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Administrative Justice and the Rule of Law:

Key Values in the Digital Era

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Introduction

> *"…the prophetic scholar has his amused revenge when practice propounds theory. Necessity is the mother of discovery. And so, this illegitimate exotic, administrative law, almost overnight overwhelmed the profession, which for years had been told of its steady advance by the lonely watchers in the tower."* F Frankfurter, "The task of administrative law" (1926-27) 75 Uni of Penn Law Rev 614 at 616[2]

So wrote Felix Frankfurter in 1927 while still holder of the chair at Harvard Law School. The revolution in administrative law in this country was to take place much later. While Else-Mitchell in his paper in 1965 at the Commonwealth and Empire Law Conference might be cast in the role of the "*prophetic scholar*",[3] the catalyst for change was the Report of the Kerr Committee in 1971, followed shortly thereafter by the more conservative recommendations in the Bland and Ellicott Reports.[4] The Kerr Committee, established on the recommendation of the then Solicitor-General, Sir Anthony Mason,[5] imagined a bold new structure for administrative law in Australia. This was a structure built on the values of lawfulness, impartiality, transparency and accountability in accordance with the

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[2] I am indebted to Lindsay Curtis, "The Vision Splendid: A Time for Re-Appraisal", *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark,* Creyke and McMillan (eds) (CIPL, 1998) (*"The Kerr Vision"*) at 36, for his reference to this article.

[3] See the discussion of the contribution made by Else-Mitchell, ibid at 37-39.

[4] All three reports are reproduced in *The Making of Commonwealth Administrative Law*: *The Kerr, Bland and Ellicott Committee Reports,* compiled by Creyke, R, and McMillan, J, (CIPL, 1996)

[5] The members of the Committee were the Hon Justice J R Kerr, CMG (Chairman), the Hon Justice A F Mason CBE (as his Honour then was), R J Ellicott QC (then Solicitor-General), and Professor Whitmore, with G V Halliday, Attorney-General's Department appointed as Secretary.

requirements for decision-making in a society governed under the rule of law.[6] And this was a structure largely implemented with bi-partisan support through successive governments of both persuasions. It remains fundamentally intact to the present day.

It is useful then to start with a brief return to the genesis of modern administrative law in Australia in the early 1970's to identify the principal concerns underlying those reforms, and the values and concepts that they embody. While I would suggest that those values and concepts remain relevant, in many instances they fall to be applied in a very different context today. Technological advances, in particular, impact on the way in which many millions of administrative decisions affecting individual rights and liberties are made each year and, indeed, on the very nature of the decisions that may be made. This is the topic that I intend to consider in the second part of my paper today, acknowledging that what I will say draws in part upon the work of the Administrative Review Council. In this regard, while the Kerr Committee may readily be forgiven for not envisaging that challenges of the kind posed, for example, by the advent of the internet may arise, it recognised the inevitability of changes to the environment in which administrative law operates and sought to accommodate this by providing for a continuing supervision of the system by that key body.[7]

The "Vision Splendid": The reforms of the 1970's

The historical context

"*The backdrop for the [Kerr] Committee's study",* as Robin Creyke and John McMillan explained on the 25th anniversary of the Kerr Report:

> *"… was a Commonwealth system of public law that comprised the High Court and a few specialist tribunals, but little else. It was a system with a century-old tradition of reliance on ministerial and parliamentary control as the principal and ultimate safeguard of the interests of the citizen in administrative decision-making.*

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[6] *Automated Assistance in Administrative Decision Making, Report to the Attorney-General,* ARC Report No. 46 (November 2004) at p. 3. See also ARC, *A Guide to Standards of Conduct for Tribunal Members*, September 2001 at pp. 12-13 (lawfulness, fairness, rationality, openness or transparency, and efficiency), and Sir Anthony Mason, "Reflections on Australian Administrative Law", *The Kerr Vision* at 124, observing that "*…judicial review of administrative decisions is a fundamental element in modern democratic life. All the talk about electoral mandates cannot obscure the fact that modern democratic government is a very complex mechanism in which the decision-making processes of government are subject to continuing scrutiny and criticism by the institutions of this country. They include the courts and the media, to name two of them. In a democracy, that is exactly as it should be."*

[7] The ARC is established by s 48 of the *Administrative Appeals Tribunal Act 1975* (Cth), and its functions under s 51 of that Act include keeping the Commonwealth administrative law system under review, monitoring developments, consulting with Commonwealth authorities and other persons, and making recommendations as to legislative and other reform. See further the discussion of the Council's work by Segal, J, and Creyke, R, "The Administrative Review Council: Future Challenges" (2007) 58 *Admin Review* 2.

> *…The dramatic post-war expansion of Australian government had created new pressures that demanded a fresh response. The growth of discretionary power had also altered the balance between citizen and government in a way that threatened the ideals of accountability and administrative justice. Innovation was required."*[8]

Nonetheless innovation is not always welcome and the initial response to the Kerr Report has been described as "*cool*". [9] Indeed, one commentator has suggested that it might have languished on dusty shelves in the Parliamentary library but for the change of government in 1972 bringing in a new political climate and focusing the spotlight on human rights and public administration.[10]

It was, thus, only a short time after its election that the Whitlam government signed the Convention on the Elimination of Racial Discrimination and the 1966 Covenants on Human Rights – the United Nations Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights. And in 1973, in its first appearance as a party in the International Court of Justice, Australia with New Zealand sought to halt atmospheric nuclear tests by France in the South Pacific Ocean, focusing international attention on the dangers posed by the tests to human life and the environment.[11]

On the domestic front, 1973 saw the establishment of the Australian Legal Aid Office and the Australian Law Reform Commission, with Michael Kirby, then a Deputy President of the Arbitration Commission, appointed as the first Chairman following a chance meeting with Lionel Murphy (then Attorney-General) in a lift in the Attorney-General's building in Canberra.[12] This was also a time of hotly contested debate – then as now - on the question of whether Australia should have a Bill of Rights.[13]

However, the reforms to the Australian administrative law system received bi-partisan support. The recent Political Memoirs of Malcolm Fraser, co-authored with Margaret Simons, chronicle that it fell to the Fraser government to appoint the first ombudsman in March 1977, to set up the Administrative Appeals Tribunal, and to bring the AD(JR) Act enacted in 1977 into force in October 1980[14]- reforms said to have succeeded "*despite the bitter opposition of the public service and the reservations of many in cabinet."*[15]

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[8] Creyke, R, and McMillan, J, Foreward to *The Kerr Vision* at iii. See also Curtis, L, op cit at 39-40.

[9] Lindsay Curtis, "The Vision Splendid: A Time for Re-Appraisal", *The Kerr Vision* at 42.

[10] Id.

[11] The merits of the claim by Australia were ultimately not adjudicated upon by the International Court as the Court found that the there was no longer any object in the proceedings after public announcements were made by France that it would cease the conduct of such tests following the completion of the 1974 series of atmospheric tests: *Nuclear Tests Case (Australia v France),* 1974 ICJ Reports 253.

[12] Jenny Hocking, *Lionel Murphy – A Political Biography* (Cambridge University Press, 1997) at 183.

[13] See e.g the discussion ibid at 184-189.

[14] Fraser, M, and Simons, M, *Malcolm Fraser – The Political Memoirs* (Melbourne University Publishing Limited, 2010) at 403-405.

[15] Ibid at 403. See also Curtis, L, op cit at 45-46 and Justice R Sackville, "The Boundaries of Administrative Law – The Next Phase", *The Kerr Vision* at 91-92.

Key values and their place in the new administrative law system

The central premise of the Kerr Committee was eloquently summed up by Professors Creyke and McMillan in stating that "*…administrative justice and accountability – correcting defective decisions and assuring the public that the rule of law was safeguarded - were the central objectives of administrative law."*[16] These can be identified more particularly as lawfulness, fairness, rationality, impartiality, transparency, and accountability, the last of which is an essential aspect of our democratic system of government.[17] Measured against these objectives, the Kerr Committee found that existing mechanisms were inadequate to ensure justice for the individual subjected to the vast array of powers and discretions created in the post-war era. It recognised that judicial review alone could not provide adequate review of administrative decisions, being constrained to review of the legality of the decisions,[18] and that independent external merits review with its capacity to correct factual error was essential to ensure the accountability of public administrators in the exercise of those powers.

Recognition of these factors lay at the heart of the Committee's approach and reflected the universal experience of other common law countries. It was the basis on which the Committee adopted a holistic approach to the subject of administrative law with its recommendations ultimately directed at the creation of a comprehensive and integrated system,[19] notwithstanding that its terms of reference were directed to review of administrative decisions by courts.[20] Its approach in this regard was to shape the way in which administrative law was conceived thereafter.[21]

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[16] Creyke, R, and McMillan, J, "Administrative Law Assumptions… Then and Now", *The Kerr Vision* at 18.

[17] *Automated Assistance in Administrative Decision Making, Report to the Attorney-General,* ARC Report No. 46 (November 2004) at p. 3. See also ARC, *A Guide to Standards of Conduct for Tribunal Members*, September 2001 at pp. 12-13 (lawfulness, fairness, rationality, openness or transparency, and efficiency), and Sir Anthony Mason, "Reflections on Australian Administrative Law", *The Kerr Vision* at 124, observing that "*…judicial review of administrative decisions is a fundamental element in modern democratic life. All the talk about electoral mandates cannot obscure the fact that modern democratic government is a very complex mechanism in which the decision-making processes of government are subject to continuing scrutiny and criticism by the institutions of this country. They include the courts and the media, to name two of them. In a democracy, that is exactly as it should be."*

[18] Kerr Committee Report at para's 5 and 7 (reproduced in *The Making of Commonwealth Administrative Law*: *The Kerr, Bland and Ellicott Committee Reports,* compiled by Creyke, R, and McMillan, J, (CIPL, 1996)).

[19] Id. See also Curtis, L, op cit at 46-48 who points out that the system has not in fact operated in as integrated a way as was envisaged by the Kerr Committee.

[20] The terms of reference and amended terms of reference are set out in the Kerr Committee Report at paras 1 and 2 (reproduced in *The Making of Commonwealth Administrative Law*: *The Kerr, Bland and Ellicott Committee Reports,* compiled by Creyke, R, and McMillan, J, (CIPL, 1996)).

[21] Lindsay Curtis, "The Vision Splendid: A Time for Re-Appraisal", *The Kerr Vision* at 53.

Operation of the system in changing times

Past and future challenges

The core values that underpinned the package of reforms created in consequence of the work of the Kerr Committee remain intact, as do the essential elements of the framework of the administrative law system giving effect to those values: external merits review by independent and impartial tribunals, judicial review, the handling of complaints and systemic review by the Ombudsman, the right to reasons (central to arming the citizen with effective remedies and improving the quality of decision-making) and freedom of information, together with oversight of the system by the Administrative Review Council.[22]

Nonetheless the environment in which the administrative law system operates is constantly evolving, and self-evidently administrative law must respond and adapt. We have seen such changes as the corporatisation and contracting out of government functions,[23] and the resurrection[24] and fall of the privative clause first at the federal,[25] and more recently, at the State, level.[26] Improving the quality of decision-making at the "grass-roots" and prevention of error have also come to be given greater emphasis, and to be pursued as separate and distinct objectives through moves such as improved training, client service charters, internal review, and the establishment of the Council of Australasian Tribunals.[27] Key current issues include:

- the growth of soft law such as guidelines and codes;[28]
- the movement towards imposing statutory preconditions and requirements on the making of delegated legislation so as increasingly to

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[22] The continued existence of the ARC was reaffirmed by the Government in response to the Senate Legal and Constitutional Committee *Report on the Role and Function of the ARC* (1977). The Government Response is published in (1998) 50 *Admin Review* 26. The Report included the proviso to the continuation of the ARC, namely, that the Council must be *"…making a significant contribution towards and affordable and cost-effective system of administrative decision-making and review"* (Recommendation 1).

[23] This issue was considered by the ARC in its 1998 Report, *The Contracting Out of Government Services* which set out thirty recommendations to address the issue. The *Ombudsman Act 1976* was subsequently changed so as to extend the Ombudsman's jurisdiction to investigate the actions of "Commonwealth service providers" as if those actions had been taken by the relevant department or agency.

[24] Section 4 of the *Administrative Decisions (Judicial Review) Act* provides that the Act has effect notwithstanding anything contained in any law in force at the commencement of the Act, thereby impliedly repealing any privative clause that would otherwise have interfered with the operation of ADJR Act.

[25] *S157/2002 v Commonwealth* (2003) 211 CLR 476.

[26] *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

[27] The ARC has contributed to this through, among other things, publication of its Best Practice Guides (revised in 2009) on Lawfulness, Natural Justice, Evidence Facts and Findings, Reasons and Accountability: available on the ARC's website www.ag.gov.au/arc (viewed 5 November 2010).

[28] See e.g. ARC Report No. 49, *Administrative Accountability in Business Areas subject to Complex Regulation* (available from the ARC website at: www.ag.gov.au/arc (viewed 5 November 2010)).

blur the lines between exercises of legislative and administrative powers;[29]

- the role and utility of the grounds of review in the AD(JR) Act in light of the modern jurisprudence on jurisdictional error and the adequacy of the present right to reasons in s 13 of the AD(JR) Act as "one size fits all" approach[30] – issues that may well be considered in the near future by the ARC which has placed judicial review on its agenda; and
- the manner in which technological developments such as the internet and computerised systems impact on administrative decisions, to which I will turn in a moment.

However, before doing so, it should be said that the capacity of the ARC to continue to supervise the health of the system and to provide a path forward in response to such challenges remains dependent on the provision of adequate resources – a point emphasised recently, for example, by Sir Anthony Mason, one of the architects of modern administrative law, when speaking at the recent national forum held by the Australian Institute of Administrative Law.[31]

So what then are the features of the technological era that might interface with administrative law, and how precisely might that occur?

Computer aided decision-making

The sheer volume of primary decisions made each year guarantee that the use of computers and the internet in decision-making will continue to expand. For example, in 2008/09, Centrelink granted 2.7m new claims and completed in excess of 3.8m reviews of eligibility and entitlement (a reduction from 4.4m reviews in the previous year due to resources being diverted to respond to national disasters and emergencies).[32]

Computers and the internet can be employed at different stages of the decision-making process.

- First, applicants are frequently given the option of lodging an on-line application form, or may be given computer or phone self-service options[33] (the most frustrating form of which is unquestionably voice recognition software!).
- Secondly, the decision-maker may correspond with the applicant by email, such as to seek further information, or advise of a hearing or

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[29] See e.g. the requirements imposed by s 303EC of the *Environment Protection and Biodiversity Conservation Act 1999* which must be followed before the Minister may amend the list of specimens suitable for live export by instrument published in the *Gazette.*

[30] See further, e.g., Lloyd SC, S, and Mitchell, D, "Statements of the Decision-Maker's Actual Reasons" (2010) 59 *Admin Review* 53.

[31] The Hon Sir Anthony Mason AC KBE, "Delivering Administrative Justice: Looking Back with Pride, Moving Forward with Concern", Australian Institute of Administrative Law, 2010 National Administrative Law Forum, 22 July 2010 (shortly to be published in *AIAL Forum*).

[32] Centrelink Annual Report 2008-2009 at pp. 11 and 37.

[33] ARC Report No. 46 at p. 49

decision, and at least some of these responses may be automatically generated by the government agency's computer system.

- Thirdly, they may guide the user through different alternative pathways, closing off irrelevant options as the user progresses through the programme.
- Fourth, they may provide commentary for the decision-maker on the legislation, cases and policy.
- Finally, computer programmes may be devised to ***determine*** whether all or part of the criteria for the decision are met depending on the information input by the applicant, a third party or the decision-maker, or alternatively may ***recommend*** a decision to the decision-maker.[34]

It is probably a fair guess that virtually all administrative decisions made today employ computers or the internet in at least one of these ways, and the number of decisions that employ computers in the actual decision-making process is certainly increasing. Agencies making extensive use of expert systems include Comcare, the Department of Veterans' Affairs, Centrelink and the ATO.[35] Properly programmed, they may apply rules based criteria to primary data consistently and accurately, and deal with applications quickly, efficiently and in a more cost effective manner, particularly where high volumes of decisions must be made.[36] (I leave aside for the moment the more difficult questions that attend the potential use of automated systems in discretionary aspects of decision-making involving value judgments.[37])

However, in a recent paper, Justice Downes identified three potential problems where decisions are computer aided that may affect good decision-making:

> *"First, the wrong data may be entered on the computer. Secondly, the right data may be wrongly entered. In both cases the absence of all of the entries on paper makes verification more difficult. Thirdly, the computer may be incorrectly programmed."*[38]

As to the last of these, the complexity of modern legislation renders accurate programming highly problematic. Difficult questions of statutory construction may add yet further layers of complexity and uncertainty, as may the need to ensure that the programme will be completely up-to-date at all times, while applying amended statutory rules only to those cases where they apply.[39] It is

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[34] See also *Automated Assistance in Administrative Decision Making, Report to the Attorney-General,* ARC Report No. 46 (November 2004) ("**ARC Report No. 46**") at p. 10.

[35] ARC Report No. 46 at p. 2. In his article "The 30th Anniversary: An Administrative Perspective", Robert Cornall AO, then Secretary of the Attorney-General's Department, stated that eight Australian Government agencies were using automated systems in administrative decision making: (2007) 8 *Admin Review* 27.

[36] ARC Report No. 46 at pp. 1, 35 and 38.

[37] See further ARC Report No. 46 at pp. 12-16 which recommended against the use of expert systems to automate exercises of discretion.

[38] The Hon Justice Gary Downes AM, "Looking Forward: Administrative Decision Making in 2020", Australian Corporate Lawyers Association 2010 Government Law Conference, Canberra, 20 August 2010.

[39] See further the discussion in ARC Report No. 46 at pp. 34-35.

trite to point out that asking the correct statutory question is central not only to good administrative decision-making, but also to the making of a lawful decision.

Furthermore, asking the right question will be of no avail if data is incorrectly entered, or errors in the data itself are entered. In this regard, verifying data entry and subsequently accessing that data pose particular problems. As Justice Downes also pointed out, "*[w]hat the problems require is systems to enable verification that data has been entered correctly and systems which will reproduce records of the processing of the data*."[40] The use of automated systems of decision-making also requires attention to who makes the decision, the risk being that, absent specific legislative authority, it may not be lawful to delegate decision-making to a computer system.[41] The use of such systems may also engender a culture of complacency in the accuracy of computer generated decisions. A recent example that comes to mind in the private sector are the reports of overcharging by one of the major banks of private customers over seven years as a result of computer error.

In its ground-breaking report on Automated Decision-Making in 2004, the ARC sought to address these kinds of issues. It identified twenty-seven best-practice principles as to how systems should be designed and maintained consistently with administrative law values, and recommended that expert systems provide a comprehensive audit trail[42] and that their utilisation should be subject to independent scrutiny.

But as these kinds of concerns highlight, the use of automated decisions poses particular challenges for transparency and accountability. How, for example, does a statement of reasons adequately reveal the automated aspects of the decision-making process so as to enable the recipient to determine whether those aspects of the decision were correctly made?

Furthermore, the use of computers at earlier stages of the decision-making process may also raise issues. To give a practical example that has arisen recently, the questions asked or information provided on an on-line form may differ from that contained in hard-copy forms, potentially to the disadvantage of those lodging on-line forms. Moreover, the ARC warned against the risk that the use of such systems should not be to the disadvantage of some users who may, for example, have low literacy skills or lack access to new technologies.[43]

Personal data and government in the digital era

Finally, a discussion of the interface between administrative law and the digital era would not be complete without at least some mention of the expanded capacity of government agencies and others to acquire, store and exchange personal data. These issues become particularly significant where information

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[40] The Hon Justice Gary Downes AM, "Looking Forward: Administrative Decision Making in 2020", Australian Corporate Lawyers Association 2010 Government Law Conference, Canberra, 20 August 2010

[41] ARC Report No. 46 at pp. 19-20.

[42] Id at p. 43. In addition, the report led to the formation of the Automated Assistance in Administrative Decision Making Advisory Working Group in November 2005 which published a better practice guide in 2007 available from www.finance.gov.au/publications/aaadm/index.html (viewed 5 November 2010).

[43] ARC Report No. 46 at pp. 49-50.

is obtained by government agencies such as the ACCC, APRA, ASIC, the ATO and Centrelink through the exercise of coercive powers. The principles contained in the ARC's 48th Report in May 2008 provide a guide to government agencies and legislators to ensure fair, efficient and effective use of these powers,[44] including on such issues as the appropriate trigger threshold for their use and on exchange of information between government agencies so as to ensure that those thresholds are not circumvented.[45] Furthermore, the many avenues now available through technological advances by which personal information can be obtained without the knowledge of the person concerned, such as through monitoring of internet sites, email or phone tapping, emphasise the need for vigilance in ensuring that compulsive powers are conferred and exercised in a manner consistent with fundamental administrative law values.

Conclusion

The architects of the bold new blueprint for Australian administrative law understandably failed to anticipate the digital era. However, as Frankfurter wrote in the passage with which I began, "*Necessity is the mother of discovery*". And so in responding to the challenges and opportunities that new technologies radically reshaping the way that society and government work and interact, we return to the fundamental values which are the bedrock of our system of administrative law. Adherence to these values not only provides protection for individual rights, as the Kerr Committee intended, but is essential to the maintenance of public confidence in the executive and the rule of law in a modern democratic society.

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[44] ARC, *The Coercive Information-Gathering Powers of Government Agencies*, Report No. 48 (May 2008).

[45] ARC Report No. 48 at pp. 68-69.