

THE "NEW" ADMINISTRATIVE LAW:

THEORY AND PRACTICE

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I certify that the substance of this thesis has not already been submitted for any degree and is not being currently submitted for any other degree.

I certify that any help received in preparing this thesis, and all sources used, have been acknowledged in this thesis.

A solid black rectangular box redacting the signature of the author.

(J.A. Henderson)

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The late Senator Alan Missen, who chaired the Senate Standing Committee on Constitutional and Legal Affairs when it inquired into the Freedom of Information Bill 1978, was most helpful, putting me in touch with relevant people in Britain, Canada and the USA. I contacted others in those countries and in Australia based on a review of the literature on FOI and administrative law, and as a Commonwealth employee involved in implementing the FOI law in a statutory authority.

Most of my research was carried out in the library of the Royal Institute of Public Administration, London, where I spent the (northern) winter and spring of 1983-84 happily immersed in its extensive collection. The Freedom of Information Campaign office in London provided generous access to people and publications. The Australian Studies Centre in the Institute of Commonwealth Studies, University of London, also provided valuable guidance and assistance. In Canada, the Institute of Public Administration of Canada proved very helpful, as did the American Society of Access Professionals in

the USA.

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Last, but by no means least, I owe an enormous debt of gratitude to my family, without whose unstinting support this thesis would not have reached fruition.

PREFACE

This thesis sets out to trace and explain developments in the so-called "new" Commonwealth administrative reforms which came into being in the latter half of the 1970s and early 1980s. It has been undertaken avowedly from two viewpoints: firstly - as will be immediately apparent - by someone who does not have a legal background, and secondly, by someone who is both a student and practitioner of public administration.

I developed an interest in this subject when I became involved in the implementation of the Commonwealth Freedom of Information (FOI) Act 1982. When I began researching FOI with a view to producing a thesis which concentrated on that concept as part of the new package, I found myself becoming more interested in administrative law per se.

My interest came to focus on the possible implications of the new enactments for a number of relationships: at the academic level, between the new administrative law and public administration; at the institutional level, between community, public service, executive, judiciary and parliament. I came to realise that I was engaged in examining the relationship between law and politics in the Australian system of government. This thesis, then, is in reality an essay in constitutional history and theory, since I found that I could most usefully bridge the gap between law and politics from that standpoint.

The vast majority of those who have written about and commented upon the new administrative law have a legal background, and it is not without trepidation that I have attempted to analyse the fruits of their labour from the viewpoint of one schooled in public adminis-

administration. To my knowledge, however, this type of extensive probing of the new Commonwealth package, that is, by someone who is both an insider and an outsider, and devoid of a legal background, has not been undertaken before.

Because this study is largely concerned with the respective languages of law and politics - the analysis of concepts, their meaning and application from both points of view - I have found it necessary to employ numerous quotations. However, I have attempted to restrict them to definitions and technicalities associated with, for example, legal decisions, reasoning, opinions, etc.

Since I am also concerned with the experience of the reforms, this study has for the most part employed recent sources, that is, from the late seventies to the present. Nonetheless, the genesis of the enactments is brought out in this material, basically in the claims made about their implications for institutional relationships.

The thesis commences by describing and investigating the meaning of the new administrative law, its impact on the public service and the use made of it in terms of promise and practice. There follows an examination of realities of the administrative environment into which the new package was inserted. This calls upon overseas perspectives and developments to search out what I have termed the constitutional matrix, which is used to explain the behaviour of the reforms, to explain why practice does not match promise. The "story" ends in the second half of 1987.

The conclusions argue essentially that practice is at odds with promise because the new package was developed for the most part within

the legal realm of discourse, according to the traditional division between law and politics in Australia's constitutional matrix. Neglect of fundamental political features of that matrix has enabled the political realm of discourse to assert predominance over the direction taken by the reforms, to their detriment in respect of rhetorical expectations. It is argued that desirable reforms can only be brought about by reconciling the respective realms of legal and political discourse under the rubric of constitutionalism.

As for style and conventions, I have followed the University of New England's 'Style Booklet for Footnotes and Documentation' (1984 Revision) and the Commonwealth Government's 'Style Manual for Authors, Editors and Printers' (third edition, AGPS, Canberra, 1978). Capital letters are not used when employing "parliament", "constitution", etc. in the generic sense, unless included in a quotation. The Bibliography is divided into the countries from which sources are drawn, thence into Books and Articles.

The preparation of this thesis has been a complex but fascinating and enjoyable undertaking. I hope that it has also been worthwhile.

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BIBLIOGRAPHY

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
AD(JR) Act	Administrative Decisions (Judicial Review) Act
AGRBO	Australian Government Retirement Benefits Office
A-G's	Attorney-General's Department
APA	Administrative Procedure Act (USA)
ARC	Administrative Review Council
ATI	Access to Information Act (Canada)
DITAC	Department of Industry, Technology and Commerce
DSS	Department of Social Security
DVA	Department of Veterans' Affairs
FOI	Freedom of Information
IDC	Inter-departmental committee
LRCC	Law Reform Commission of Canada
NSBs	Non-statutory bodies
PCA	Parliamentary Commissioner for Administration
PMC	Department of Prime Minister and Cabinet
PSB	Public Service Board