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IS THE ADJR ACT HAMPERING THE DEVELOPMENT OF AUSTRALIAN ADMINISTRATIVE LAW?

Professor Mark Aronson

The ADJR Act is the legislative template for statutory judicial review schemes in several places, and has helped secure the Federal Court's practical pre-eminence in Australian judicial review. However, it is not beyond criticism. This article discusses the need to extend its coverage to those areas presently reached only by common law judicial review, and questions whether the Judiciary Act's extensions have made the ADJR Act redundant. The article also discusses recent suggestions that the ADJR's judicial review grounds are deficient for being wholly particularised. Is it correct to suggest that the Act contain a statement of general principles, and that the absence of such a statement has stunted the growth of Australia's common law of judicial review?..... 79

COMMENTARY ON PROFESSOR ARONSON'S ARTICLE "IS THE ADJR ACT HAMPERING THE DEVELOPMENT OF AUSTRALIAN ADMINISTRATIVE LAW?"

John Griffiths SC

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PROCEDURAL FAIRNESS: ITS DEVELOPMENT AND CONTINUING ROLE OF LEGITIMATE EXPECTATION

Hon Sir Anthony Mason AC KBE

The article begins by briefly tracing the historical development of procedural fairness (natural justice) from the 19th century down to the present with the principal emphasis on the hearing rule. The hearing rule requires the decision-maker to hear a party before making a decision which adversely affects the party's interests. The article then identifies recent developments and current issues. 103

LEGITIMATE EXPECTATION: COMMENT ON THE ARTICLE BY THE HON SIR ANTHONY MASON AC KBE

Stephen Gageler SC

The current conceptual uncertainty about the doctrine of legitimate expectation is a manifestation of an unresolved tension between two fundamentally irreconcilable perspectives on administrative law. One is the “common law” perspective to which the doctrine of legitimate expectation belongs. The other is the “ultra vires” perspective in which the doctrine has no place. 111

PLAINTIFF S157/2002: A CASE-STUDY IN COMMON LAW CONSTITUTIONALISM

Professor Cheryl Saunders

The purpose of this article is to explore and explain the relationship between the formal Constitution and uncoded principles of a constitutional kind in the common law constitutional tradition, by reference to a case study involving ouster clauses in Australia. An earlier version of the article was presented to an administrative law seminar, organised by the Federal Court of Australia and the Law Council of Australia, in April 2004. The article subsequently was revised into its present form for the purposes of a festschrift for Professor Theo Ohlinger, of the University of Vienna (Saunders C, “A Case Study in Common Law Constitutionalism” in Hammer S, Somek A, Steltzer M and Weichelsbaum B (eds), *Demokratie und Sozialer Rechtsstaat in Europa* (Facultas Verlags- und Buchhandels, 2004) p 210). The article has not been further revised to take account of subsequent Australian developments, in particular, importantly for the argument in the article, the decision of the High Court in *Al-Kateb v Godwin* (2004) 78 ALJR 1099. To the extent that the article still reflects the views put forward at the seminar, however, I hope that it will serve the purpose of providing a complete record of those proceedings in this Journal. 115

PUBLIC ADMINISTRATION IN PRIVATE HANDS

Professor Margaret Allars

Assumptions that the proper scope of administrative law may be determined by identification of public institutions or public functions require careful scrutiny. Australian tests of justiciability of administrative action turn upon some combination of eight identifiable criteria. The test of justiciability under the ADJR Act has increasingly been characterised by technicality and incoherence, in particular in the context of decisions of corporatised government business enterprises where the outer reaches of justiciability are interrogated. Moreover, the High Court’s majority decision in NEAT introduced criteria which have not been part of the test of justiciability under the ADJR Act, including a criterion of whether the decision has a public element. In response to these developments, a practical approach to the test of justiciability is advocated, such that the criteria as to which decisions are susceptible to judicial review are clear, not technical, and not distorted by the assumptions. 126

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Below is the full list of articles published in this two part series.

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