the context of the surge of litigation that followed the legislative changes referred to in the text.
37. See R. J. Ellicott et al, op. cit.; and J. Griffiths, 'Legislative Reform of Judicial Review of Commonwealth Administrative Action', *Federal Law Review*, vol. 9 no. 1, 1978, pp. 42–70. The intended significance of the new statutory right to the reasons for decisions is discussed below in text to n 76.
38. See the papers from a conference 'Ten Years of the Federal Administrative Decisions (Judicial Review) Act', *Federal Law Review*, vol. 20 no. 1, 1991.
39. *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
40. *Church of Scientology v Woodward* (1982) 154 CLR 25; see also *Alister v R* (1984) 154 CLR 404.

41. See the discussion in the text to nn. 200–207 below, referring to the *Peko* and *O'Shea* cases.
42. Cf *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, and *Ogle v Strickland* (1987) 71 ALR 4.
43. e.g. *Kioa v West* (1985) 159 CLR 550; and *Annetts v McCann* (1990) 170 CLR 596.
44. e.g. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; and *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 ALN 238.
45. M. Crock, *Immigration and Refugee Law in Australia* (hereafter 'Immigration Law'), Federation Press, Sydney, 1998, p. 15.
46. (1977) 137 CLR 461 (Barwick CJ, Gibbs, Jacobs, Mason and Aickin JJ; Murphy J dissenting; Stephen J not deciding). For a similar illustration from the same period of the High Court conceding an unfettered statutory authority to the Minister, see *Znaty v Minister for Immigration* (1970) 126 CLR 1.
47. (1977) 137 CLR 461 at 464.
48. (1977) 137 CLR 396.
49. *Judiciary Act 1903* (Cwlth) s. 23(2)(b).
50. e.g. *Kioa v West* (1985) 159 CLR 550 (deportation); and *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 and *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339 (migrant entry). See also M. Crock, *Immigration Law*, op. cit., pp. 279–283.
51. e.g. *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 (legitimate expectation); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (international conventions); *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549 (duty of inquiry); and *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24 (reasons statements). Generally, see M. Crock, *Immigration Law*, op. cit., chapters 3, 13; M. Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government', *Sydney Law Review*, vol. 17 no. 2, June 1995, pp. 204–241; and J. McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, no. 22, 1999, pp. 1–25.
52. (1985) 159 CLR 550 at 578 per Mason J, at 597 per Wilson J, and at 630–631 per Deane J; contra Gibbs CJ at 566–567, and Brennan J at 625.
53. Also referred to in *Kioa v West* (1985) 159 CLR 550 at 578–579 per Mason J, at 623–626 per Brennan J, and at 630–631 per Deane J; cf Wilson J at 600. The changes are explained at M. Crock, *Immigration Law*, op. cit., pp. 42–46.
54. The Immigration Review Tribunal (later the Migration Review Tribunal) was established by the *Migration Legislation Amendment Act 1989* (Cwlth), and the Refugee Review Tribunal by the *Migration Reform Act 1992* (Cwlth).
55. (1995) 183 CLR 273.

56. (1995) 183 CLR 273 at 291 per Mason CJ and Deane J.
57. (1982) 148 CLR 636 at 641 per Stephen J applying *Chow Hung Ching v R* (1948) 77 CLR 449 at 478. An argument that a decision-maker is under an obligation to consider the relevance of international conventions was rejected in *Kioa v West*—both in the Full Federal Court (1984) 55 ALR 669 at 681 per Northrop and Wilcox JJ; and in the High Court, (1985) 159 CLR 550 at 570–571 per Gibbs CJ, and at 629 per Brennan J. See also *Mayer v Minister for Immigration and Ethnic Affairs* (1984) 4 FCR 312 (FC) at 314 per Davies J; *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 (HC), at 294 per Gibbs CJ, and at 305 per Brennan J (both dissenting); and *Tasmanian Wilderness Society Inc v Fraser* (1982) 56 ALJR 763 at 764 per Mason J.
58. See the collection of essays in P. Alston and M. Chiam, eds, *Treaty-Making and Australia*, Federation Press, Sydney, 1995; and B. R. Opeskin and D. R. Rothwell, eds, *International Law and Australian Federalism*, Melbourne University Press, Melbourne, 1997. See also A. Twomey, 'Federal Parliament's Changing Role in Treaty Making and External Affairs', Department of the Parliamentary Library, *Research Paper no. 15*, 1999–2000.
59. e.g. the *World Heritage Properties Conservation Act 1983* (Cwlth), the validity of which was upheld in *Commonwealth v Tasmania* (1983) 158 CLR 1; and the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cwlth), the validity of which was upheld in *Richardson v Forestry Commission* (1988) 164 CLR 1. See also *Queensland v Commonwealth (Tropical Rainforests Case)* (1989) 167 CLR 232. Other examples are discussed in P. Alston, 'Reform of Treaty-Making Processes: Form over Substance?' in P. Alston and M. Chiam, *ibid.*, pp. 5–9.
60. See *Human Rights (Sexual Conduct) Act 1994* (Cwlth).
61. See Senate Legal and Constitutional References Committee, *Trick or Treaty: Commonwealth Power to Make and Implement Treaties*, The Committee, Canberra, 1995 (the report of the inquiry was tabled shortly after the date of the *Teoh* decision). The implementation of treaties was debated also in the Australian Constitutional Convention in 1985: see Constitutional Commission, *Final Report*, AGPS, Canberra, 1988, vol. 2, pp. 735–736. Steps taken since *Teoh* to increase parliamentary influence in the treaty process (e.g. the creation in 1996 of a Joint Standing Committee on Treaties) are referred to below in the text to n. 132; and in A. Twomey, *op. cit.*
62. See H. Charlesworth, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights', *Melbourne University Law Review*, vol. 18 no. 2, 1991, pp. 428–434.
63. The debate about the juridical basis of judicial review is well covered in M. Aronson and B. Dyer, *Judicial Review of Administrative Action*, 2nd ed., Law Book Company, Sydney, 2000, pp. 2–7, chapter 3. See also M. Taggart, ed., *The Province of Administrative Law*, Hart, Oxford, 1997; P. Bayne, 'The Common Law Basis of Judicial Review', *Australian Law Journal*, vol. 67 no. 10, October 1993, pp. 781–786; Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in M. Taggart, ed., *Judicial Review of Administrative Action in the 1980s*, Oxford University Press, Oxford 1986, p. 18; D. Feldman, 'Democracy, the Rule of Law and Judicial Review', *Federal Law Review*, vol. 19 no. 1, 1990, pp. 1–20; and C. Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires

- Doctrine, the Sovereignty of Parliament and Judicial Review', *Cambridge Law Journal*, vol. 55, 1996, p.122.
64. A list of recent reports by parliamentary committees and other bodies is given in J. McMillan, 'Administrative Law under a Coalition Government—Key Issues', in J. McMillan, ed., *Administrative Law under the Coalition Government*, Australian Institute of Administrative Law, Canberra, 1997, p. 1. Examples of the reports (not elsewhere referred to in this paper) include: Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest*, The Committee, Canberra, 1994; House of Representatives Standing Committee on Legal and Constitutional Affairs, *In Confidence: The Protection of Confidential and Personal Information*, The Committee, Canberra, 1995; Senate Finance and Public Administration References Committee, *Service Delivery by the Australian Public Service*, The Committee, Canberra, 1995; Joint Committee of Public Accounts, *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector*, Report no. 336, AGPS, Canberra, April 1995 (Parliamentary Paper 78 of 1995); Senate Legal and Constitutional Legislation Committee, *Role and Function of the Administrative Review Council*, The Committee, Canberra, 1997; Joint Committee of Public Accounts, *Corporate Governance and Accountability Arrangements for Commonwealth Government Business Enterprises*, Report no. 372, The Committee, Canberra, 1999; and Joint Committee of Public Accounts, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Report no. 374, The Committee, Canberra, 2000.
65. See *Ombudsman Act 1976* (Cwlth) ss. 15(2)(d), 17, 19. The Australian Law Reform Commission has also been engaged in periodic review of many aspects of public law.
66. As to the failure to pass the Administrative Decisions (Judicial Review) Amendment Bill 1987, see Senate, *Debates*, 20 April 1988, vol. 126 at pp. 1715–1726, and the report on the Bill by the Senate Standing Committee on Legal and Constitutional Affairs, *Administrative Decisions (Judicial Review) Amendment Bill 1987*, Commonwealth Government Printer, Canberra, 1987 (Parliamentary Paper no. 212 of 1987). As to the Migration Legislation Amendment (Judicial Review) Bill 1998, see n. 100 below. As to the Administrative Decisions (Effect of International Instruments) Bill 1999, see nn. 129–131 below. The administrative law reforms that have been stalled in the Parliament also send an ambivalent message—see, e.g. the discussion of the Legislative Instruments Bill, n. 119 below.
67. See the references in n. 28 above.
68. Cases that spearheaded the change included *Finch v Goldstein* (1981) 36 ALR 287 and *Ansell v Wells* (1982) 43 ALD 41. A survey of Commonwealth officers was critical of the changes: see Public Service Commission, *People Management and Administrative Law*, State of the Service Paper no. 3, AGPS, Canberra, 1994. The legislative response to counteract the judicial developments was principally in the *Public Service Legislation (Streamlining) Act 1986* (Cwlth), and the *Public Service Act 1999* (Cwlth): see *Towards a Best Practice Australian Public Service*, Discussion Paper issued by the Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, Department of Industrial Relations, Canberra, 1996.

69. As to broadcasting regulation, see the *Broadcasting Services Act 1992* (Cwlth); House of Representatives Standing Committee on Transport, Communications and Infrastructure, *Role and Functions of the Australian Broadcasting Tribunal*, The Committee, Canberra, 1988 (Parliamentary Paper no. 263 of 1988); and L. Grey, 'The Impact of Administrative Law in Communications Regulation' in J. McMillan, ed., *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law, Canberra, 1992, p. 232; cf Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Stage One*, Report no. 26, Government Printer, Canberra, 1986. As to heritage protection: see the Aboriginal and Torres Strait Islander Heritage Bill 1998 (Cwlth); the Second Reading Speech on the Bill, House of Representatives, *Debates*, 2 April 1998, vol. 220 at pp. 2416–2419; and the discussion of *Norvill v Chapman* in the text to n. 212 below.
70. ADJR Act s. 13; AAT Act s. 28. See also *Acts Interpretation Act 1901* (Cwlth) s. 25D.
71. *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447 (NSW CA). See also M. D. Kirby, 'Accountability and the Right to Reasons' in M. Taggart, ed., *Judicial Review of Administrative Action in the 1980s*, Oxford University Press, Oxford, 1986, p. 36.
72. (1986) 159 CLR 656.
73. e.g. *Yung v Adams* (1997) 150 ALR 436, affirmed (1989) 51 ALD 584.
74. See the debate summarised in Aronson and Dyer, *op. cit.*, pp. 447–448; and P. P. Craig, 'The Common Law, Reasons and Administrative Justice', *Cambridge Law Journal*, vol. 53, 1994, p. 282.
75. The developments are examined in J. McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, no. 22, 1999, pp. 1–25. The controversy is also reflected in conflicting Full Federal Court decisions, examined in *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 845.
76. See Commonwealth Administrative Review Committee, *op. cit.*, at para 266; and R. J. Ellicott et al, *op. cit.*, pp. 34–37. A reference to the parliamentary debates is given in n. 26 above.
77. See the discussion in Aronson and Dyer, *op. cit.*, pp. 291–292; T. McEvoy, 'New Flesh on Old Bones: Recent Developments in Jurisprudence Relating to Wednesbury Unreasonableness', *Australian Journal of Administrative Law*, vol. 3 no. 1, November 1995, pp. 36–53; S. Kneebone, 'A Commentary on Proportionality: Protection of Common Law Rights or "Chipping Away at the Diceyan Edifice"' in L. Pearson, ed., *Administrative Law: Setting the Pace or Being Left Behind?*, Australian Institute of Administrative Law, Canberra, 1996, p. 168; and B. Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law', *Public Law Review*, vol. 7 no. 4, December 1996, pp. 212–222.
78. J. J. Doyle, 'Common Law Rights and Democratic Rights' in P. D. Finn, ed., *Essays on Law and Government*, vol. 1, Law Book Company, Sydney, 1995, pp. 144–167, at p. 154. See also A. M. Gleeson, 'Legal Oil and Political Vinegar', *Public Law Review*, vol. 10 no. 2, June 1999, pp. 108–113, at p. 112: 'The modern preoccupation with the subject of human rights ... has given a new dimension to the judicial role, and one which is

- guaranteed to give rise to trouble between the judiciary, and Parliaments and governments which represent, and must be responsive to, the wishes of the majority'.
79. D. Dyzenhaus, 'Reuniting the Brain: The Democratic Basis of Judicial Review', *Public Law Review*, vol. 9 no. 2, June 1998, pp. 98–110. See also the references in n. 63 above.
 80. Sir Anthony Mason, 'Future Directions in Australian Law', *Monash Law Review*, vol. 13 no. 3, September 1987, pp. 149–163. See also the quote from Kirby J in text to n. 133 below.
 81. Sir Gerard Brennan, 'Courts, Democracy and the Law', *Australian Law Journal*, vol. 65 no. 1, January 1991, pp. 32–42, at p. 40.
 82. Cf J. Doyle, 'Implications of Judicial Law-Making' in C. Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, Sydney, 1996, pp. 84–97, at p. 96: 'in our present pluralistic and multicultural society I have some doubts about the ability of judges to identify the relatively permanent values of the whole community'.
 83. See, e.g. the essay collection, 'Evaluating Senate Committees', *Legislative Studies*, vol. 5, no. 2, 1991. See also Senator B. Cooney, 'The Relationship of Administrative Law to Parliament and Ministerial Decision Making', *Legislative Studies*, vol. 9 no. 1, 1994, pp. 65–70, at pp. 68–70: 'The legislature is more capable than some may think in going about its given task. ... Appropriate judicial scrutiny of executive action is necessary, but it should not be exercised on the basis that parliament is now irrelevant to the upholding of peoples' rights and liberties.'
 84. Hofstadter, 'The Founding Fathers: An Age of Realism', 1979, as quoted in S. Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review', *Federal Law Review*, vol. 17 no. 3, 1987, pp. 162–198, at p. 166.
 85. *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395–396.
 86. P. B. Maxwell, *The Interpretation of Statutes*, J. Anwyl Theobald, ed., 4th ed., Sweet and Maxwell, London, 1905, p. 121 as adopted in *Potter v Minihan* (1908) 7 CLR 277 at 304 per O'Connor J. For contemporary endorsement, see *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, and *Coco v R* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
 87. *Coco v R* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
 88. *ibid.*, at pp. 437–438.
 89. Cf, e.g. the work of the two legislative scrutiny committees of the Senate, the Standing Committee for the Scrutiny of Bills, and the Standing Committee on Regulations and Ordinances: generally, see D. Pearce and S. Argument, *Delegated Legislation in Australia*, 2nd ed., Butterworths, Sydney, 1999, chapter 2; K. Patterson, 'The Role of the Senate Standing Committee on Regulations and Ordinances' in S. Kneebone, ed., *Administrative Law and the Rule of Law: Still Part of the Same Package?* (hereafter 'Package'), Australian Institute of Administrative Law, Canberra, 1999, p. 31; and S. Argument, 'Parliamentary Scrutiny of Quasi-Legislation', *Papers on Parliament*, no. 15, 1992.
 90. e.g. *Russell v Wilson* (1923) 33 CLR 538; and *Gollan v Nugent* (1988) 166 CLR 18.

91. *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 399. See Aronson and Dyer, *op. cit.*, pp. 77–80, and chapter 18.
92. Aronson and Dyer, *op. cit.*, at pp. 675 and 78 respectively. The reliance placed on this text is acknowledged.
93. e.g. *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313; and *Belmore Property Co (Pty) Ltd v Allen* (1950) 80 CLR 191.
94. e.g. *Wingecarribee Shire Council v Minister for Local Government* [1975] 2 NSWLR 779.
95. e.g. *Houssein v Under Secretary of Industrial Relations* (1982) 148 CLR 88.
96. e.g. *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; and *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415.
97. Commonwealth Court of Conciliation and Arbitration, *Report on Proceedings etc.*, Government Printer, Melbourne, 1914 (Parliamentary Papers, vol. 2 of 1914), p. 14, as quoted in Aronson and Dyer, *op. cit.*, p. 685.
98. House of Representatives, *Debates*, 13 November 1914, vol. LXXV at pp. 651 and 653, as quoted in Aronson and Dyer, *ibid.*
99. The history is colourfully summarised in Aronson and Dyer, *ibid.*, pp. 685–688.
100. Migration Legislation Amendment (Judicial Review) Bill 1998, which was the subject of a report of the same name in 1999 by the Senate Legal and Constitutional Committee. See also P. Ruddock, 'Narrowing of Judicial Review in the Migration Context', *AIAL Forum*, no. 13, 1997, pp. 13–21; R. Creyke, 'Restricting Judicial Review', *AIAL Forum*, no. 15, 1997, pp. 22–32; and M. Crock, 'Privative Clauses and the Rule of Law: The Place of Judicial Review within the Construct of Australian Democracy' in S. Kneebone, *Package*, *op. cit.*, p. 57.
101. See *Immigration Restriction Act 1901* (Cwlth) ss. 2 and 15, and *Customs Act 1901* (Cwlth) s. 4 (definition of 'Officer'). See too the *Migration Act 1958* (Cwlth), which in 1958 conferred many powers upon an 'officer of the Department of Immigration', s. 5.
102. *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 at 563.
103. See *Acts Interpretation Act 1901* ss. 18C, 19, 19A, 19B, 19BA, 19BAA, 19BB, 19BC, 19C. The enlarged code also deals with changes both in departmental names and in the Administrative Arrangements Order. For an example of a case which caused an expansion of the section, see *Foster v Attorney-General* (1998) 158 ALR 394. This decision (later reversed by the Full Court: (1999) 161 ALR 232) led to the addition of s. 18C, by the *Acts Interpretation Amendment Act 1998* (Cwlth).
104. See also the cases holding that the obligation of a minister (as decision-maker) to consider all relevant matters cannot be discharged by those matters being considered by a subordinate on the minister's behalf—e.g. *Norvill v Chapman*, discussed in text to n. 212 below; and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38.
105. (1997) 147 ALR 673.

106. *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 95 per Brennan J (AAT).
107. See *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177; and *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54. The issue also arose but was not resolved in *Bread Manufacturers of NSW v Evans* (1994) 180 CLR 404. See P. O'Connor, 'Knowing when to say "Yes": Ministerial Control of Discretions Vested in Officials', *Australian Journal of Administrative Law*, vol. 5 no. 3, May 1998, pp. 168–182, at p. 169.
108. *Ansett* case, *ibid.*, at 61–62 per Barwick CJ, and 87 per Murphy J; *Ipec* case, *ibid.*, at 204 per Windeyer J.
109. *Ansett* case, *ibid.*, at 82 per Mason J; *Ipec* case, *ibid.*, at 188 per Kitto J, and 201 per Menzies J. Cf, in the *Ansett* case, Gibbs J at 62, and Aickin J at 115.
110. See R. Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective', *Public Law Review*, vol. 6 no. 1, March 1995, pp. 7–23, at p. 7.
111. Common statutory formulas are discussed in M. Aronson, 'Ministerial Directions: The Battle of the Prerogatives', *Public Law Review*, vol. 6 no. 1, March 1995, pp. 77–95, at p. 77.
112. *Commonwealth Authorities and Companies Act 1997* (Cwlth) ss. 28 and 43.
113. The cases are discussed more fully in J. McMillan, 'Review of Government Policy by Administrative Tribunals', *Law and Policy Papers*, no. 9, 1998, pp. 48–52.
114. (1996) 139 ALR 577.
115. (1990) 94 ALR 207.
116. e.g. *Secretary, Department of Primary Industries and Energy v Collins* (1992) 106 ALR 351; and *Collins v Repatriation Commission* (1994) 33 ALD 557.
117. (1993) 114 ALR 340.
118. *ibid.*, at 346 per Neaves, Burchett and O'Loughlin JJ.
119. The Legislative Instruments Bill 1994 was the subject of reports by the Senate Standing Committee on Regulations and Ordinances, Report no. 99, The Committee, Canberra, October 1994, and the House of Representatives Standing Committee on Legal and Constitutional Affairs, The Committee, Canberra, February 1995. A Bill by the same name was reintroduced in 1996 and 1998. See also S. Argument, 'The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill' in S. Kneebone, Package, op. cit., p. 253; and D. Pearce and S. Argument, op. cit., para 1.18.
120. e.g. *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; and *Re East; Ex parte Quoc Phu Nguyen* (1998) 159 ALR 108 at 113. Generally, see R. Piotrowicz and S. Kaye, *Human Rights in International and Australian Law*, Butterworths, Sydney, 2000.

121. See J. McMillan and N. Williams, 'Administrative Law and Human Rights' in D. Kinley, ed., *Human Rights in Australian Law*, Federation Press, Sydney, 1998, pp. 80–82; and M. Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"', *University of Western Australia Law Review*, vol. 25 no. 1, July 1995, pp. 30–48.
122. (1992) 175 CLR 1.
123. (1992) 175 CLR 1 at 42 per Brennan J; Mason CJ and McHugh J concurring.
124. (1995) 183 CLR 273.
125. Text to n. 55 above.
126. For discussion generally of the case, see Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law', *Public Law Review*, vol. 7 no. 1, March 1996, pp. 20–32; K. Walker, 'Treaties and the Internationalisation of Australian Law' in C. Saunders, op. cit., p. 204; G. Evans, 'The Impact of Internationalisation on Australian Law: A Commentary' in C. Saunders, op. cit., p. 236; M. Allars, op. cit.; R. Piotrowicz, 'Unincorporated Treaties in Australian Law', *Public Law*, Summer 1996, pp.190–195; H. Burmester, 'The *Teoh* Decision—A Perspective from the Government Service', *AIAL Forum*, no. 5, June 1995, pp. 6–9; J. McMillan, '*Teoh*, and Invalidity in Administrative Law', *AIAL Forum*, no. 5, June 1995, pp. 10–16; N. Williams, 'Legitimate Expectations—Beyond *Teoh*' in L. Pearson, op. cit., p. 401; S. Sheridan, 'Legitimate Expectation: Where does the Law now Lie?' in J. McMillan, *Administrative Law under the Coalition Government*, Australian Institute of Administrative Law, Canberra, 1997, p. 218; and J. McMillan and N. Williams, op. cit., pp. 82–88.
127. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 153 ALR 490 at 517–518 per McHugh, Gummow, Kirby and Hayne JJ.
128. e.g. *Vaitaki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608; *Browne v Minister for Immigration and Ethnic Affairs* (1998) 52 ALD 550; *Tien v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 405; *Lam v Minister for Immigration and Multicultural Affairs* [1998] FCA 154; and *Hui v Minister for Immigration and Multicultural Affairs* [1999] FCA 985.
129. Administrative Decisions (Effect of International Instruments) Bill 1999, clause 5. The 1997 Bill is identical; the 1995 Bill contained different wording but of the same intended effect.
130. Senate Legal and Constitutional Legislation Committee, *Report on the Administrative Decisions (Effect of International Instruments) Bill 1997*, The Committee, Canberra, 1997, para 5.3.
131. Similar legislation has been enacted by the South Australian Parliament—see *Administrative Decisions (Effect of International Instruments) Act 1996* (SA).
132. See Senate, *Debates*, 2 May 1996, vol. 177, at p. 217. The treaty process has been the subject of a recent Government review: see Department of Foreign Affairs and Trade, *Review of the Treaty Making Process*, Commonwealth of Australia, 1999. See also A. Twomey, op. cit..

133. M. Kirby, 'The Role of International Standards in Australian Courts' in P. Alston and M. Chiam, *op. cit.*, p. 89.
134. Senate Standing Order 23, specifying the terms of reference for the Senate Standing Committee on Regulations and Ordinances. See other references in n. 89 above.
135. See, e.g. the Privileges Resolutions establishing a code of procedure for protection of witnesses adopted by the Senate on 25 February 1988: Senate, *Debates*, vol. 125, at pp. 620–642—republished in J. R. Odgers, *Odgers' Australian Senate practice*, H. Evans, ed., 9th ed., Department of Senate, Canberra, 1999, at Appendix 2. Cf C. Stuart, 'Parliamentary Privileges Committees: Natural Justice on Trial', *Legislative Studies* vol. 4 no. 2, 1989, pp. 9–16.
136. *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157. See F. C. Green, *Servant of the House*, Heinemann, Melbourne, 1969, pp. 155–163; and E. Campbell and H. Whitmore, *Freedom in Australia*, Sydney University Press, Sydney, 1973, pp. 318–323.
137. L. F. Crisp, *Australian National Government*, Longman, Melbourne, 1965, p. 258.
138. D. Solomon, *Inside the Australian Parliament*, George Allen and Unwin, Sydney, 1978, p. 124.
139. G. M. Bryant, 'The Work of a Federal Member' in H. Mayer, *Australian Politics: A Reader*, 2nd ed., Cheshire, Melbourne, 1967, p. 409.
140. House of Representatives, *Debates*, 14 October 1971, vol. 74, p. 2355.
141. e.g. L. F. Crisp, *op. cit.*, p. 258; and D. Solomon, *op. cit.*, p. 124.
142. Commonwealth Administrative Review Committee, *op. cit.*, para 19.
143. See the comparative figures for Ombudsman in different countries in Commonwealth Ombudsman, *Annual Report 1987–88*, p. 32.
144. The achievements of the Ombudsman are chronicled also in three publications: a collection of conference papers, 'The Ombudsman Through the Looking Glass 1977–1985', *Canberra Bulletin of Public Administration*, vol. 12 no. 4, 1985; Commonwealth Ombudsman, *Twenty Years of the Commonwealth Ombudsman 1977–1997* (hereafter 'Twenty Years'), Commonwealth Ombudsman's Office, Canberra, 1997, and Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, AGPS, Canberra, 1991, chapter 5 entitled 'Ombudsman's Performance'.
145. Senate Standing Committee on Finance and Public Administration, *op. cit.*, at para 9.1.
146. Foreword to Commonwealth Ombudsman, *Twenty Years*, *op. cit.*.
147. D. Pearce, 'Who Needs an Ombudsman', in Commonwealth Ombudsman, *Twenty Years*, *op. cit.*, at p. 50. See also D. Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in R. Creyke and J. McMillan, *Kerr Vision*, *op. cit.*, p. 54; and Commonwealth Ombudsman, *Annual Report 1989–90*, p. 15.

148. J. Richardson, 'The First Commonwealth Ombudsman—As it all began' in *Commonwealth Ombudsman, Twenty Years*, op. cit., pp. 42–43.
149. Commonwealth Ombudsman, *Annual Report 1985–86*, p. 4 ('it has been this office's experience that, with some exceptions, members of the Parliament do not have a very positive perception of the office of Ombudsman'); and *Annual Report 1986–87*, pp. 24–27.
150. A. Cameron, 'Future Directions in Administrative Law: The Ombudsman' in J. McMillan, ed., *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law, Canberra, 1992, p. 211: 'I predict that future scholars may opine that the Senate Committee missed an opportunity to redefine the role and take it forward'.
151. P. Smith, 'Twenty Years of the Ombudsman' in *Commonwealth Ombudsman, Twenty Years*, op. cit., pp. 2–3.
152. G. S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne University Press, Melbourne, 1989, p. 255.
153. See L. F. Crisp, op. cit., p. 259.
154. *Ombudsman Act 1976* (Cwlth) s. 17.
155. The list of the reports up until 1991 is given in Appendix V to Senate Standing Committee on Finance and Public Administration, op. cit.. For a longer list of reports, submissions and public statements, see *Commonwealth Ombudsman, Twenty Years*, op. cit., pp. 26–32. The two reports in 1985 and 1986 were referred to the Senate Standing Committee on Constitutional and Legal Affairs, which made a report supporting the Ombudsman, but neither the Government nor the Parliament took the issue further: see Senate Standing Committee on Finance and Public Administration, op. cit., at para 3.7.
156. J. Richardson, op. cit., p. 43. See also *Commonwealth Ombudsman, Annual Report 1990–91*, p. xviii.
157. Senate Standing Committee on Finance and Public Administration, op. cit., at para 3.27. The Ombudsman at the time signified acceptance of the Committee's reasoning: A. Cameron, op. cit., p. 203.
158. Senate Standing Committee on Finance and Public Administration, op. cit., at para 3.29.
159. *Ombudsman Act 1976* (Cwlth) s. 19.
160. Special reports are covered by a standing reference to the Senate Standing Committee on Legal and Constitutional Affairs. The annual and occasional reports are referred to the Senate Standing Committee on Finance and Public Administration and the House of Representatives Standing Committee on Banking, Finance and Public Administration.
161. Senate Standing Committee on Finance and Public Administration, op. cit., at para 8.28.
162. P. Smith, op. cit., p. 3. For similar comments see *Commonwealth Ombudsman, Annual Report 1988–89*, pp. 15–16; and *Annual Report 1991–92*, p. 7. Recently, too, Senate committees have referred matters to the Ombudsman for investigation.
163. e.g. *Commonwealth Ombudsman, Annual Reports: 1984–85*, p. 5–6; *1985–86*, p. 3; *1986–87*, pp. 1–2, and 16–18; *1987–88*, pp. 23–24; *1989–90*, pp. 11–12; *1993–94*, pp. 10–12;

- 1994–95, pp. 28–31; and 1996–97, pp. 43–51. See also A. G. Kerr, 'New Frontiers...Recommending Pecuniary Recompense: Ex Gratia and Compensation Based on Fairness', *Canberra Bulletin of Public Administration*, vol. 12 no. 4, 1985, pp. 260–264.
164. e.g. Commonwealth Ombudsman, *Annual Reports: 1984–85*, p. 3–4; 1987–88, pp. 31–33; 1988–89, pp. 3 and 20–21; 1989–90, pp. 15–16; 1990–91, pp. 115–116; and 1995–96, pp. 7–8, and 45–47. See also W. J. Blick and C. T. Hunt, 'An Unequal Struggle: Meeting Objectives with Reduced Resources', *Canberra Bulletin of Public Administration*, vol. 12, no. 4, 1985, pp. 242–248.
165. Commonwealth Ombudsman, *Annual Report 1996–97*, 'Resources', chapter 10.
166. Senate Standing Committee on Finance and Public Administration, op. cit., at paras 6.27 and 6.19.
167. See *Parliamentary Commissioner Act 1971* (WA), and *Parliamentary Commissioner Act 1974* (Qld). The Queensland Act proscribes executive direction to the Ombudsman, s. 11A; and the budgetary estimates for the Queensland office go to a parliamentary committee: see D. Pearce, 'Who Needs an Ombudsman', in Commonwealth Ombudsman, *Twenty Years*, op. cit., pp. 69–70.
168. D. Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in R. Creyke and J. McMillan, *Kerr Vision*, op. cit., pp. 65–72. See also summary of submissions in Senate Standing Committee on Finance and Public Administration, op. cit., paras 8.1–8.15.
169. D. Pearce, *ibid.*, p. 72.
170. Senate Standing Committee on Finance and Public Administration, op. cit., paras 8.15 and 8.19; the Report did, however, express support for a more active role by existing parliamentary committees: paras 8.28 and 8.32.
171. Commonwealth Ombudsman, *Annual Report 1995–96*, p. 7.
172. This approach was endorsed by the Joint Select Committee on Parliamentary Privilege, *Final Report*, Commonwealth Government Printer, Canberra, 1984 (Parliamentary Paper no. 219 of 1984), pp. 153–154.
173. *Duncan v Cammell Laird and Co* [1942] AC 624 (House of Lords); *Lanyon Pty Ltd v Commonwealth* (1974) 3 ALR 58 at 60.
174. See Odgers, 9th ed., op. cit., pp. 465–481; and G.S. Reid and M. Forrest, op. cit., pp. 276–280. See also, E. Campbell, 'Parliamentary Inquiries and Executive Privilege', *Legislative Studies*, vol. 1 no. 1, 1986, pp. 10–19; and G. Lindell, 'Parliamentary Inquiries and Government Witnesses', *Melbourne University Law Review*, vol. 20 no. 2, 1995, pp. 383–422.
175. Senate, *Debates*, 16 July 1975, vol. 64, pp. 2762–2763.
176. Senate Standing Committee of Privileges, *Report on Matters Referred by Senate Resolution of 17 July 1975*, Commonwealth Government Printer, Canberra, 7 October 1975 (Parliamentary Paper no. 215 of 1975).

177. Joint Committee on the Parliamentary Committee System, *A New Parliamentary Committee System*, Commonwealth Government Printer, Canberra, 1977 (Parliamentary Paper no. 128 of 1976), paras 299–301.
178. The Guidelines, which were updated in 1984, are reprinted in Senate, *Debates*, 30 November 1989, vol. 137, pp. 3693–3702.
179. See the Order of the Court: (1978) 142 CLR 1 at 110–111.
180. The prosecutions, which were commenced privately, were withdrawn in February 1979. Earlier, the Attorney-General, Mr Ellicott, QC, had resigned after objecting that Cabinet had attempted improperly to place pressure upon him to take over and terminate the proceedings: House of Representatives, *Debates*, 6 September 1977, vol. 106, pp. 721–732.
181. (1984) 154 CLR 404.
182. (1993) 176 CLR 604.
183. Odgers, 9th ed., op. cit., pp. 465–466.
184. *House of Representatives practice*, L. M. Barlin, ed., 3rd ed., AGPS, Canberra, 1997, p. 648—but cf at p. 580.
185. G.S. Reid and M. Forrest, op. cit., p. 287.
186. (1998) 195 CLR 424. See also C. Mantziaris, 'Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege', Department of the Parliamentary Library, *Research Paper no. 12*, 1999–2000.
187. (1995) 195 CLR 424 at 455. The NSW Court of Appeal had earlier upheld the allegation of trespass, (1996) 40 NSWLR 650, and there was no appeal against that finding.
188. (1998) 195 CLR 424 at 452 per Gaudron, Gummow and Hayne JJ, see also McHugh J at 476–477; Kirby J at 501–502; cf Callinan J at 510–511.
189. (1999) 46 NSWLR 563.
190. Between the date of hearing and the Court's decision, an election was held in NSW, thus terminating the Minister's suspension from the House: see (1999) 46 NSWLR 563 at 579. After the election the Government had a majority in both Houses.
191. (1999) 46 NSWLR 563 at 574 per Spigelman CJ, and at 597 per Meagher JA; Priestley JA (dissenting), at 594, did not place any qualification on the Council's power to overrule a claim of privilege.
192. *Egan v Willis* (1998) 195 CLR 424 at 447 per Gaudron, Gummow and Hayne JJ; at 485 per Kirby J; and at 513 per Callinan J; cf McHugh J at 467.
193. (1998) 195 CLR 424 at 438, 444–446 per Gaudron, Gummow and Hayne JJ; and at 490–494 per Kirby J.
194. Cf (1998) 195 CLR 424 at 455 per Gaudron, Gummow and Hayne JJ; at 478–479 per McHugh J; at 504–505 per Kirby J, and at 514 per Callinan J.
195. *Parliamentary Privileges Act 1987* (Cwlth) ss. 3(3), 7, 9.

196. This issue was raised but not explored by Spigelman CJ: (1999) 46 NSWLR 563 at 567.
197. See Odgers, 9th ed., op. cit., pp. 475–480; and *Journals of the Senate*, 25 November 1999, p. 2077.
198. The Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*, 49th Report, The Committee, Canberra, September 1994 (Parliamentary Paper no. 171 of 1994). See also a statement by the President, Senate, *Debates*, 22 November 1978, vol. 79, p. 2358; and Joint Select Committee on Parliamentary Privilege, *Final Report*, Commonwealth Government Printer, Canberra, 1984 (Parliamentary Paper no. 219 of 1984), p. 154. Cf The Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 Casselden Place Reference*, 52nd Report, The Committee, Canberra, March 1995 (Parliamentary Paper no. 21 of 1995) proposing the appointment of a neutral external arbiter to resolve disagreements over the commercial confidentiality of documents.
199. e.g. Senator P. Walsh, 'Equities and Inequities in Administrative Law', *Canberra Bulletin of Public Administration*, no. 58, 1989, p. 29; E. Willheim, 'Ten Years of the ADJR Act: From a Government Perspective', *Federal Law Review*, vol. 20 no. 1, pp. 111–127, at p. 117; and P. Ruddock, 'The Broad Implications for Administrative Law under the Coalition Government' in J. McMillan, ed., *Administrative Law under the Coalition Government*, Australian Institute of Administrative Law, Canberra, 1997, p. 9.
200. (1987) 75 ALR 218.
201. (1986) 70 ALR 523. Earlier the judge, in a decision not disturbed on appeal by the Full Federal Court or the High Court, had issued an interlocutory order requiring the Commonwealth to request the World Heritage Committee to defer consideration of the Commonwealth's nomination: *Cohen v Peko-Wallsend Ltd* (1986) 61 ALJR 57.
202. (1986) 70 ALR 523 at 227 per Sheppard J; see also Bowen CJ at 225: 'The matter appears to my mind to lie in the political arena'.
203. (1986) 70 ALR 523 at 249 per Wilcox J, with whom Bowen CJ and Sheppard J agreed.
204. (1987) 163 CLR 378. See also the views of Murphy J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 374, rejecting the notion that decisions of the Governor could be impugned for breach of natural justice.
205. (1987) 163 CLR 378 at 402. See also Brennan J at 411: 'The public interest in this context is a matter of political responsibility'.
206. (1987) 163 CLR 378 at 387.
207. (1987) 163 CLR 378 at 419–420.
208. See in particular *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; and *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.
209. See also ss 48B, 72, 91F, 91L, 345, 391 and 454, discussed in M. Crock, *Immigration Law*, op. cit., pp. 274–276.

210. *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 137 ALR 103; and *Re Bedlington; Ex parte Chong* (1997) 149 ALR 266.
211. *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322; and *Bedlington v Chong* (1998) 157 ALR 436.
212. (1995) 133 ALR 226.
213. See references to the parliamentary debates in n. 216 below.
214. See also the similar finding in *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 149 ALR 78 at 98–100.
215. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) s. 15.
216. See House of Representatives, *Debates*, 9 November 1994, vol. 197, pp. 2859–2880; and Senate, *Debates*, 11 October 1994, vol. 167, p. 1444–1452, and 12 October 1994, vol. 167, pp. 1184–1507. It should, however, be noted that in *Norvill v Chapman* the Court held as well that the process leading up to the Minister's decision occurred in breach of natural justice.
217. Further, see J. McMillan, 'The Impact of Judicial Review on Ministerial Decision-Making', *Canberra Bulletin of Public Administration* no. 66, October 1991, pp. 97–102. For contrasting examples, see *Curragh Coal Sales Co Pty Ltd v Wilcox* (1984) 6 ALN N154; *Re Drake and Minister for Immigration and Ethnic Affairs (no. 2)* (1979) 2 ALD 634; and *Sita Queensland Pty Ltd v Beattie*, Queensland Supreme Court, 10 September 1999.
218. [1999] FCA 951 (15 July 1999).
219. (1994) 127 ALR 223 at 245–246.
220. (1990) 169 CLR 648.

Bibliography

- Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Stage One*, Report no. 26, Government Printer, Canberra, 1986.
- Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, ARC Report no. 39, AGPS, Canberra, 1995.
- Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper, Appendix D, ARC, Canberra, 1997.
- M. Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government', *Sydney Law Review*, vol. 17 no. 2, June 1995, pp. 204–241.
- P. Alston and M. Chiam, eds, *Treaty-Making and Australia*, Federation Press, Sydney, 1995.
- S. Argument, 'Parliamentary Scrutiny of Quasi-Legislation', *Papers on Parliament*, no. 15, 1992.
- S. Argument, 'The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill' in S. Kneebone, ed., *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Australian Institute of Administrative Law, Canberra, 1999.
- M. Aronson, 'Ministerial Directions: The Battle of the Prerogatives', *Public Law Review*, vol. 6 no. 1, March 1995, pp. 77–95.
- M. Aronson and B. Dyer, *Judicial Review of Administrative Action*, 2nd ed., Law Book Company, Sydney, 2000.
- Australian Law Reform Commission, *Freedom of Information*, Issues Paper 12, ALRC, Sydney, 1994.
- P. Bayne, 'The Common Law Basis of Judicial Review', *Australian Law Journal*, vol. 67 no. 10, October 1993, pp. 781–786.
- W. J. Blick and C. T. Hunt, 'An Unequal Struggle: Meeting Objectives with Reduced Resources', *Canberra Bulletin of Public Administration*, vol. 12 no. 4, 1985, pp. 242–248.
- Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in M. Taggart, ed., *Judicial Review of Administrative Action in the 1980s*, Oxford University Press, Oxford 1986.
- Justice Brennan, 'Reflections', *Canberra Bulletin of Public Administration*, no. 58, April 1989, p. 32.
- Sir Gerard Brennan, 'Courts, Democracy and the Law', *Australian Law Journal*, vol. 65 no. 1, January 1991, pp. 32–42.
- G. M. Bryant, 'The Work of a Federal Member' in H. Mayer, *Australian Politics: A Reader*, 2nd ed., Cheshire, Melbourne, 1967.
- H. Burmester, 'The *Teoh* Decision—A Perspective from the Government Service', *AIAL Forum*, no. 5, June 1995, pp. 6–9.
- A. Cameron, 'Future Directions in Administrative Law: The Ombudsman' in J. McMillan, ed., *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law, Canberra, 1992.

- E. Campbell, 'Parliamentary Inquiries and Executive Privilege', *Legislative Studies*, vol. 1 no. 1, 1986, pp. 10–19.
- E. Campbell and H. Whitmore, *Freedom in Australia*, Sydney University Press, Sydney, 1973.
- H. Charlesworth, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights', *Melbourne University Law Review*, vol. 18 no. 2, 1991, pp. 428–434.
- Committee on Administrative Discretions, *Interim Report*, Government Printer of Australia, Canberra, 1973 (Parliamentary Paper no. 53 of 1973).
- Committee on Administrative Discretions, *Final Report*, Government Printer of Australia, Canberra, 1973 (Parliamentary Paper no. 316 of 1973).
- Commonwealth Administrative Review Committee, *Report*, Commonwealth Government Printing Office, Canberra, 1971 (Parliamentary Paper no. 144 of 1971).
- Commonwealth Ombudsman, *Annual Reports*.
- Commonwealth Ombudsman, *A Good Practice Guide for Effective Complaint Handling*, Commonwealth Ombudsman's Office, Canberra, 1997.
- Commonwealth Ombudsman, *Twenty Years of the Commonwealth Ombudsman 1977–1997*, Commonwealth Ombudsman's Office, Canberra, 1997.
- Constitutional Commission, *Final Report*, vol. 2, AGPS, Canberra, 1988.
- Senator B. Cooney, 'The Relationship of Administrative Law to Parliament and Ministerial Decision Making', *Legislative Studies*, vol. 9 no. 1, 1994, pp. 65–70.
- P. P. Craig, 'The Common Law, Reasons and Administrative Justice', *Cambridge Law Journal*, vol. 53, 1994, p. 282.
- R. Creyke, 'Restricting Judicial Review', *AIAL Forum*, no. 15, 1997, pp. 22–32.
- R. Creyke, 'The Administrative Appeals Tribunal: What's Happening?' Department of the Parliamentary Library, *Current Issues Brief*, no. 8, 1999–2000.
- R. Creyke and J. McMillan, eds, *The Making of Commonwealth Administrative Law*, Australian National University Centre for International and Public Law, Canberra, 1996.
- R. Creyke and J. McMillan, eds, *The Kerr Vision of Australian Administrative Law—At the Twenty-Five Year Mark*, Australian National University Centre for International and Public Law, Canberra, 1998.
- L. F. Crisp, *Australian National Government*, Longman, Melbourne, 1965.
- M. Crock, *Immigration and Refugee Law in Australia*, Federation Press, Sydney, 1998.
- M. Crock, 'Privative Clauses and the Rule of Law: The Place of Judicial Review within the Construct of Australian Democracy' in S. Kneebone, ed., *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Australian Institute of Administrative Law, Canberra, 1999.
- Department of Finance and Administration, *Client Service Charter Principles*, DOFA, Canberra, 2000.

- Department of Foreign Affairs and Trade, *Review of the Treaty Making Process*, Commonwealth of Australia, 1999.
- J. J. Doyle, 'Common Law Rights and Democratic Rights' in P. D. Finn, ed., *Essays on Law and Government*, vol. 1, Law Book Company, Sydney, 1995, pp. 144–167.
- J. Doyle, 'Implications of Judicial Law-Making' in C. Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, Sydney, 1996, pp. 84–97.
- D. Dyzenhaus, 'Reuniting the Brain: The Democratic Basis of Judicial Review', *Public Law Review*, vol. 9 no. 2, June 1998, pp. 98–110.
- R. J. Ellicott et al, *Prerogative Writ Procedures: Report of Committee of Review*, Government Printer of Australia, Canberra, 1973 (Parliamentary Paper no. 56 of 1973).
- 'Evaluating Senate Committees', *Legislative Studies*, vol. 5 no. 2, 1991.
- G. Evans, 'The Impact of Internationalisation on Australian Law: A Commentary' in C. Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, Sydney, 1996.
- D. Feldman, 'Democracy, the Rule of Law and Judicial Review', *Federal Law Review*, vol. 19 no. 1, 1990, pp. 1–20.
- C. Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review', *Cambridge Law Journal*, vol. 55, 1996, p.122.
- S. Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review', *Federal Law Review*, vol. 17 no. 3, 1987, pp. 162–198.
- A. M. Gleeson, 'Legal Oil and Political Vinegar', *Public Law Review*, vol. 10 no. 2, June 1999, pp. 108–113.
- F. C. Green, *Servant of the House*, Heinemann, Melbourne, 1969.
- L. Grey, 'The Impact of Administrative Law in Communications Regulation' in J. McMillan, ed., *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law, Canberra, 1992.
- J. Griffiths, 'Legislative Reform of Judicial Review of Commonwealth Administrative Action', *Federal Law Review*, vol. 9 no. 1, 1978, pp. 42–70.
- House of Representatives practice*, L. M. Barlin, ed., 3rd ed., AGPS, Canberra, 1997.
- House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill 1994*, The Committee, Canberra, February 1995.
- House of Representatives Standing Committee on Legal and Constitutional Affairs, *In Confidence: The Protection of Confidential and Personal Information*, The Committee, Canberra, 1995.
- House of Representatives Standing Committee on Transport, Communications and Infrastructure, *Role and Functions of the Australian Broadcasting Tribunal*, The Committee, Canberra, 1988 (Parliamentary Paper no. 263 of 1988).
- Joint Committee of Public Accounts, *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector*, Report no. 336, AGPS, Canberra, April 1995 (Parliamentary Paper 78 of 1995).

- Joint Committee of Public Accounts, *Corporate Governance and Accountability Arrangements for Commonwealth Government Business Enterprises*, Report no. 372, The Committee, Canberra, 1999.
- Joint Committee of Public Accounts, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Report no. 374, The Committee, Canberra, 2000.
- Joint Committee on the Parliamentary Committee System, *A New Parliamentary Committee System*, Commonwealth Government Printer, Canberra, 1977 (Parliamentary Paper no. 128 of 1976).
- Joint Select Committee on Parliamentary Privilege, *Final Report*, Commonwealth Government Printer, Canberra, 1984 (Parliamentary Paper no. 219 of 1984).
- A. G. Kerr, 'New Frontiers...Recommending Pecuniary Recompense: Ex Gratia and Compensation Based on Fairness', *Canberra Bulletin of Public Administration*, vol. 12 no. 4, 1985, pp. 260–264.
- M. D. Kirby, 'Accountability and the Right to Reasons' in M. Taggart, ed., *Judicial Review of Administrative Action in the 1980s*, Oxford University Press, Oxford, 1986.
- M. Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"', *University of Western Australia Law Review*, vol. 25 no. 1, July 1995, pp. 30–48.
- M. Kirby, 'The Role of International Standards in Australian Courts' in P. Alston and M. Chiam, eds, *Treaty-Making and Australia*, Federation Press, Sydney, 1995.
- S. Kneebone, 'A Commentary on Proportionality: Protection of Common Law Rights or "Chipping Away at the Diceyan Edifice"' in L. Pearson, ed., *Administrative Law: Setting the Pace or Being Left Behind?*, Australian Institute of Administrative Law, Canberra, 1996.
- Law Reform Commission of Canada, *Seventh Annual Report*, Ottawa, 1977–78.
- G. Lindell, 'Parliamentary Inquiries and Government Witnesses', *Melbourne University Law Review*, vol. 20 no. 2, 1995, pp. 383–422.
- T. McEvoy, 'New Flesh on Old Bones: Recent Developments in Jurisprudence Relating to Wednesbury Unreasonableness', *Australian Journal of Administrative Law*, vol. 3 no. 1, November 1995, pp. 36–53.
- J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review*, vol. 8, 1977, pp. 379–434.
- J. McMillan, 'Developments under the ADJR Act—the Grounds of Review', *Federal Law Review*, vol. 20 no. 1, 1991, pp. 50–82.
- J. McMillan, 'The Impact of Judicial Review on Ministerial Decision-Making', *Canberra Bulletin of Public Administration* no. 66, October 1991, pp. 97–102.
- J. McMillan, '*Teoh*, and Invalidity in Administrative Law', *AIAL Forum*, no. 5, June 1995, pp. 10–16.
- J. McMillan, 'Administrative Law under a Coalition Government—Key Issues', in J. McMillan, ed., *Administrative Law under the Coalition Government*, Australian Institute of Administrative Law, Canberra, 1997.
- J. McMillan, 'Review of Government Policy by Administrative Tribunals', *Law and Policy Papers*, no. 9, 1998, pp. 48–52.
- J. McMillan, 'Federal Court v Minister for Immigration', *AIAL Forum*, no. 22, 1999, pp. 1–25.

- J. McMillan and R. Todd, 'The Administrative Tribunals System: Where to from here?' in S. Argument, ed., *Administrative Law: Are the States Overtaking the Commonwealth?*, Australian Institute of Administrative Law, Canberra, 1996.
- J. McMillan and N. Williams, 'Administrative Law and Human Rights' in D. Kinley, ed., *Human Rights in Australian Law*, Federation Press, Sydney, 1998.
- C. Mantziaris, 'Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege', Department of the Parliamentary Library, *Research Paper no. 12*, 1999–2000.
- Sir Anthony Mason, 'Future Directions in Australian Law', *Monash Law Review*, vol. 13 no. 3, September 1987, pp. 149–163.
- Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years', *Federal Law Review*, vol. 18 no. 3, 1989, pp.122-133.
- Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law', *Public Law Review*, vol. 7 no. 1, March 1996, pp. 20–32.
- P. O'Connor, 'Knowing when to say "Yes": Ministerial Control of Discretions Vested in Officials', *Australian Journal of Administrative Law*, vol. 5 no. 3, May 1998, pp. 168–182.
- J. R. Odgers, *Odgers' Australian Senate practice*, H. Evans, ed., 9th ed., Department of Senate, Canberra, 1999.
- B. R. Opeskin and D. R. Rothwell, eds, *International Law and Australian Federalism*, Melbourne University Press, Melbourne, 1997.
- K. Patterson, 'The Role of the Senate Standing Committee on Regulations and Ordinances' in S. Kneebone, ed., *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Australian Institute of Administrative Law, Canberra, 1999.
- D. Pearce, 'Who Needs an Ombudsman', in Commonwealth Ombudsman, *Twenty Years of the Commonwealth Ombudsman 1977–1997*, Commonwealth Ombudsman's Office, Canberra, 1997.
- D. Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in R. Creyke and J. McMillan, eds, *The Kerr Vision of Australian Administrative Law—At the Twenty-Five Year Mark*, Australian National University Centre for International and Public Law, Canberra, 1998.
- D. Pearce and S. Argument, *Delegated Legislation in Australia*, 2nd ed., Butterworths, Sydney, 1999.
- R. Piotrowicz, 'Unincorporated Treaties in Australian Law', *Public Law*, Summer 1996, pp.190–195.
- R. Piotrowicz and S. Kaye, *Human Rights in International and Australian Law*, Butterworths, Sydney, 2000.
- Public Service Commission, *People Management and Administrative Law*, State of the Service Paper no. 3, AGPS, Canberra, 1994.
- G. S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne University Press, Melbourne, 1989.

- J. Richardson, 'The First Commonwealth Ombudsman—As it all began' in Commonwealth Ombudsman, *Twenty Years of the Commonwealth Ombudsman 1977–1997*, Commonwealth Ombudsman's Office, Canberra, 1997.
- P. Ruddock, 'Narrowing of Judicial Review in the Migration Context', *AIAL Forum*, no. 13, 1997, pp. 13–21.
- P. Ruddock, 'The Broad Implications for Administrative Law under the Coalition Government' in J. McMillan, ed., *Administrative Law under the Coalition Government*, Australian Institute of Administrative Law, Canberra, 1997.
- B. Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law', *Public Law Review*, vol. 7 no. 4, December 1996, pp. 212–222.
- Senate Finance and Public Administration References Committee, *Service Delivery by the Australian Public Service*, The Committee, Canberra, 1995.
- Senate Legal and Constitutional Legislation Committee, *Role and Function of the Administrative Review Council*, The Committee, Canberra, 1997.
- Senate Legal and Constitutional Legislation Committee, *Report on the Administrative Decisions (Effect of International Instruments) Bill 1997*, The Committee, Canberra, 1997.
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- Senate Legal and Constitutional References Committee, *Trick or Treaty: Commonwealth Power to Make and Implement Treaties*, The Committee, Canberra, 1995.
- Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest*, The Committee, Canberra, 1994.
- Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information*, AGPS, Canberra, 1979.
- Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, AGPS, Canberra, 1991.
- Senate Standing Committee on Legal and Constitutional Affairs, *Administrative Decisions (Judicial Review) Amendment Bill 1987*, Commonwealth Government Printer, Canberra, 1987 (Parliamentary Paper no. 212 of 1987).
- Senate Standing Committee of Privileges, *Report on Matters Referred by Senate Resolution of 17 July 1975*, Commonwealth Government Printer, Canberra, 7 October 1975 (Parliamentary Paper no. 215 of 1975).
- Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 1994*, Report no. 99, The Committee, Canberra, October 1994.
- S. Sheridan, 'Legitimate Expectation: Where does the Law now Lie?' in J. McMillan, *Administrative Law under the Coalition Government*, Australian Institute of Administrative Law, Canberra, 1997.
- P. Smith, 'Twenty Years of the Ombudsman' in Commonwealth Ombudsman, *Twenty Years of the Commonwealth Ombudsman 1977–1997*, Commonwealth Ombudsman's Office, Canberra, 1997.
- D. Solomon, *Inside the Australian Parliament*, George Allen and Unwin, Sydney, 1978.

- C. Stuart, 'Parliamentary Privileges Committees: Natural Justice on Trial', *Legislative Studies* vol. 4 no. 2, 1989, pp. 9–16.
- M. Taggart, ed., *The Province of Administrative Law*, Hart, Oxford, 1997.
- 'Ten Years of the Federal Administrative Decisions (Judicial Review) Act', *Federal Law Review*, vol. 20 no. 1, 1991.
- 'The Ombudsman Through the Looking Glass 1977–1985', *Canberra Bulletin of Public Administration*, vol. 12 no. 4, 1985.
- The Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*, 49th Report, The Committee, Canberra, September 1994 (Parliamentary Paper no. 171 of 1994).
- The Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 Casselden Place Reference*, 52nd Report, The Committee, Canberra, March 1995 (Parliamentary Paper no. 21 of 1995).
- G. Terrill, *Secrecy and Openness*, Melbourne University Press, Melbourne, 2000.
- Towards a Best Practice Australian Public Service*, Discussion Paper issued by the Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, Department of Industrial Relations, Canberra, 1996.
- A. Twomey, 'Federal Parliament's Changing Role in Treaty Making and External Affairs', Department of the Parliamentary Library, *Research Paper no. 15*, 1999–2000.
- K. Walker, 'Treaties and the Internationalisation of Australian Law' in C. Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, Sydney, 1996.
- Senator P. Walsh, 'Equities and Inequities in Administrative Law', *Canberra Bulletin of Public Administration*, no. 58, 1989, p. 29.
- R. Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective', *Public Law Review*, vol. 6 no. 1, March 1995, pp. 7–23.
- E. Willheim, 'Ten Years of the ADJR Act: From a Government Perspective', *Federal Law Review*, vol. 20 no. 1, pp. 111–127.
- N. Williams, 'The ADJR Act and Personnel Management', *Federal Law Review*, vol. 20 no. 1, 1991, pp. 158–164.
- N. Williams, 'Legitimate Expectations—Beyond *Teoh*' in L. Pearson, ed., *Administrative Law: Setting the Pace or Being Left Behind?*, Australian Institute of Administrative Law, Canberra, 1996.

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