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Administrative Law Values, Publicisation and Outsourcing

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DECLARATION

This thesis is the original work of Virginia Newell.

Signature

[Signature]
ACKNOWLEDGEMENTS

With love to Mark and Albi, who support me always and remind me that there is more to life than studying.

With love and admiration to my Mother who has devoted her life to her six children while working, studying and dancing.

With thanks to Jill Newell and Marg Bowman for their expert assistance with proof-reading and editing; to Daniel Stewart for his patience and guidance as my Supervisor; and to Peter Cane and Peter Bailey for their useful comments.

Dedicated in hope and love to CEN.
The dissertation represents a response to the concept of 'publicisation'\(^1\) popularised by Jody Freeman,\(^2\) which posits the possibility of outsourcing being adequately controlled and overseen through new public and private mechanisms, in which are embedded appropriate public or democratic norms. As there is a nascent administrative law values discourse within the Australian administrative law discipline, I refer to values in my dissertation rather than norms. There are two hurdles to evaluating and utilising the concept of publicisation in the Australian context.

The primary hurdle is the need to correctly identify the relevant values. I argue that, in the Australian context, the relevant values to achieve the publicisation of outsourcing are those that underpin the existing administrative law system. I next conduct a critical textual analysis of the 1970 Reform Reports — the Kerr Committee Report, the Bland Committee Reports and the Ellicott Committee Report\(^3\) with the aim of identifying the values that were embedded in the Australian administrative law system at its inception. My aim in conducting this empirical research is to identify administrative law values other thansubjectively. The research demonstrates that in terms of administrative law values, the key to the 1970s reforms was the prioritisation of citizen participation in order to promote legality and fairness. The second finding is that while the reports consistently make reference to the need to safeguard executive efficiency, there is a stronger

\(^1\) Spelt publiclzation in the American context.


commitment to ensuring that the values of participation, fairness and legality are prioritised. The italicised words represent value-types.

The second hurdle to evaluating the concept of publicisation, in a practical rather than theoretical way, is the need to identify an appropriate methodology to use when looking for evidence of publicisation. In the final chapter of this dissertation I conduct two limited values benchmarking exercises designed to illustrate how evidence of publicisation might be identified in the Australian context and I argue that values benchmarking, a form of standards benchmarking, provides a useful methodological framework. One of the values benchmarking exercises pertains to the 2005 amendments to the Ombudsman Act 1976 (Cth) and the proposed 2009 amendments to the Freedom of Information Act 1982 (Ch). The second values benchmarking exercise looks for evidence of publicisation in the federal courts’ jurisprudence regarding their jurisdiction to hear judicial review applications where the decision-maker is not a member of the traditional executive (Minister, agency, officer).

My conclusion is that publicisation provides a useful way of evaluating new mechanisms by reference to administrative law values. I qualify this support by arguing that new mechanisms should not be recognised as evidencing publicisation if they do not both extend administrative law values and deliver administrative law goals such as executive accountability or administrative justice. I also observe that mechanisms that can be described as evidencing publicisation cannot necessarily be thought of as equivalent to administrative law mechanisms because publicisation does not insist on the administrative law value of citizen participation being embedded and prioritised.
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BIBLIOGRAPHY
INTRODUCTION

The law is developed by the application of old principles to new circumstances. Therein lies its genius.1

‘Outsourcing’ or ‘contracting-out’;2 are terms used interchangeably to describe the government’s use of private bodies to provide services3 that government would otherwise provide. To the extent that government is procuring services for its own use (cleaning, maintenance, IT, security), outsourcing raises value-for-money arguments but is typically non-controversial.4 From an administrative law perspective, the controversial facet of outsourcing is where the government outsources a service-delivery function or a decision-making function, and in so doing interposes a private body between the government and the citizen.5 The

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1 Viscount Simonds in Midlands Silicones Ltd v Scruttons Ltd [1962] AC 446, 467–68.
2 I will use the terms interchangeably throughout this thesis. Of course, some outsourcing does not involve a contract. For example, the government often outsources certain decision-making functions to expert private bodies either through administrative arrangement or regulation.
3 I will use the word ‘service’ in this dissertation to refer to the function, and associated decisions and conduct, that has been outsourced. I acknowledge that the word ‘service’, along with words such as ‘consumer’ and ‘complaint’, reflect the commercial emphasis implicit in the outsourcing context and have displaced words such as ‘rights’, ‘citizens’ and ‘grievance’. The change in language is indicative of the change in relationship between executive government and citizen. See Margaret Allars, ‘The Commercialisation of Administrative Law’ in Susan Kneebone (ed), Administrative Law and the Rule of Law: Still Part of the Same Package (1999) 146,150–51. See also argument by Spigelman resisting the adoption of commercial language: ‘Human life cannot be characterised merely as a series of consumer choices’: James Spigelman, ‘Economic Rationalism and the Law’ (2001) 24(1) University of New South Wales Law Journal 200, 203.
4 Occasionally, other issues arise such as tendering irregularities: see Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151.
5 The need to differentiate between outsourcing where the government is the client and outsourcing that affects citizens directly was emphasised by Nicholas Seddon, ‘Commentary: Privatisation and Contracting Out — Where Are We Going?’ (1998) 87 Canberra Bulletin of Public Administration 94, 95. ‘Citizen’ will be used in this dissertation to
effect of this interpolation is, by and large, to render the administrative decisions associated with the provision of those services beyond the scope of the administrative law system.\(^6\) This is not a novel observation; the Administrative Review Committee ('ARC'), in its 1998 report on the contracting out of government services, stated:

> [W]hen government activities and services are contracted out, neither administrative law nor private law may be adequate to deal with the issues that may arise in the new relationships between the government agency which purchases the services, the private sector contractor which provides them and the members of the community who receive the service or who might otherwise be affected by the actions of the contractor.

The delivery of government services by contractors, and the consequent 'privatising' of the relationship between service providers and members of the public, has the potential to result in a loss of the benefits which the administrative law system provides for individuals.\(^7\)

Outsourcing as a mode of public administration has elicited many responses from the Australian administrative law fraternity over the last two decades. One common response has been to advocate that the government legislate to bring government contractors within the scope of the administrative law system.\(^8\) A related response has been for legal commentators to argue that particular outsourced functions that are clearly public in nature, such as the delivery of social services, should be brought back within the scope of the administrative law system.\(^9\) Governments of

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\(^6\) See discussion in relation to judicial review in chapter III, part C.


\(^9\) See, eg, David de Carvalho, 'The Social Contract Renegotiated: Protecting Public Law Values in the Age of Contracting' (2001) 29 AIAL Forum 1. De Carvalho argues that social services are clearly public services regardless of whether government or private actors deliver them and should be subject to public law protections. See also Richard Mulgan's
both political persuasions have largely ignored these recommendations and arguments. The inference that some have drawn is that government has embraced outsourcing, as a mode of public administration, in part because it took executive-sponsored and funded action beyond the scope of the administrative law system.

1 Publicisation

This dissertation represents a different response to outsourcing that focuses on administrative law values rather than administrative law mechanisms. The basic premise is that the existing administrative law system is not the only way to deliver fairness and accountability to individual citizens and to the Australian community. It is possible that the very same administrative law values that were embedded in the administrative law system at its inception could be embedded effectively into alternative accountability mechanisms applicable in the outsourcing context that would protect affected citizens. The idea is to respond to outsourcing as a manifestation of privatisation (making private business practices applicable to the public sector) through a process of ‘publicisation’ (making administrative law values applicable to the private sector). The concept of publicisation has been

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suggestions as to how ‘core’ public service functions could be identified: ‘Identifying the “Core” Public Service [Should the Public Service Be Reduced to its “Core” Functions? and If So, on What Basis?]’ (1997) 87 Canberra Bulletin of Public Administration 1.

10 The 2005 amendments to the Ombudsman Act 1976 (Cth) and the proposed amendments to the Freedom of Information Act 1982 (Cth) are significant exceptions and are discussed further in chapter III, part B.

11 See, eg, Richard Mulgan, ‘Contracting Out and Accountability’ (1997) 56(4) Australian Journal of Public Administration 106, 110: ‘Indeed, some of the advantages of contracting out surely derived from the reduction in accountability’. See also Margaret Allars, ‘Citizenship Rights, Review Rights and Contractualism’ (2001) 18(2) Law in Context 79, 79: ‘[G]overnment has in the past hived off responsibility for areas of decision-making which are controversial or technical to independent statutory authorities. Contracting out in the field of welfare services is a new mechanism by which the state distances itself from decisions which are unpleasant and distressing, not only to citizens directly affected but also in the ledger of public opinion. Distance from difficult decisions brings the added advantage of reducing or eliminating accountability for those decisions’.

12 It is spelt publicization in the American context.
popularised by Jody Freeman\(^{13}\) and, in the outsourcing context, describes a process whereby government contractors commit themselves to, or are bound by, public law norms in return for being granted contracts to provide goods or services to citizens,\(^{14}\) on behalf of the state.\(^{15}\)

Publicisation is a promising concept to explore in the Australian context, not least because its starting point is not oppositional. It does not question the government's decision to use outsourcing as a mode of public administration, nor does it challenge the underlying economic paradigm that made outsourcing attractive to

\(^{13}\) Jody Freeman, 'Extending Public Law Norms Through Privatization' (2003) 116 Harvard Law Review 1285. See also Jody Freeman, 'The Private Role in Public Governance' (2000) 75(3) New York University Law Review 543. I note, however, that in 1999, in the Australian context, Allars made reference to an alternative response to outsourcing involving, 'the infiltration of the principles of administrative law into private law', which clearly encapsulates the concept of publicisation: see Allars, 'The Commercialisation of Administrative Law' above n 3, 147. Also, in 1982 the Administrative Review Council recommended in relation to government business enterprises that, 'the objectives of the administrative law package are inappropriate, or they can be achieved as effectively by other more suitable mechanisms': Administrative Review Council, Government Business Enterprises and Commonwealth Administrative Law, Report No 38 (1982), xi. The ARC's focus was on ensuring that the objectives of the administrative law system continue to be pursued, where relevant, and not on the continuation of administrative law values or public law norms as is the case with publicisation. Nevertheless, the concept of private law mechanisms delivering public law goals is evident.

\(^{14}\) Freeman emphasises the need to decide on the types of outsourcing that are most in need of publicisation and argues, 'the strongest cases for publicization ... involve highly contentious and value-laden services that are hard to specify and over which providers have significant policymaking discretion, that affect vulnerable populations with few exit options and little political clout, and for which the motivation for privatization is discernibly ideological rather than pragmatic': Freeman, 'Extending Public Law Norms Through Privatization', above n 13, 1342.

government. There are, however, two major stumbling blocks to analysing responses to outsourcing in Australia in terms of publicisation.

The first stumbling block lies in identifying which public law norms should continue to apply in relation to outsourcing in Australia. It can be assumed that the relevant public norms would be those that, but for the fact that the service has been outsourced, would apply to the delivery of that service by government. The norms promoted through the existing administrative law system would therefore be the relevant set of public law norms but it is then necessary to identify the particular norms that belong to that set. Within the Australian administrative law discipline, there is an existing, nascent discourse on administrative law values, and some legal commentators, drawing on their extensive experience, have been able to list specific administrative law values. However, there has been no research that has attempted to identify administrative law values other than by reference to experience and observation.

The second stumbling block lies in effectively applying or utilising the concept of publicisation. In this respect we have no guidance from Freeman, who, when discussing how publicisation might come about in practice rather than theory, lists some possible legislative and judicial mechanisms but does not go into detail. According to one interpretation of publicisation, if a new mechanism that promotes

16 I note that the Commonwealth Auditor-General and various parliamentary committees have been critical of the trade-off between accountability and efficiency in the outsourcing context. This point is discussed by Richard Mulgan, 'Government Accountability for Outsourced Services' (Policy and Governance Discussion Paper, Asia Pacific School of Economics and Government, Australian National University, 2005–06), 2. Mulgan identifies critical reports by the Auditor-General in 1999 and 2001 and parliamentary committee reports by the Joint Committee of Public Accounts and Audit and Senate Finance and Public Administration References Committee.

17 Freeman identified the relevant public law norms as accountability, due process, equality and rationality: Freeman, 'Extending Public Law Norms Through Privatization', above n 13, 1285. Freeman skirts the larger question as to why any public law norms, be they administrative law values or other norms, should continue to apply in relation to outsourcing. For the purposes of her argument she assumes that public law norms have an ongoing relevance and in doing so she relies on the views of public law advocates. This issue is considered further in chapter III, part A.

18 Ibid 1315.
one or more administrative law values is introduced specifically in relation to outsourcing, then that mechanism is evidence of publicisation having taken place. But analysis of this kind tells us nothing about whether the mechanism is an effective check or balance on outsourcing or whether it delivers accountability and justice outcomes for citizens. The preferable approach is to consider the manner in which public law norms have been embedded within a new mechanism, with particular emphasis on the relationship and balance between administrative law values. This kind of analysis is best done within a framework that encourages a systematic approach. But what framework would be suitable?

2 Research Questions

My over-arching research question asks whether publicisation provides a useful way of evaluating the adequacy of the disparate control, review and accountability mechanisms that apply in the context of outsourcing. The type of outsourcing that concerns me is that affecting citizens or individuals\(^{19}\) and which, but for a change in public administration favouring the commercial delivery of services, would have been subject to the administrative law system. My first two specific research questions relate to the two stumbling blocks identified above, which must be addressed before it is possible to evaluate publicisation in the Australian context.

- What are the values that buttress the administrative law system? Are there non-subjective means of identifying these values? These questions are addressed in chapters I and II.

- What is the appropriate methodology to use in order to identify evidence of publicisation in the Australian context? This question is addressed in chapter III, part A.

Once the above two questions are answered, it is possible to consider whether in the Australian context there are examples of publicisation, by which I mean new mechanisms that have been introduced in response to outsourcing which manifest administrative law values. My third specific research question addressed in chapter III, parts B and C is set out below.

\(^{19}\) Individuals includes persons who are non-citizens and corporations. I will refer to either citizens or individuals in this dissertation, depending on the context.
• Is there evidence of publicisation in particular:
  - legislative mechanisms extending the scope of the administrative law system in response to outsourcing; or
  - judicial mechanisms extending the scope for judicial review?

Having set out my research questions so precisely, I now need to emphasise the weighting I have given to each research questions so as not to mislead the reader. The preponderance of my research relates to answering question one and therefore, while the focus of my dissertation is on outsourcing and publicisation, the major contribution of my research will, perhaps, be in identifying the administrative law values that underpin our current administrative law system through empirical research (chapter II).

The dissertation is presented in three chapters and an annotated chapter outline of each chapter is set out below.

3 Chapter I — An Administrative Law Values Framework

Chapter I constructs a framework for thinking and talking about administrative law values that is a necessary precursor to the empirical research presented in chapter II. The disparate elements of this framework are best understood as an attempt to answer the 'what', 'where', 'why' and 'how' questions in relation to administrative law values. What are administrative law values (part A)? Where do administrative law values fit into the administrative law system (part B)? Why should administrative law values be regarded as having ongoing relevance in relation to outsourcing (part C)? How can we talk about administrative law values (part D)?

In part A, I define the term 'administrative law values' — leaving to one side the question of what those particular values might be — with a view to rendering its parameters certain enough to avoid obscurity. I then canvass the words and terms that are frequently used synonymously with values. I also consider the importance of identifying administrative law values in a defensible manner.

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I add to the framework, in part B, by considering the relationship between
administrative law values and the concepts of administrative justice and executive
accountability, which are regularly cited as objectives or goals of the administrative
law system. Considering the nature of these relationships is significant because
publicisation assumes that if administrative law values are embedded in new public
or private mechanisms, then appropriate administrative justice and accountability
objectives can continue to be secured in relation to outsourcing. In relation to
accountability, I introduce the idea that administrative law values can be manifest in
a range of mechanisms that will deliver different types of executive accountability. In
relation to administrative justice, my starting point is an analysis of Creyke’s
comment that ‘values and standards are the essence of administrative justice’.21

In part C I argue that administrative law values have continuing relevance in the
context of outsourcing.

Chapter I concludes with part D, which comprises a literature review of key authors
who have named the values which they believe buttress the Australian
administrative law system. It is significant to note that commentators infrequently
give sustained attention to the topic of administrative law values; rather, they
typically discuss values in order to frame particular arguments or conclusions.22 I
make this observation not as a criticism but to explain why the literature review
focuses so specifically on the values that legal commentators have listed as being
administrative law values. Through the literature review, I compile a nomenclature of
Australian administrative law values comprising the values that are most frequently
cited within the Australian administrative law discipline. My aim in compiling this

22 I acknowledge significant exceptions to this statement: Peter Cane, ‘Theory and Values in
Public Law’ in Paul Craig and Richard Rawlings (eds), Law and Administration in Europe:
Essays in Honour of Carol Harlow (2003) 3; De Carvalho, above n 9; Gabriel Fleming, Rival
Goals and Values in Administrative Review: A Study of Migration Decision-Making (PhD
Thesis, Sydney University, 2001); Robert French, ‘Administrative Law in Australia: Themes
and Values’ in Matthew Groves and H P Lee (eds), Australian Administrative Law:
Fundamentals, Principles and Doctrines (2007) 15; Dawn Oliver, ‘Underlying Values of
values vocabulary is to ensure that the empirical research I present in chapter II builds on the existing values discourse within the administrative law discipline.

4 Chapter II — The 1970s Reform Reports: Identifying Administrative Law Values

Chapter II presents empirical research designed to identify the administrative law values that were embedded in the Australian administrative law system at its inception. It also considers subsequent amendments to the administrative law system up to the present day and whether the administrative law values that were originally embedded are still evident.

Part A comprises a brief explanation and defence of my use of the empirical methodology, which is fundamentally a textual analysis of primary source documents. As a former historian, it is evident to me, like Spigelman, that 'history matters' and is embedded in the institutions of a society, thus when searching for a suitable primary text, I looked backwards to the 1970s when the New Administrative Law System was conceived. The source texts I chose are the Kerr Committee, Bland Committee and Ellicott Committee Reports prepared in the early 1970s ('the 1970s Reform Reports').

The process of identifying the embedded administrative law values involves identifying the key reform issues each report identified and then marshalling the

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24 The label 'New Administrative Law System' was bestowed in the late 1970s and is still used regularly but, as it is now thoroughly anachronistic, and unless it is relevant in the context, I will instead refer to the 'administrative law system' or the 'Australian administrative law system'.

arguments and recommendations pertaining to each reform issue. I have used a series of tables to present this large body of information in a succinct, clear and accessible format. The table format also allows me to juxtapose visually the arguments and recommendations. The final step of the textual analysis is to consider which administrative law value (or values) links both the argumentation and resulting recommendation. For example, the Bland Committee argued that citizens should always be entitled to a review of a decision affecting them directly. The Committee went on to recommend that a merits review of discretionary decisions affecting individuals, be carried out by a tribunal. In terms of administrative law values, the Bland Committee was concerned with embedding ‘fairness’ (of decision and decision maker) and ‘participation (of citizen affected by a decision) in the New Administrative Law System. In effect, I am extrapolating administrative law values from the argumentation of the relevant committee and its recommendations.

Parts B–D presents the results of the textual analyses of the Kerr Committee Report, the Bland Committee Report and the Ellicott Committee Report respectively. At this introductory stage it is not necessary to go into detail regarding the findings, suffice it to say that the key feature of the reforms was on prioritising citizen participation in the administrative law system and ensuring that citizens were able to challenge the fairness of a decision not simply its legality. The primary difference between the reports is how they prioritised and balanced the administrative law values of participation, fairness and legality on the one hand and efficiency on the other. A discussion of these results is contained in part E, and one of the primary conclusions is that the reform agenda that led to the New Administrative Law System involved the elevation of citizen participation, and a concern with the fairness of decision-making, over concerns about executive efficiency. The italicised words represent value-types.

26 Bland Committee Final Report, above n 25, 45, recommendation (x).
27 Ibid 45, recommendations (xxxvii) and (xxxviii).
28 The Kerr Committee, which made the initial recommendation that a comprehensive merits review system be introduced, argued that tribunals would also be able to efficiently (time, cost) deal with grievances. Efficiency is another administrative law value. This will be dealt with in detail in chapter II. See Kerr Committee Report, above n 25, 107–8.
In part E, I consider how the 1970s Reform Reports transformed into the enactments we know today as the pillars of the administrative law system and in part F, I then consider how these enactments have been amended in the intervening 30 years. The focus in both parts is on tracing whether the manner in which the administrative law values were embedded, prioritised and balanced has altered over time. My conclusion is that little has changed.

The conclusion to Chapter II draws out four dominant themes evident from the empirical research

Chapter III — Values Benchmarking: Evidence of Publicisation?

The purpose of chapter III is to put the concept of publicisation to the test — in practice rather than theory. Is it possible to identify new mechanisms that have been introduced in response to outsourcing which manifest administrative law values and, if so, does this provide evidence of publicisation in the Australian context? Chapter III approaches the question in two ways. Firstly, I advocate a standards benchmarking methodology as an appropriate way to identify whether there is evidence of publicisation. Secondly, I carry out two small-scale ‘values benchmarking’ exercises to consider if there is evidence of publicisation in relation to selected amendments (legislative mechanisms) and jurisprudence (judicial mechanisms).

The topic of benchmarking clearly needs some introduction and explanation as its reputation has been tarnished within the public law discipline by its close association with the New Public Management reforms of the late 1980s and 1990s: this is undertaken in part A. Most of the concerns about benchmarking, however, can be ameliorated by clearly differentiating standards benchmarking, which is the benchmarking methodology used in this dissertation, from performance benchmarking. Standards benchmarking is a common tool used within both the private and public sector and is a proven way of prioritising fidelity with standards when analysing complex, value-laden systems.

Also referred to as best-practice standards benchmarking.

‘Values benchmarking’ is used as short form for standards benchmarking exercise that uses administrative law values as the relevant standard.
Parts B and C document the two values benchmarking exercises that I have undertaken. I have chosen to focus on whether there is evidence of publicisation in the actions and decisions of the Parliament and the judiciary respectively. The first benchmarking exercise looks for evidence of publicisation in recent amendments to the *Ombudsman Act 1976* (Cth) and the proposed amendments to the *Freedom of Information Act 1982* (Cth). The second benchmarking exercise focuses on the jurisprudence of the federal courts relating to judicial review and in particular the jurisdictional issues that typically prevent outsourcing cases from being heard. It may be evident to the reader that the two values benchmarking exercises I have chosen to undertake are likely to respectively provide a good example of publicisation, and a poor example of publicisation. These contrasting results allow me scope for reaching conclusions as to whether the concept of publicisation has broader application and utility in the Australian context.

^ obviously conducting values benchmarking exercises that focused on whether private sector mechanisms or soft law mechanisms provided evidence of publicisation would also be very interesting, and potentially fruitful. The scope of this dissertation did not allow consideration of these issues. 
CHAPTER I
AN ADMINISTRATIVE LAW VALUES FRAMEWORK

Obscure concepts hinder progress. So an attempt of a more candid formulation of principle has more than a semantic purpose.¹

The aim of this chapter is to build a framework for recognising and discussing administrative law values that will inform the empirical research in chapter II and the benchmarking exercises undertaken in chapter III.

The disparate elements of this framework are best understood as an attempt to answer the 'what', 'where', 'why' and 'how' questions in relation to administrative law values. What are administrative law values (part A)? Where do administrative law values fit into the administrative law system (part B)? Why should administrative law values be regarded as having ongoing relevance in relation to outsourcing (part C)? How can we talk about administrative law values (part D)?

Part A canvasses some possible definitions of the word 'values' and the term 'administrative law values' and considers the difficulty in recognising synonyms. No attempt is made to present the definitive definition or categorization system for values,² the emphasis instead is on the need to be able to defensibly identify administrative law values. Part B focuses on recognising the relationship between administrative law values and administrative law goals or objectives. If this relationship is not appreciated, it is difficult to analyse how control, review or accountability mechanisms differ in terms of their outcomes depending on the manner in which administrative law values are embedded. Part C addresses the question of why administrative law values should or could have continuing relevance in relation to outsourcing. Finally, in part D, I compile a vocabulary for

discussing administrative law values in the Australian context that draws on the existing discourse amongst legal commentators within Australia.

A Recognising 'Administrative Law Values'

1 Definition

'Values' is defined as 'principles or standards of behaviour'\(^3\) or as 'the things of social life (ideals, customs, institutions, etc) towards which the people of the group have an affective regard'.\(^4\) Following the same formulation, the term administrative law values could be defined as the values, principles or standards of behaviour that are attributable to the administrative law system. Such definitions, however, add little to our understanding of administrative law values as a composite, conceptual noun.

When institutions or systems are attributed values, the purpose is often to facilitate reflection and discussion, within a community, about the institution. For example, the composite noun ‘family values’,\(^5\) which has far greater currency than administrative law values, having made it into Australian idiom, is defined as the ‘values supposedly characteristic of a traditional family unit, typically those of high moral standards and discipline’\(^6\) (emphasis added). This definition makes it clear that the meaning of the term ‘family values’ is related to moral standards and discipline within a family unit but is a contested or relative term, hence the need for qualifiers such as ‘typically’ and ‘supposedly’ (which may also suggest that the values are aspirational and illusory). In spite of the fact that no two people can agree on the precise values that comprise ‘family values’,\(^7\) the term constitutes a

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\(^4\) Macquarie Dictionary (5th ed, 2010).


\(^7\) A survey of the literature suggests that respect and trust are the most oft-cited family values.
benchmark against which actual family behaviour is discussed and assessed in public discourse.

If the term ‘administrative law values’ was to gain currency, its dictionary entry might closely follow the format used for ‘family values’ and read: the values characteristic of administrative law — typically those of promoting administrative justice and accountability within the Australian democracy.

The existence of institutional values is typically uncontroversial. However, agreement as to which particular values underpin an institution or the degree to which they have adequately been embedded in an institution or the desirability of additional values being embedded will always be contested or relative, as commentators will be approaching the question from different moral and political outlooks. The utility of engaging in a values discourse is that it provides a focus for discussion and the building of consensus, regarding the core purpose of an institution without getting bogged down in operational minutiae. Typically, core values (or ‘value types’, as names often differ between commentators) can be readily identified, with attention then focusing on peripheral or emerging values, which are often more contested.

2 Synonyms

In this dissertation I have chosen to use ‘values’ in preference to any alternative synonyms, primarily because an increasing number of Australian commentators have settled on this term8 to conduct a discourse about the essential and desirable nature of the administrative law system. In choosing the term ‘values’ rather than other words sometimes used synonymously such as ‘principles’, ‘goals’, ‘central elements’, ‘criteria’, ‘ideals’, etc9 I was also influenced by the work of Marcia Neave and the Administrative Review Council (‘ARC’) and Carol Harlow.

8 See table 1 below at 34.
9 Ibid.
In 1998, Neave in her role as President of the ARC and while introducing the highly influential report on the contracting out of government services, named the ‘objectives’ of the Australian administrative law system as being: to give individuals redress if they are affected by incorrect decisions or wrongful government action; to do this by providing a means of correcting decisions; to help improve the quality and effectiveness of government administration; and to ensure the accountability of government to its citizens. Later, in 1999, Neave spoke of the ‘qualitative administrative justice goals’ as including, encouraging compliance with the rule of law; contributing to government accountability (by making it possible for individuals to challenge decisions which affect them); and enhancing participatory democracy.

Neave, through her clear articulation of the ‘objectives’ and ‘goals’ of the administrative law system was striving to clearly describe the system’s outputs or desired outcomes and, in so doing, was building on an existing discourse on the proper objectives and goals of the Australian administrative law system. For the purposes of this dissertation, I needed to settle on an alternative term that encapsulated something akin to a systemic input, precondition, or foundation.

I was also influenced in my choice of nomenclature by Harlow’s work and by her choice of terminology when speaking of the foundations on which the discipline of global administrative law could be based. Harlow differentiated between the

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12 Marcia Neave, ‘In the Eye of the Beholder — Measuring Administrative Justice’ in Robin Creyke and John McMillan (eds), Administrative Justice — The Core and the Fringe (2000) 124, 130. In this dissertation the objectives or goals of the administrative law system are referred to in a summative form as — administrative justice for individuals and executive accountability: see below part B.

13 See the papers compiled by John McMillan (ed), Administrative Law Under a Coalition Government (1998): most commentators made reference to the goals and objectives of the administrative law system.

14 Discussed below at 21-3.
discipline's founding 'values' and its 'principles'. She justified her chosen nomenclature in the following terms:

\[\text{T}o \text{skip lightly over a semantic argument that occupies much space in works of jurisprudence, it is accepted here both that principles contain an ethical dimension, and that the legal order and legal principles both contribute to the formation of community morality and take their values from it.}\]

\[\text{Nonetheless, a distinction between 'principles', which form an essential building-block of a legal system, and 'values', which are largely formulated outside that system, is helpful.}\]

I note that later in that article Harlow felt the need to qualify the word 'principle' as 'legitimating principles' or 'governing principles', with the aim of rising one step above mere legal principles. With her definitions clearly enunciated, Harlow proceeded on her quest for the 'principles' that legitimate the new discipline of global administrative law. While I ultimately chose a different nomenclature from Harlow, for the reasons outlined above, her description of principles as being the building-blocks of a legal system was convincing and clearly a reference to a system input of the kind I refer to as values in this dissertation.

From the above discussion it should be evident that, when considering secondary sources regarding administrative law values, it is important to recognise potential synonyms and consider the meaning that is being attributed to the word. What is a 'value' to one academic is a 'legitimating principle' to another, a 'norm' to a third and an 'essential characteristic' to a fourth.

3 Justifying the Values You Recognise

From the section above, it should be apparent that recognising and identifying administrative law values is an inherently relative exercise. Yet the concept of

\[\text{15 Harlow referenced: Peter Cane, Responsibility in Law and Morality (2002).}\]


\[\text{17 Both terms are used at Carol Harlow, Ibid 190.}\]

\[\text{18 Moreover, in her concluding comments Harlow talks of administrative law norms rather than principles. Ibid 208.}\]
publicisation relies on the fact that administrative law values, as the relevant public law norms, can be identified with some degree of certainty. In this context, it is important that those relying on values to support their arguments are prepared to justify their selection of particular values. The alternative, as Mason states, is that values may be used as a veneer for subjective decision-making. In this section we consider the importance of identifying values through a defensible methodology.

(a) Judicial Utilisation of Values — Avoiding a Values Veneer

In the context of discussing the judicial decision-making process and values, Mason in 2003, discussed the difficulty in identifying ‘the core of values by reference to which judicial decision-making is to be made’. Mason’s comments were made in reply to a paper David Dyzenhaus presented on justice, the common law and the rule of law. Mason’s starting point after broadly concurring with Dyzenhaus’ paper was to note that positivism as a legal theory no longer offers an adequate explanation of the legal world in which we live and that the emphasis has now shifted to another methodology.

21 David Dyzenhaus, ‘The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law’ in Cheryl Saunders and Katherine Le Roy (eds), The Rule of Law (2003) 21. In this paper Dyzenhaus argued, amongst other things, that the resurgence of interest in the rule of law is partly due to a need to mask the ‘juridification of democratic politics’ — democracy trumped by judge-made law. In this context the rule of law concept is used as an ideological tool to legitimise the extension of judge-made law. Dyzenhaus traced the way that legal positivists have responded to Dworkin’s interpretative theory of law and his insistence that there be a link between morality and law. His conclusion is that the rule of law, a moral ideal from the common law tradition, provides the legitimating legal principle in a democratic state. See pp 42–4 for concluding comments. Mason expressed broad agreement with Dyzenhaus’ paper and he responded by emphasising the duty judges have, in his opinion, to ensure that their decisions are consistent with the legal values that underpin the Australian legal system. Neither Dyzenhaus nor Mason refer to administrative law values expressly, though Mason is clearly referencing these values.
rightly shifted to recognising that 'law is a body of rules and principles whose object is to generate just outcomes'.

Mason identified three types of values that Australian judges reference and rely on. He acknowledged that relevant values will derive from the community, as the judge is unavoidably the interpreter of community values and standards. He suggested that some values will also derive from general democratic values, such as the need for a government to justify its actions. Finally he noted the willingness of the court to turn to international law values as expressed in unimplemented international treaties where there is the need. Mason thus views community values, democratic values and international values as legitimate points of reference in judicial reasoning, in particular cases.

Interestingly, Mason then chose an administrative review case as his example to illustrate why judges need to reference value frameworks when making decisions. He discussed the case of Osmond in which the High Court held that there was no common law right to reasons. Mason commented that the decision runs contrary to the rules of natural justice and fairness and was, moreover, contrary to the culture of 'justification', which is a democratic value. It has been consistently argued that justification (governmental accountability that requires the government to articulate and justify its actions) is a democratic norm that is 'a necessary adjunct to the power...'

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23 Mason, 'Reply to David Dyzenhous', see above n 19, 52. Some say that activism of the Mason High Court was an aberration and that the current 'conservative turn' of the High Court, and its commitment to legal formalism, is more typical.


25 Mason, 'Reply to David Dyzenhous', above n 19, 54.


27 Public Service Board (NSW) v Osmond (1986) 159 CLR 656. Mason was not one of the deciding judges.

28 Mason, 'Reply to David Dyzenhous', above n 19, 54.
that the government exercises in our society', and is part of the social compact between citizen and state. Mason also makes reference to the rules of natural justice and fairness and in so doing is referencing the relevant administrative law values. He argues that the High Court should have given weight to these administrative law values, along with the democratic value of justification, in reaching its decision. His implicit conclusion is that if these values had been used as a relevant point of reference by the deciding judges, the common law would have developed appropriately.

Mason’s conclusion is that there is a need to develop express standards of review and principles of public law that protect and enhance our form of democracy as provided for by the Constitution and ‘which are more than a veneer for subjective decision-making’. The empirical–historical research in the following chapter, which aims to identify the administrative law values embedded in our current system, will respond in a small way to this call.

Mason’s comments on judicial decision-making and values may be viewed as out of sync with the current High Court, which is known for formalism rather than activism and which, as Taggart has noted, eschews, ‘the role of principle, policy, values and justice in adjudication; and in extreme forms a denial of judicial law-making’. Nevertheless, Mason’s central point remains valid, which is, if values are to be relied on in judgments, they will need to be selected in a defensible manner rather than purely subjectively.

31 Mason, ‘Reply to David Dyzenhous’, above n 19, 56.
32 Jason L Pierce, Inside the Mason Court Revolution: The High Court of Australia Transformed 2006.
In this section, consideration is given to the methodologies being used by researchers at the international level to identify global administrative law values.

Legal commentators advocating in favour of the recognition of global administrative law (or global governance)\(^34\) as a new international law discipline that spans the public–private divide,\(^35\) argue that the rules that currently govern administration at the international level have a commonality, which if recognised and developed could offer a legal framework for ensuring more accountable international administration. At this nascent stage in the development of global administrative law, its proponents are carefully and somewhat introspectively seeking to articulate its distinct attributes and to identify the values on which the body of law rests. At the same time, critics are challenging the legitimacy of the values that are identified.\(^36\) In other words a values discourse is being used to shape debate about the legitimacy and scope of an emerging area of international law.

The terminology used to discuss global administrative law values varies, for example Krisch and Kingsbury speak of the ‘meaning and the normative justifications of the core concept of global administrative law’,\(^37\) and of ‘global administrative norms’\(^38\) while Harlow speaks of ‘the universally recognised principles’ for global administrative law.\(^39\) In the parlance of this dissertation they are each discussing global administrative law values.

The values identified as global administrative law values also vary. Kingsbury and Krisch identify transparency, participation and reasoned decision-making\(^40\) and perhaps other classical accountability measures such as consultation, rationality,

\(^35\) At the international level the rule makers are not always, or even typically, governments and, accordingly, global administrative law necessarily straddles the public–private divide.
\(^36\) Carol Harlow is the primary critic, above n 16, 218.
\(^38\) Ibid 12.
\(^39\) Harlow, above n 16, 218.
legality and access to review as global administrative law values. More generally, they advocate the need for 'procedural participation' and 'review mechanisms' to be recognised as global administrative law values and for all transnational or global institutions to adopt and recognise them. Carol Harlow, by comparison, identifies a greater number of potential global administrative law values derived from a disparate number of legal discourses: procedural principles exemplified in national administrative law systems (legality and due process); rule of law values advocated by free trade exponents and economic liberals (fixed laws, access to conflict resolution mechanisms, and many more if a 'thick' rule of law is considered); good governance values (accountability, participation and transparency); and human rights values (due process rights or civil rights).

Leaving aside the obvious overlap between global administrative law values and those values discussed in part D of this chapter, the significant feature of the research into global administrative law values, in the context of this dissertation, is that Kingsbury and Krisch and Harlow have used different empirical methodologies to identify potential global administrative law values. Harlow extrapolates global administrative law values by reference to a broad range of values discourses. Kingsbury and Krisch extrapolate global administrative law values from a broad examination of existing best practice. The respective authors justify their research methodologies, which were utilised expressly to facilitate peer comment and review. The difference in methodologies reflects the different concerns and objectives of the authors. Should global administrative law comprise a set of standards for improving the legitimacy and consistency of administrative decision-making at the international level (Krisch and Kingsbury) or should the focus be on reconciling disparate interests, with a focus on protecting the vulnerable (Harlow).

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41 Ibid 4.
44 Harlow, above n 16, 188, sections 3–6.
45 In fact Harlow's work is a response to the earlier work by Kingsbury, Krisch and Stewart, above n 42. It is in response to this earlier article that she advocates recognising a broader range of relevant global administrative law values specifically so that the rights of the international citizenry can be better represented and protected.
In the following chapter, I will use a different empirical methodology — a critical textual analysis — to identify the administrative law values that were embedded in the modern-day Australian administrative law system at its inception. The example considered in this section, serves as a reminder that the choice of methodology will likely affect the scope of the values identified. Like Kingsbury, Krisch and Harlow, I will expressly state my methodology not simply to comply with best practice in social science research methodology but to facilitate meaningful critiques, debate and comments by other commentators. In this way a more objective and robust administrative law values discourse, of the type Mason advocates, can be advanced.

B Contextualising Administrative Law Values

The terms ‘administrative justice’ and ‘accountability’ are often cited as the dual objectives of the administrative law system. Others like McMillan recognise these as the principles underpinning administrative law but also include ‘good government’. This section focuses on administrative justice and executive accountability and considers how administrative law values are relevant to how we view these concepts. Considering the nature of these relationships is significant because publicisation assumes that if administrative law values are embedded in new public and private mechanisms then those mechanisms will deliver appropriate administrative justice and accountability objectives in relation to outsourcing.

4 Administrative Justice

Administrative justice, like administrative law values, is a relative, composite,
conceptual noun, which precludes the possibility of simple and certain definition.49 As Creyke has noted, '[t]he juxtaposition of “administrative” and “justice” makes this uncertainty inevitable, since it involves balancing the distributive justice focus of public administration against individual interests'. Because of the difficulty with definition, many discussions about administrative justice are frustratingly teleological, with the justness of administrative action being determined by subjectively categorising its outcomes as just or unjust.50

Creyke and McMillan have, however, attributed administrative justice with the following ‘core’ meaning: ‘administrative justice is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safeguarded’.51 What is noteworthy is that, at its core, administrative justice is a concept that focuses on justice for individuals. Creyke and McMillan’s core definition leaves open the contested question of whether achieving administrative justice necessitates empowering individuals to challenge decisions (individual justice) or simply requires the instigation of just processes (distributive justice), or both.52

Expressed in terms of administrative law mechanisms the issue can be brought down to whether administrative justice requires the provision of grievance processes for individuals, appropriate systemic review, or both.53


50 For example, John Braithwaite and Christine Parker emphasise that people must be able to contest the exercise of power, ‘by reference to their own conceptions of justice’: ‘Conclusion’ in John Braithwaite, Christine Parker et al (eds), Regulating Law (2004) 269, 282.


52 This issue is discussed further in Creyke, ‘Towards Integrity in Government’, above n 49.

French is one who has struggled in greater detail with the ‘protean’ nature of the term, ‘administrative justice’.

We can, with Rawls, conceive of justice as fairness, but to unbundle fairness into a menu of criteria for practical action is no less a problem than to dissect justice. In the end any working definition is instrumental. What justice should involve, in the context of official decision-making, will derive from the proponent’s perceptions of common values or attitudes about the way that decision-makers should act (references omitted).  

French argues that one’s perception of what constitutes administrative justice is intrinsically linked to one’s perception of the relevant administrative law values. He continues:

justice is a normative and ultimately instrumental concept [which] has its roots in community values conservatively identified in the law itself and constitutional instruments.  

French then names legality, fairness and rationality as being on the ‘menu of criteria of administrative justice’. Creyke has made a related observation on the link between values and administrative justice: ‘values and standards are the essence of administrative justice’. While French and Creyke use different metaphors to relate administrative law values to administrative justice, the intent is clear — to indicate that administrative justice obtains its potency and direction from administrative law values.

I will stress one final link between administrative law values and administrative justice. Both concepts prioritise the protection of the rights of the individual. In her

55 French, above n 54, 17.
56 Ibid 16. See also, Creyke and McMillan, ‘Administrative Justice — The Concept Emerges’ above n 49, 14. The specific values identified by French as being administrative law values are included below at 34 (table 1).
work on global administrative law, Harlow has warned of the need to continually ask the question — who will benefit from recognising particular values as global administrative law values? Her scepticism about the discipline of global administrative law stems from her concern that the values being recognised as buttressing the new discipline will not benefit the international citizenry. In chapter II, I will argue that the values that were embedded in the Australian administrative law system, and remain embedded in that system, have been expressly embedded to benefit, on balance, the citizen. If administrative justice obtains its potency from administrative law values then it is hardly surprising that a focus on protecting the rights of citizens in terms of values translates to a focus on protecting the rights of citizens in terms of administrative justice. In Australia, while the executive's need to operate efficiently is consistently recognised, it is not prioritised above the protection of the individual vis-à-vis the executive.

For the purpose of this dissertation, it is accepted that administrative justice is one of the goals or objectives of the administrative law system and that administrative law values are the roots or essence of administrative justice.

5  Accountability

Accountability has been defined synonymously as answerability, responsibility, efficient management and adherence to the rule of law. It has been defined conceptually as, 'the obligation of power-holders to account for or take responsibility for their actions'. However, for the purpose of this dissertation, a dynamic, relational definition is to be preferred. Davies defines accountability as a relationship between the account giver and the caller to account. She states that accountability requires firstly that there must be responsibility and secondly that there must be others with an interest in how that responsibility is discharged. Responsibility can

60 Malena, Foster and Singh, 'Social Accountability', above n 30, 2.
61 Anne Davies, Accountability: A Public Law Analysis of Government by Contract (2001), 75–76. Other commentators have also stressed the importance of identifying the protagonists in the accountability relationship. For example, Richard Mulgan, Holding Power to Account (2003) 22–30.
62 Davies, Accountability, above n 61, 75–6.
be attracted by performance of a role or, supervision of others carrying out that role. In arriving at her definition, Davies drew extensively on the work of Day and Klein, who made the critical observation that there can be no effective accountability unless there is an imbalance in the relationship between the account giver and the caller to account, with the latter having the upper hand. If the caller to account does not have the upper hand such that they can demand an explanation, then what you are left with is self-regulation by the party exercising 'responsibility'.

The administrative law system in Australia delivers a particular type of accountability where the caller to account is always the citizen and the account giver is always the executive. The imbalance in favour of the citizen is built into the Administrative Decisions Judicial Review Act (Judicial Review Act) 1977 (Cth) ('Administrative Review Act'), the Administrative Appeals Tribunal Act 1975 (Cth) ('AAT Act') and the Ombudsman Act 1976 (Cth) ('Ombudsman Act') in that the citizen is empowered to seek redress, and procedures are tailored and streamlined to facilitate access. The executive must give account to the citizen via an independent third party who is empowered to conduct a review of the executive's decision or action. The type of accountability, mediated through an independent court or tribunal, is often described as delivering 'legal accountability' as opposed to 'political accountability' and

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63 Ibid.
65 Complemented later by the Freedom of Information Act 1982 (Cth) ('FOI Act').
66 Legal accountability is a term most often used to denote accountability that is delivered as a right to an individual, retrospectively, via a system comprising known rules, adjudication and enforcement. It is also the type of accountability that, as Sedley J has noted, focuses on wrongs as opposed to rights: (R v Somerset County Council, ex parte Dixon [1998] Env Lr 111, 121, per Sedley J) and as Lord Wilberforce has said focuses on remedies rather than principles (Davy v Spelthorne BC [1983] 3 All ER 278, 285). It is also the type of accountability that is extolled as essential to the maintenance of the rule of law: Dawn Oliver, 'English Law and Convention Concepts' in Michael Taggart (ed), Law and Administration in Europe: Essays in Honour of Carol Harlow (2003) 83, 85.
67 The government is politically accountable to Parliament through: a) the doctrine of responsible government — see generally, Hugh V Emy, The Politics of Australian Democracy: Fundamental in Dispute (2nd ed, 1978); b) parliamentary oversight mechanisms such as parliamentary committees: for a candid history and assessment of the parliamentary committee system see, Harry Evans, 'Time, Chance and Parliament Lessons from Forty Years', (Speech delivered at Parliament House, Canberra, 24 July 2009); (c) parliamentary question time. It is also politically accountable to the Australian electorate as a whole.
'external accountability' (external to the executive) rather than 'internal accountability'.

For the purposes of this dissertation what is noteworthy is that the creation and longevity of the Australian administrative law system has given rise to an expectation that there will be a direct accountability relationship between the citizen and the executive and that the preferable mode of accountability is via review by an independent third party. Administrative law values that prioritise citizen participation as a means of seeking redress support this expectation.

In the context of outsourcing, the relevant accountability relationship becomes uncertain. The government transfers responsibility for delivering services or making particular decisions but claims to retain ultimate accountability responsibilities, by which it presumably means political accountability. At the same time, one of the purposes in outsourcing the service was to subject the provider of the service to commercial or market-based accountability mechanisms rather than administrative accountability mechanisms as provided for through the administrative law system. In the process the citizen has become a consumer and finds that he or she can now only demand account from the government contractor, typically limited to making complaint directly or via the Ombudsman.

Publicisation suggests that executive accountability, and the accountability of its contractors, can be adequately and appropriately safeguarded through new control

through direct elections held every three years. Moreover, the government voluntarily holds itself to political account through continued support for, and compliance with, laws such as the Audit Act 1994 (Cth). There are also an impressive array of internal review mechanisms ranging from oversight and complaint procedures to codes of conduct and investigation.


Cane and McDonald, Principles of Administrative Law, above n 53, 10. For example, compliance with the Corporations Law can be considered a commercial accountability mechanism.
and accountability mechanisms in which administrative law values are embedded. The question is, what type of accountability is being delivered? In whose favour are the accountability scales tipped and who is obligated to give account. These questions are explored in the benchmarking exercises in chapter III.

C The Relevance of Administrative Law Values in the Outsourcing Context

Since the late 1980s legal commentators have consistently raised concerns about outsourcing and the loss of accountability and review rights. In terms of values this can be understood as a concern that administrative law values do not have application in relation to outsourcing. For example, in 1998, the ARC in its report titled The Contracting Out of Government Services said:

[T]he Report is based on the principle that rights and remedies which are available to members of the public when services are delivered by government agencies should not be lost or diminished as a result of contracting out.

The obvious implication of the ARC’s principle, in terms of the public–private divide, is that outsourcing that affects citizens directly and is paid for by government remains at the public end of the public–private divide and the rights afforded to citizens by the administrative law system — the ability to call the executive to account and seek administrative review — should remain available. This argument expressed in terms of values, would be that the values that buttress the administrative law system are relevant, and remain relevant, in the context of outsourcing.

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71 See eg, McMillan, ‘Administrative Law Under a Coalition — Key Issues’, above n 13, 2; Michael Kirby, ‘Public Funds and Public Power Beget Public Accountability’ (Speech delivered at the University of Canberra Corporate Governance ARC Research Project; Corporate Governance in the Public Sector Dinner, High Court of Australia, Canberra, 19 March 2006): ‘[I]t is important, in my view that standards of accountability should be maintained even whilst an increasingly integrated approach to government service delivery is being pursued.’

The concept of publicisation, which posits the possibility of administrative law values having ongoing relevance in relation to outsourcing could, in this context, be viewed as a providing a solution that goes some way to addressing the concerns of the ARC and others.

It is important, however, to recognise that Freeman’s advocacy of publicisation is not motivated by a conviction that there has been a diminution of accountability or administrative justice accompanying outsourcing. Rather, Freeman’s stated research focus is on ensuring that private actors are able to be effectively harnessed in the pursuit of public ends. In that context, she advocates the concept of publicisation as a means of, ‘reassuring public law scholars that mechanisms exist for structuring public–private partnerships in democratic-enhancing ways’. Public law proponents, she argues, view the maintenance of democratic and public law norms as providing both public accountability and essential protection for individuals affected by government contracting decisions. In other words, through her advocacy of publicisation, Freeman hopes to dispel disquiet amongst public law proponents, at least to the extent necessary to ensure the effective utilisation of private actors in the delivery of public services.

Publicisation, as advocated by Freeman, is therefore premised on an assumption that the public policy proponents, such as the ARC, have a legitimate concern — being that the loss of public law norms in relation to outsourced service delivery affecting individuals is not desirable. Given this dissertation focuses on identifying administrative law values and exploring the concept of publicisation, it is not strictly necessary to do more than assume, as Freeman does, that it is arguable that administrative law values should remain relevant in relation to outsourcing. My preference though is to marshall some of the key arguments that support the

74 Ibid.
75 Ibid 1310. She notes that ‘public policy advocates’ are particularly concerned about ensuring public participation, accountability and due process when the benefits and services being delivered through contractors affect ‘vulnerable populations lacking exit options, especially where important individual rights and interests are at stake’.
76 The inability of economists to factor public law norms into their assessments represents a further obstacle: Freeman, ‘Extending Public Law Norms through Privatization’, above n 73, 1310–14.
assumption. I am conscious that any justification must necessarily be brief given the constraints of the dissertation, and highly selective given the need to traverse the extensive literature on the public–private divide.

The arguments that have been marshalled to justify categorising outsourcing as suitably public, or having the requisite public nexus, are many and varied. Some stress the public nature of the funds spent on outsourcing; the public nature of the power being exercised by government contractors making the decisions; or the inherent ‘publicness’ of the service being delivered. Others focus on the protagonists in the outsourcing triangle. Government contractors or the executive must be, they argue, accountable to citizens and their decisions subject to review because while the government may transfer responsibility for certain decisions or activities, it cannot outsource accountability. The government itself has accepted its ongoing need to remain accountable for outsourced services. If one approaches the issue from the citizen’s perspective, it is arguable that after 30 years of the administrative law system, citizens now expect to be able to seek review and demand account in relation to decisions and services which affect them directly — the nature of the provider does not dent the expectation. This argument dovetails

77 See eg, Richard Mulgan, ‘Identifying the “Core” Public Service [Should the Public Service Be Reduced to its “Core” Functions? and If So, on What Basis?]’ (1997) 87 Canberra Bulletin of Public Administration 1, 1: [Citizens have] a legitimate expectation that providers of public services paid for by public funds will be publicly accountable; Kirby, ‘Public Funds and Public Power Beget Public Accountability’, above n 71.


80 Industry Commission, above n 69, 4–5; Nicholas Seddon, ‘Commentary: Privatisation and Contracting Out — Where Are We Going?’ (1998) 87 Canberra Bulletin of Public Administration 94, 97–98. Seddon went so far as to suggest that the government should be vicariously liable for its contractors. Cf Davies, Accountability, above n 61. Davies has argued that the accountability relationship only arises when one party has responsibility in relation to a second party. If responsibility is successfully transferred then it is arguable that it is the contractor that must be accountable to the citizen.

81 Commonwealth, Parliamentary Debates, Senate, 14 May 2003, 1382. However, as discussed above at 27, the government may be envisioning retaining political accountability rather than ensuring that either the government or the contractor is accountable directly to the citizen.
with the contention that a right to administrative review is an emerging human right that transcends the public-private divide. An associated argument at the international level, is that the legitimacy of all those who exercise ‘administrative and regulatory’ power is increasingly linked to their willingness to transparently provide account through open rule and decision-making, review mechanisms, notice and comment procedures etc, regardless of whether they are state, corporate or not for profit decision-makers.

For the remainder of the dissertation, it will be presumed that administrative law values have an ongoing relevance in relation to outsourcing and the focus will be on identifying the values that comprise administrative law values and considering whether the concept of publicisation provides a useful way of evaluating the adequacy of the disparate control, review and accountability mechanisms that apply, or don’t apply, in the context of outsourcing.

D An Administrative Law Values Vocabulary

The aim in this section is to compile a vocabulary for discussing administrative law values that is consistent with the existing discourse on administrative law values. This vocabulary is essential to ensuring that the research I present in chapter II builds on and contributes to the existing discourse.

6 Particular Administrative Law Values Identified By Legal Commentators

In this section, I have collected and tabulated the lists of administrative law values, whether expressed as objectives, purposes, guiding principles, aims or ideals, which key commentators have cited (table 1). While I have paid no heed to the

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82 Margaret Allars has convincingly argued that it is possible for ‘review rights’, held by individuals, to be categorised as a species of civil and political rights pursuant to the International Covenant on Civil and Political Rights. More generally, a citizen’s right to information from government and to demand an account from government: ‘Citizenship Rights, Review Rights and Contractualism’ (2001) 18(2) Law in Context 79, 103–107. See also, Anthony W Bradley, ‘Administrative Justice: A Developing Human Right?’ (1995) 1 European Public Law, 347, 351. Bradley argues that there is an emerging ‘right to administrative justice’.

particular nomenclature used, I have ensured that each of the commentators was trying to identify the fundamental or essential characteristics of the administrative law system. I am not ignoring the fact that values are relative and that the values that a person chooses to name as administrative law values depends, at least to some extent, on what that person wants the administrative law system to deliver, and to whom.® Instead, by looking at a broad-cross section of values that have been named as administrative law values, I hope to ensure that my vocabulary is suitably representative of the discourse.

The key commentators included in table 1 have either compiled a list of administrative law values that other commentators have cited with approval or they have compiled a list of administrative law values that I consider reflects a broader legal perspective. An example of the second category is the list of administrative law values William Deane compiled while he was the Governor-General. His list can be expected to evince a judicial and/or executive perspective. Similarly, Sandra Koller’s list of administrative law values has been included as it provides a useful consumer perspective. I have also chosen to include two lists of administrative law values that Michael Taggart compiled — one made in 1992 and the other in 1997 — with a view to highlighting the differences.®

Table 1 does not seek to be exhaustive, but rather seeks to capture the administrative law values, however named, that have greatest currency amongst key legal commentators in Australia.® I have tabulated the results for ease of reference.

® Aronson and Dyer in the opening sentence of their seminal text on judicial review noted that ‘[d]efining administrative law is a topic on which few commentators can reach agreement, because it ultimately depends on what they want out of administrative law’:


®® Of course, Taggart is from New Zealand but has been included because he writes extensively on Australian administrative law. I would also have liked to have included the ‘tripartite cardinal principles of administrative law’ so simply expressed by Robin Cooke: that
Table 1 — Administrative Law Values Named in Secondary Sources

<table>
<thead>
<tr>
<th>Commentator(s)</th>
<th>Nomenclature Used</th>
<th>Values Identified</th>
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<tbody>
<tr>
<td>Margaret Allars, 1995&lt;sup&gt;a&lt;/sup&gt;</td>
<td>Values protected by administrative law review</td>
<td>Openness, rationality, fairness and participation</td>
</tr>
<tr>
<td>ARC, 1995&lt;sup&gt;b&lt;/sup&gt; (&amp; Gabriel Fleming, 1999&lt;sup&gt;c&lt;/sup&gt;)</td>
<td>Values underlying administrative review</td>
<td>Lawfulness, fairness, openness, participation and rationality</td>
</tr>
<tr>
<td>ARC President, Bettie McNee, 1996&lt;sup&gt;d&lt;/sup&gt;</td>
<td>The administrative law values which the ARC promotes</td>
<td>Lawfulness, fairness, rationality, openness, transparency, and efficiency</td>
</tr>
<tr>
<td>Aronson &amp; Dyer, 2000&lt;sup&gt;e&lt;/sup&gt;</td>
<td>Ideals of good government according to law</td>
<td>Openness, fairness, participation, accountability, consistency, rationality, accessibility of grievance procedures, legality and impartiality</td>
</tr>
<tr>
<td>Sir William Deane, 1997&lt;sup&gt;f&lt;/sup&gt;</td>
<td>Core values to be observed by government administrators and which underlie public administration in a democratic community</td>
<td>Incorruptibility, accountability and fairness</td>
</tr>
<tr>
<td>Justice Robert French, 1999&lt;sup&gt;g&lt;/sup&gt;</td>
<td>Criteria or central elements that law should strive to impart to public administration</td>
<td>Lawfulness, fairness and rationality</td>
</tr>
<tr>
<td>Sandra Koller, 1999&lt;sup&gt;h&lt;/sup&gt;</td>
<td>Principles in administrative justice</td>
<td>Access, independent decision-making, procedural fairness and explanation&lt;sup&gt;i&lt;/sup&gt;</td>
</tr>
<tr>
<td>Ron McLeod, 1999&lt;sup&gt;j&lt;/sup&gt;</td>
<td>Administrative justice implies a set of values, not always mutually consistent</td>
<td>Natural justice, participation, democracy, efficiency, fairness, transparency and cost effectiveness</td>
</tr>
</tbody>
</table>

<sup>a</sup> Decision-makers must act in accordance with the law, fairly and reasonably. Cooke, however, did not write specifically on Australian administrative law.
<table>
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<tr>
<th>Commentator(s)</th>
<th>Nomenclature Used</th>
<th>Values Identified</th>
</tr>
</thead>
<tbody>
<tr>
<td>John McMillan, 2003&lt;sup&gt;k&lt;/sup&gt;</td>
<td>Administrative law values ... integral to the ombudsman method of administrative investigation</td>
<td>Objectivity, transparency, procedural fairness, independent thought and reasoned conclusions</td>
</tr>
<tr>
<td>Michael Taggart, 1992&lt;sup&gt;l&lt;/sup&gt;</td>
<td>Fundamental values for the exercise of public power</td>
<td>Legality, openness, accessibility, fairness, participation, impartiality and rationality</td>
</tr>
<tr>
<td>Michael Taggart, 1997&lt;sup&gt;m&lt;/sup&gt;</td>
<td>Public law values ... distilled primarily from administrative law</td>
<td>Openness, fairness, participation, impartiality, accountability, honesty and rationality</td>
</tr>
</tbody>
</table>

<sup>d</sup> Bettie McNee, 'Administrative Review – Observations and Reflections' (2001) 54 Admin Review 5, 16. She noted in her lecture that, in her opinion, these values were 'systemic values' as critical for private corporations as for government. These ARC values were repeated, with transparency omitted, by Robin Creyke and Jillian Segal, 'The Administrative Review Council: Future Challenges' (2007) 58 Admin Review 2, 8.
<sup>e</sup> Aronson and Dyer, Judicial Review of Administrative Action, above n 84, 1.
<sup>f</sup> William Deane, 'Opening Address' (Speech delivered by the Governor General at the Opening of the National Conference of the Institute of Public Administration, Melbourne.
<sup>h</sup> Sandra Koller, 'Back From the Fringe - What Consumers Expect from Administrative Justice' in Robin Creyke and John McMillan (eds), Administrative Justice — The Core and the Fringe (2000) 150, 162.
<sup>i</sup> Explanation is my one word summary of what she referred to as 'formal acknowledgment of the process, such as a report with reasons'.
<sup>j</sup> Ron McLeod, 'Administrative Justice — An Ombudsman’s Perspective on Dealing with the Exceptional' in Robin Creyke and John McMillan (eds), Administrative Justice — The Core
and the Fringe (2000) 58, 58. McLeod cited the following work in relation to this point:
'Standing Conference on the Resolution of Citizens' Grievances', a consultation paper
published by the Bristol Centre of Administrative Justice, University of Bristol.

\[\text{John McMillan, 'Future Directions for Australian Administrative Law — The Ombudsman'}\]
(Address by Commonwealth Ombudsman delivered to the AIAL National Administrative Law
Forum, Canberra, 3-4 July 2003), 1.

\[\text{Taggart, 'The Impact of Corporatisation and Privatisation', above n 85, 371.}\]
\[\text{Taggart, 'The Province of Administrative Law Determined', above n 85, 3.}\]
Taking the results in table 1 at face value, without grouping similar values, the most commonly cited administrative values are set out in order in table 2.

Table 2 — Identifying the Most Frequently Cited Administrative Law Values

<table>
<thead>
<tr>
<th>Most Frequently Cited Administrative Law Values</th>
<th>Frequency*</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Fairness</td>
<td>9</td>
</tr>
<tr>
<td>• Rationality</td>
<td>7</td>
</tr>
<tr>
<td>• Openness</td>
<td>6</td>
</tr>
<tr>
<td>• Participation</td>
<td>6</td>
</tr>
<tr>
<td>• Lawfulness-legality</td>
<td>5</td>
</tr>
<tr>
<td>• Accountability</td>
<td>3</td>
</tr>
<tr>
<td>• Impartiality</td>
<td>3</td>
</tr>
<tr>
<td>• Transparency</td>
<td>3</td>
</tr>
<tr>
<td>• Accessibility</td>
<td>2</td>
</tr>
<tr>
<td>• Efficiency</td>
<td>2</td>
</tr>
<tr>
<td>• Independence / independent thought</td>
<td>2</td>
</tr>
<tr>
<td>• Natural justice / procedural fairness</td>
<td>2</td>
</tr>
<tr>
<td>• Consistency</td>
<td>1</td>
</tr>
<tr>
<td>• Cost effectiveness</td>
<td>1</td>
</tr>
<tr>
<td>• Democracy</td>
<td>1</td>
</tr>
<tr>
<td>• Explanation</td>
<td>1</td>
</tr>
<tr>
<td>• Honesty</td>
<td>1</td>
</tr>
<tr>
<td>• Incorruptibility</td>
<td>1</td>
</tr>
<tr>
<td>• Objectivity</td>
<td>1</td>
</tr>
<tr>
<td>• Reasoned conclusions</td>
<td>1</td>
</tr>
</tbody>
</table>

*Number of commentators in table 1 who cited a particular administrative law value

What is surprising about tables 1 and 2 is the degree of concurrence in the values named as administrative law values. Ten key legal commentators managed to name only 20 administrative law values and some of those values are clearly overlapping (eg impartiality, objectivity, natural justice, independence and incorruptibility) and

I felt it uncontentious to group together: lawfulness and legality; natural justice and procedural fairness; and independence and independent thought.
arguably duplicative (e.g., openness and transparency). The clearest limitations of tables 1 and 2 are that no attempt has been made to ensure that commentators were using terms consistently and no weighting has been given to the administrative law values nominated by Allars and Aronson and Dyer, which would be appropriate as their lists have been most frequently cited by other commentators.

There are some striking inclusions in tables 1 and 2 that warrant discussion at this stage: in particular, the nomination of fairness, effectiveness, efficiency, democracy and accountability as administrative law values.

7 Fairness

All commentators other than McMillan and Koller name fairness as a key administrative law value. Fairness is regularly used as shorthand for the adequacy of the decision-maker and the decision-making process (rationality, openness, lawfulness, impartiality, transparency, independence, natural justice, consistency, honesty, incorruptibility, objectivity) but it can also refer to the adequacy of the pre and post decision-making procedures (openness, participation, accessibility, accountability and explanation). In fact, of the 20 administrative law values cited in tables 1 and 2, it seems that the protean nature of the term ‘fairness’ is capable of encompassing all except perhaps efficiency, cost effectiveness and democracy. 88

In Australia fairness is a value that transcends the administrative law system and is also said to be one of the key values of the Australian legal system (along with truth and justice), 89 one of the key contemporary community values relevant to the administration of our criminal justice system 90 one of the much touted Australian values the then Prime Minister John Howard articulated in 2006. 91 When Australian

88 Arguments could be made equating both efficiency and cost effectiveness as values that the executive must uphold, as a matter of fairness, vis-à-vis taxpayers.
90 Dietrich v The Queen (1992) 177 CLR 292, 321 (Brennan J).
91 The others were: respect for the freedom and dignity of the individual; a commitment to the rule of law; the equality of men and women; and a spirit of egalitarianism that embraces tolerance, fair play and compassion for those in need: John Howard, ‘A Sense of Balance: The Australian Achievement in 2006’ (Address by the Prime Minister to the National Press Club, Canberra, 25 January 2006). See also, Anne Winckel, ‘A 21st Century Constitutional
legal commentators say that fairness is a key administrative law value, what do they mean, given that they typically go on to enumerate more specific or subsidiary values?

The contemporary philosopher, Stuart Hampshire, offers one explanation as to why fairness is a central value in relation to institutions and systems. In essence, he argues that conflict is a constant to be embraced and that rationality therefore requires the pursuit of justice, on a case by case basis, through reliance on procedurally fair conflict-resolution processes. Hampshire is differentiating fairness in terms of securing substantive justice, which he argues will always vary with moral outlooks, and fairness in terms of procedural justice, which he considers one of only two universal norms: ‘fairness and justice in procedures are the only virtues that can reasonably be considered as setting norms to be universally respected’.

Comments by Brennan J in Dietrich v The Queen offer some support for Hampshire’s conception that there is an emerging norm or contemporary value that promotes fairness in procedures. In relation to criminal trials, Brennan J noted, ‘[a]s an abstract proposition, contemporary values favour steps designed to reduce the possibility of injustice and to enhance the fairness of trials’.

If we accept Hampshire’s dichotomy between substantive fairness, which is always morally relative, and procedural fairness, which is a universal norm, then what type of fairness have commentators named as a core administrative law value? The associated values listed by those commentators who have cited fairness as an administrative law value in tables 1 and 2 suggests that commentators are using the
word ‘fairness’ as shorthand for fairness of the decision-making process generally, including fairness of the decision-maker.⁹⁵

8 Efficiency, Cost Effectiveness

The degree of commonality in the values identified in tables 1 and 2 serves to highlight the different tenor of the administrative law values nominated by McLeod. McLeod’s list of administrative law values was taken from a paper he presented in his capacity as the Commonwealth Ombudsman in 1999⁹⁶. The values he identified as implicit components of administrative justice were natural justice, participation, democracy, efficiency, fairness, transparency and cost effectiveness (see table 1). His conception of the values constituting administrative law values stands out because of the inclusion of democracy, efficiency and cost effectiveness, though I note that McNee also included efficiency as an administrative law value.

When McLeod identified efficiency and cost effectiveness as administrative law values he expressly noted that value sets do not have to be mutually consistent.⁹⁷ The values included by McLeod provided him with an opportunity to discuss how administrative law values can be reconciled with the dominant public administration values that typified the New Public Management era (efficiency and effectiveness). This particular attempt to merge administrative law values and public administration values is not surprising given that during his tenure as Ombudsman, McLeod advocated for, and secured an extension of the jurisdiction of the Ombudsman to include overseeing outsourced government functions. This development will be discussed further in Chapter II and III,⁹⁸ but at this stage it is sufficient to note that review of government contractors by the Ombudsman Office will necessarily involve balancing or reconciling the values of effectiveness and efficiency, which are the public administration values which underpin outsourcing as a mode of public administration, and administrative law values. In short, McLeod’s role as Ombudsman may have inclined him towards a broader conception of administrative law values that incorporated public administration values in order to highlight the

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⁹⁵ However, this does not explain why commentators then go on to enumerate more specific values that could also be viewed as dictating fairness in procedures.

⁹⁶ McLeod was the federal Ombudsman from 1998–2003.


⁹⁸ See below at 129–32, 154–158.
compromises that must, of necessity, be made when amending the administrative law system such that it is applicable in relation to outsourcing.

I doubt that other commentators would question the importance of efficiency or cost effectiveness to the administrative law system but they may prefer to categorise effectiveness and cost efficiency as closely aligned public administration values rather than administrative law values. As McLeod rightly noted, the issue is whether value sets should be, or need to be, mutually consistent. Having conducted the research set out in chapter II, I am inclined, like McLeod, to include efficiency as an administrative law value and recognise that one of the strengths of a values discourse is that it provides an opportunity to discuss and prioritise countervailing values that operate within a discipline.

9  Democracy

McLeod also listed democracy as an administrative law value. Harlow would agree with McLeod on this point, having referred to democracy and the rule of law as twin ideals comprising the 'legitimating principles' of any Western administrative law.99 However, I find Neave’s conception of participatory democracy as an administrative justice goal, rather than value, far more satisfactory.100 Other conceptions of the relationship between democracy and administrative law values emphasise that administrative law values are premised on the existence of a democratic system of government. For example, Oliver conceives of democracy as one of the ‘paramount values’ from which common key public law values flow. Similarly, Freeman implicitly conceives of ‘public law norms’ as a subset of ‘democratic norms’ (accountability, due process, equality and rationality).101

To argue that Australian administrative law values may be parochial in the sense that they have developed within a particular democratic tradition, incorporating the Westminster system, a federation, a written constitution but no bill of rights, is incontrovertible. To reduce democracy into a single administrative law value is, in my opinion, unhelpful.

99 Remembering that Harlow used ‘legitimating principles’ in a manner that is synonymous with values in this dissertation: see Harlow, above n 16, 190.
100 The other two goals being the rule of law and assisting government accountability: Neave, above n 12, 137.
101 Freeman, ‘Extending Public Law Norms Through Privatization’, above n 73, 1288, 1314.
Accountability was named as an administrative law value by only three commentators, but the eminence of those commentators, Taggart, Deane, and Aronson and Dyer, has caused me to reflect on its inclusion. Accountability was, in fact, one of the values that Taggart added to his list in 1997 having not included it in 1992. As discussed in part B of this chapter executive accountability is one of the twin goals of the administrative law system and is best defined in terms of a relationship between a caller to account and an account giver, with the balance being always in favour of the caller to account. One word synonyms for accountability such as answerability and responsibility focus on capturing the imbalance in the relationship by naming the duties with which the executive must comply if they are to be adequately accountable. A number of the values named in tables 1 and 2, such as explanation, transparency and reasoned conclusions could be subsumed by a value such as accountability.

A closer look at table 1 may clarify the context in which accountability was named by the specific commentator as an administrative law value. For example, Deane was naming the core administrative law values that government administrators should observe and limits himself to naming three values — incorruptibility, accountability and fairness. In this context, and given Deane’s exclusion of legality, one can assume that accountability was meant to encompass legal accountability. Similarly, Taggart’s 1997 list excludes legality but includes accountability, which may suggest that he too is using the value of accountability to encompass legal accountability. No similar conclusion can be drawn from Aronson and Dyer’s list.

11 Grouping the 20 Administrative Law Values Identified by Key Commentators

In this section I will group the 20 values identified in tables 1 and 2 into ‘value types’. As I embark on this task, I am acutely mindful of the fact that the process of grouping is subjective and therefore understandably contentious. In particular Aronson and Dyer warn of the impossibility of reaching consensus on the definitive set of administrative law values because the composition of the list ‘ultimately
depends on what [commentators] want out of administrative law. I am also mindful of Harlow's conclusion that the quest for a universal set of administrative law values is not desirable and that diversity and pluralism are to be preferred.

My aim, however, is not to synthesise a small agreed list of administrative law values. Rather, my aim is to devise a manageable way of conceptualising and discussing the disparate administrative law values named in tables 1 and 2. In chapter II, I will be presenting research undertaken to identify the values that buttress our administrative law system and I need a method for referencing these values without necessarily differentiating between closely related values such as openness and transparency.

My starting premise for the grouping exercise was that there were obvious overlaps and links between the 20 values. My belief was that through a grouping process I could reduce the list of 20 values to a handful of value types, all be they overlapping. I started by attempting to redistribute all the values that were listed by one or two commentators only (see table 2) to related higher-ranking values. I then removed 'democracy' from the list of values for the reasons discussed immediately above. Finally, I made a series of decisions on how to best group the values, including decisions to limit or demarcate the protean values of fairness and accountability. The two key decisions were firstly, to limit 'fairness' to fairness on the part of the decision-maker and secondly, to subordinate 'accountability' to 'lawfulness'. I have recorded these and other decisions pertaining to the grouping exercise in table 3, providing a limited justification in the right-hand column.

102 Aronson and Dyer, above n 84, 1. Judging by the lengthy list of 'ideals' that Aronson and Dyer then advocate, what they want out of administrative law is a deluxe system (see table 1).

103 Harlow, above n 16, 207. Her general argument is that the 'norms' of administrative law, while value laden, are capable of operating in different value systems.
Table 3 – Grouping of Administrative Law Values Identified by Commentators

<table>
<thead>
<tr>
<th>Value Types</th>
<th>Administrative Law values</th>
<th>Justification</th>
</tr>
</thead>
</table>
| **Fairness (10)** — Values focused on the fairness of the decision-maker or decision-making process. | • Rationality (7)  
  • Impartiality (3)  
  • Independence (2)  
  • Consistency (1)  
  • Honesty (1)  
  • Incorruptibility (1)  
  • Objectivity (1)  
  • Reasoned conclusions (1) | As noted above, ‘fairness’ as an administrative law value could be defined broadly enough to encompass all of the values listed in table 1. I have limited the meaning of ‘fairness’, for the purpose of this grouping exercise, to fairness on the part of decision-makers or fairness of the decision-making process. Fairness clearly overlaps with lawfulness/legality and with participation. I acknowledge readily that some commentators may have been trying to, additionally, indicate the need for decisions to be substantively fair. |
| **Participation (6) or Openness (6)** — Values focused on making it possible for citizens to challenge executive decisions | • Natural justice / procedural fairness (3)  
  • Transparency (3)  
  • Accessibility (2)  
  • Explanation (1) | I have grouped together all of the values that allow for an affected party to follow, understand and, if necessary, complain about a decision. ‘Natural justice’ is included because the hearing rule is a central means of ensuring individual participation in the administrative system. However, I acknowledge that the rule against bias is also a central tenet of natural justice and would be better placed under ‘fairness’. I will generally refer to this value type as ‘participation’ but, at times, it will be more appropriate to use the label ‘openness’. |
<table>
<thead>
<tr>
<th>Value Types</th>
<th>Administrative Law values</th>
<th>Justification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawfulness or legality (5)</td>
<td>• Accountability (3)</td>
<td>My preference would be to define ‘lawfulness’ or ‘legality’ by reference to the broad doctrine of <em>ultra vires</em> and to include all errors that lead to an error of law. However, defining legality thus results in a broad area of overlap with the values listed under ‘fairness’ and ‘participation’. But if a narrow definition of <em>ultra vires</em> is used instead to define lawfulness, there is less overlap. A degree of overlap between lawfulness/legality and fairness is unavoidable. Accountability has been included under legality because it seems likely that legal accountability was being emphasised by at least two of the three commentators who named it as an administrative law value.</td>
</tr>
<tr>
<td>Efficiency (2)</td>
<td>• Cost effectiveness (1)</td>
<td>In spite of the fact that only McLeod and McNee named efficiency as an administrative law value and only McLeod named cost effectiveness, I have nevertheless included them in this values ‘grouping’ exercise in recognition of the significance of this value as a counter-balance to legality–lawfulness, fairness and participation.</td>
</tr>
</tbody>
</table>

There is inevitable and unavoidable overlap between the values types identified above but the different value-types focus on the actions of the different protagonists in the administrative review system (citizens must participate; the executive must behave fairly and legally; the judiciary must decide on issues of legality; Parliament...
needs the executive to function efficiently). I will use the value types identified above as a means of referring to the value-types that I identify in chapter III and where necessary, I will refer to the more specific values.

12 Chapter I Conclusion

In this chapter, I have endeavoured to define, compare and analyse the term ‘administrative law values’ and to thereby situate my dissertation within the existing discourse on administrative law values. I have also catalogued the administrative law values that legal commentators in Australia have identified as administrative law values and compiled a suitable vocabulary to use when discussing those values.

In chapter II, I turn to a consideration of the 1970 Administrative Law Reports and undertake a critical textual analysis of these reports with a view to identifying the administrative law values that were embedded in the New Administrative Law System. It is my contention that the administrative law values that were the hallmark of the 1970s Reform Reports are the very same administrative law values that are the hallmark of our current system of administrative law.
CHAPTER II
THE 1970S REFORM REPORTS:
IDENTIFYING ADMINISTRATIVE LAW VALUES

Our proposals, we believe, reconcile basic ideas of justice, acceptance of the wide and growing power of the administration and efficient and fair exercise of that power in a democratic society.\(^1\)

1 Introduction

The reform agenda set out in the Kerr Committee Report, the Bland Committee Interim Report, the Bland Committee Final Report and the Ellicott Committee Report (to be referred collectively to as the ‘1970s Reform Reports’)\(^2\) was an overdue response to the post-war burgeoning of the executive, in terms of size and influence. The doctrine of ministerial responsibility, while still relevant, could not possibly be expected to apply to each of the multifarious decisions made in each department. It was widely recognised that executive action was having an unprecedented effect on the daily lives of citizens and, while there were differing views on the wisdom of the ‘big government’ phenomena, there was a general consensus that the rights of citizens to seek review of executive decisions needed to be bolstered. At the same time, it was evident to the legal fraternity that the judicial review system was stagnating, bogged down in procedural and jurisprudential technicalities, such that it was not a viable option for citizens seeking the review of executive decisions. Within the legal fraternity and the executive there was talk of the reforms to the administrative law systems that had taken place in the United Kingdom and New Zealand and discussion of whether similar reforms might

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not be useful in the Australian context. In short, demand was growing for the review and reform of the administrative law system in Australia and there was already some enthusiasm for the creation of new administrative review mechanisms that were accessible to citizens and were designed to deal with a higher volume of complaints or applications in a streamlined, cost-efficient fashion.

This is the essential context against which the 1970s Reform Reports must be read. It explains why the 1970s Reform Committees showed such enthusiasm for reform and why they felt so little need to justify precisely why the reforms were necessary.

This chapter is divided into nine parts, with the first part describing the research methodology that I will be utilising (part A).

Parts B–E report on empirical research undertaken for the purpose of identifying the values that buttress the Australian administrative law system through conducting a textual analysis of the Kerr Committee Report, the Bland Committee Interim Report, the Bland Committee Final Report, and the Ellicott Committee Report. My aim in conducting this research is to identify administrative law values in a less subjective fashion than has been attempted to date.

In parts F–G of this chapter I argue that the administrative law values of today do not differ from the administrative law values embedded in the New Administrative Law System of the 1970s. In order to make this argument I trace the 1970 administrative law values through from recommendations to enactments (part F) and then consider whether amendments to the enactments over the last three decades have altered the embedded administrative law values (part G).

In the conclusion to this chapter, I draw out some themes from the research presented.

The administrative law values I identify in this chapter will be used in chapter III to consider whether the concept of publicisation is a useful way of evaluating new mechanisms developed in response to outsourcing.

3 Kerr Committee Report, above n 1, 31–54. Relevant reforms had also take place in the United States and France but these were less applicable in the Australian context: at 55–66.
A Methodology

2 Assumption Underlying the Methodology

This chapter is premised on the assumption that there are, in fact, administrative law values that are able to be deducted from the argumentations and recommendations in the 1970s Reform Reports. Unlike natural lawyers, my assumption is not based on a conviction that there is a spiritual, natural or even moral order underpinning all human systems. Rather, my assumption that there are administrative law values embedded in the Australian administrative law system stems from my training as an historian and lawyer, and from my conviction that history matters and is embedded in the institutions of a society. Moreover, when the institutions in question are legal institutions there is even greater reason to expect historical continuity, as continuity is one of the key legitimating features of our legal system.

3 Choice of Primary Source

In the late 1970s and early 1980s the administrative law system in Australia was transformed as a result of the implementation of extensive and wide-ranging reforms proposed in the 1970s Reform Reports.

The Kerr Committee Report is the most significant of the 1970s Reform Reports as it contains the reform vision and outlines the reform agenda. The Bland Committee Reports (Interim and Final) and the Ellicott Committee Report were both commissioned to report on how best to implement particular reforms proposed in

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4 Post-modernist scholars would reject this assumption and would argue that there are no objectively determinable values and that to understand the meaning of the 1970s Reform Reports I would need to focus on the meaning within the social and political constructs of 1971. I found Susan Crennan’s recent summation of post modernism helpful: Susan Crennan, ‘Scepticism and Judicial Method’ (Speech delivered at the Australian Bar Association Conference, Chicago, 28 June 2007).


6 Ibid 204–5.
the Kerr Committee Report. Each of the 1970s Reform Reports evidence a commitment to providing citizens with new and effective means of seeking redress in relation to the growing number of executive decisions affecting their daily lives. An associated secondary argument was that by providing effective and accessible redress to citizens, executive accountability would be safeguarded.

There was bipartisan support for the reform agenda, in principle, and therefore, in spite of an intervening change in government, implementation of the reform agenda progressed relatively quickly. The 1970s Reform Reports heralded the introduction of the 'New Administrative Law System', the hallmarks of which include the enactment of the Administrative Appeals Tribunal Act 1975 (Cth) ('AAT Act'), the enactment of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ('Administrative Review Act') and the Ombudsman Act 1976 (Cth) ('Ombudsman Act'): legal icons which still dominate the Australian administrative law system in Australia.

In reading the 1970s Reform Reports, one cannot help but recognise the enthusiasm for reform and the breadth of the reform agenda itself. The reports are rich in detail and justification and the Kerr Committee Report is warmly argued, making them ideal primary sources for textual analysis. Of course, alternative primary sources such as the administrative law enactments, parliamentary debates, and explanatory memoranda, whether contemporary or historical, could also have

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8 The Bland Committee was the last of the reform committees to report and presented its final report in October 1973. By 1977 the enactments to give effect to the extensive reform agenda were in place: Administrative Appeals Tribunal Act 1975 (Cth); Ombudsman Act 1976 (Cth); Administrative Decisions (Judicial Review) Act 1977 (Cth). While four years to implement the reform agenda may seem a long period, one must remember that there was an intervening change of government and extensive planning was necessary to create three entirely new institutions (the ombudsman's office, the Administrative Appeals Court and the 'court of review', which became the Federal Court — Federal Court of Australia Act 1976 (Cth)).
9 The significance of the 1970s Reform Reports was recognised by their re-publication in 1996: Robin Creyke and John McMillan, The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark (1996).
been used as primary source documents. However, such documents are not noted for their argumentation and justification, making textual analysis less rewarding.10

As Creyke and McMillan said of the 1970s Reform Reports in 1996,

[T]he Kerr, Bland and Ellicott Committee reports are as relevant now to the study of administrative law as when they were first completed. That relevance attests to a rare alignment of new ideas and political willingness to introduce far-reaching change.11

4 Critical Textual Analysis

The methodology I utilise in this chapter involves undertaking a critical textual analysis of the 1970s Reform Reports with a view to identifying the administrative law values embedded in the New Administrative Law System. Textual analysis is a standard empirical research methodology, used routinely in relation to the analysis of case law or other authoritative legal texts.12 However, it is arguable that my methodology is post-empiricist in that it relies not only on observation, experience and reason but also heavily relies on interpretation, history and criticism. Martin Loughlin argues in favour of using a post-empiricist theoretical framework when researching public law:

[A] theoretical approach to public law must therefore be ... interpretative because in the field of law fact and value cannot be kept categorically distinct. It must be empirical in that it must be rooted in an understanding of the realities of government and the functions which law is expected to perform in relation to the political system. It must be critical both in subjecting various interpretations to rational scrutiny and to enquiry in respect of empirical understanding of the functions of government and law.

10 Occasionally such detail can be gleaned from second reading speeches and parliamentary debates.
12 For a discussion of the progression from dialectic analysis to 'the methods of analysis and synthesis of authoritative texts 'characteristic of the western legal tradition, see Patrick Parkinson, Traditions and Change in Australian Law (2nd ed, 2001) 31–2.
Finally it should be undertaken with a degree of historical sensitivity with a sense of the changing needs of societies through time.\(^\text{13}\)

Regardless of whether the critical textual analysis methodology is more correctly described as empiricist or post-empiricist, it is subject to criticism because empirical research relies on both the researcher’s skills of observation and their experience, and can therefore be unduly subjective.\(^\text{14}\)

Chapter I goes some way to managing the scope of any inappropriate subjectivity by providing a framework for thinking and talking about administrative law values that has been drawn from the existing discourse within the legal discipline. For example, rather than creating and justifying my own idiosyncratic lexicon of administrative law values, I will be using the system compiled by reference to the values other legal commentators have named (summarised immediately below, for ease of reference).\(^\text{15}\)

<table>
<thead>
<tr>
<th>Participation</th>
<th>Legality</th>
<th>Fairness</th>
<th>Efficiency</th>
</tr>
</thead>
<tbody>
<tr>
<td>(of citizen affected by a decision)</td>
<td>(of decision)</td>
<td>(of decision-maker /agency/decision)</td>
<td>(of executive)</td>
</tr>
<tr>
<td>Openness</td>
<td>Accountability</td>
<td>Rationality</td>
<td>Cost effectiveness</td>
</tr>
<tr>
<td>Natural justice / procedural fairness</td>
<td></td>
<td>Impartiality</td>
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<tr>
<td>Transparency</td>
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<td></td>
<td></td>
<td>Consistency</td>
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</tbody>
</table>

\(^\text{13}\) A post-empiricist theory of public law challenges the bright-line distinction between objectivism and subjectivism embedded in empirical methodologies see, for example, discussion by Martin Loughlin, *Public Law and Political Theory* (1992), 33–6.

\(^\text{14}\) See Loughlin’s comments on the need to avoid ‘radical subjectivism’, which he argues is evident in some Critical Legal Studies scholarship: Ibid 33.

\(^\text{15}\) Above at 43-4 (table 3). Besides fairness, participation, ‘lawfulness’ and ‘efficiency’, I have also identified that a number of the reform proposals in the 1970s Reform Reports were motivated by a concern to uphold constitutional values and in particular judicial independence and responsible government. The fact that the 1970 reformers felt it necessary to safeguard existing constitutional values at the same time as enshrining certain administrative law values should not be surprising. Administrative law values must, of necessity, be consistent with overlapping constitutional law values.
In this chapter I will also ensure that my reasoning process is explicit and transparent by thoroughly documenting the specific observations and arguments on which I am founding my conclusions. This will not necessarily prevent subjectivism, but it will enable the reader to follow my reasoning and reach their own conclusions. I have chosen to provide this detailed documentation in a series of tables, as I find this format an accessible way to present large quantities of dense information.

The process I will follow when conducting my critical textual analysis of each of the four 1970s Reform Reports will firstly involve a close reading of the report and the identification of the major reform issues. I will then complete a separate table in relation to each of these reform issues. Column one of the tables will comprise a list of arguments put forward by the relevant committee in relation to that specific reform issue. The arguments I include will be representative rather than comprehensive — selected to reveal the motivation or intention of the committee. The actual recommendations made in relation to a reform issue will be included in column two. By juxtaposing a committee’s arguments on a particular reform issue (column one) against its ultimate recommendations made on that issue (column two) I will be able to identify the underlying administrative law value(s) that explain(s) both the argument and the recommendation. The third column will name the relevant administrative law value and summarise the reasoning that led me to identify a particular administrative law value, or set of administrative law values, as being implicit in the committee’s approach to that reform issue. The process documented in column three can be thought of as one of extrapolating administrative law values from the arguments and recommendations of the respective committees.

The format of each table is as follows:

| Table No [ ] and name: [Reform issue identified by a particular committee] |
|---|---|---|
| Arguments | Recommendations | Administrative Law Value |
| | | |
An example will illustrate how the process of extrapolation works in practice. In table 1, the reform issue being considered is the Kerr Committee’s concern to ensure that the executive be made more accountable to citizens. In column one the various arguments regarding this reform issue are listed, such as the committee’s concern about the increasing intrusion of executive decision-making on the lives of citizens. Listed in the second column are the numerous recommendations that the committee ultimately made to address this issue such as the extension of the judicial review jurisdiction by the creation of an administrative court and the need to stipulate the grounds of review. Having considered the various arguments and recommendations, in the third column I conclude that a concern to ensure the legality of decision-making is the primary administrative law value implicit in these arguments and recommendations but that a secondary concern is to facilitate citizen participation (which of course includes accessibility, openness and explanation).

B The Kerr Committee Report

5 Membership and Terms of Reference

In October 1968 the Attorney-General established the Kerr Committee and provided it with terms of reference that asked it to deliberate as to the adequacy of the system of administrative review in Australia. The Kerr Committee comprised Justice John Kerr, judge of the Commonwealth Industrial Court (Chairman); Justice Anthony Mason, judge of Appeal of the Supreme Court of NSW; Robert Ellicott QC, Solicitor-General of the Commonwealth of Australia; and Professor Harry Whitmore, Dean of the Faculty of Law, ANU. The committee was small by contemporary standards, with the government clearly focusing on obtaining quality legal advice. It has been suggested that Professor Whitmore was the power behind the committee and that he wrote the first draft of the Kerr Committee Report.

16 Below at 62.
17 Justice Robert Ellicott joined the committee on 15 May 1969 when he was appointed Solicitor-General.
The terms of reference for the Kerr Committee, as amended, were:

1) To consider what jurisdiction (if any) to review administrative decisions made under Commonwealth law should be exercised by the proposed Commonwealth Superior Court, by some other Federal Court or by some other Court exercising federal jurisdiction.

2) To consider the procedure whereby review is to be obtained.

3) To consider the substantive grounds for review.

4) To consider the desirability of introducing legislation along the lines of the United Kingdom Tribunal Inquiries Act 1958.

5) To report to the government the conclusions of the Committee.

6) The Kerr Committee’s Approach

The Kerr Committee Report was written to convince. It may seem evident in hindsight that the reforms would receive wide support, but the structure, tone, explanations and arguments in the Kerr Committee Report suggest that the committee felt the need to sell its reform agenda to the government and wider community. The hallmarks of the report are its argumentation and its zeal.

(a) What Was Wrong with the Existing System?

The starting point for the Kerr Committee, as set out on the first page of its report, was that the existing form of external review of administrative action, which relied almost entirely on judicial review by the courts through applications for prerogative writs, was an entirely inadequate system of administrative review. In justifying this statement, it said dismissively that:

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19 Number 1 of the terms of reference initially read, ‘To consider the jurisdiction to be given to the proposed Commonwealth Superior Court to review administrative decisions’. This was amended on 14 December 1970.

20 Kerr Committee Report, above n 1, 1 [1].

21 Kerr Committee Report, above n 1, 1 [5].
In formulating our proposals we have concluded that there is an established need for review of administrative decisions. We have not thought this to be a matter of real debate.\textsuperscript{22}

One key problem of the old system of administrative review that the Kerr Committee identified was that, very often, a citizen affected by unfavourable administrative decisions was forced to seek judicial review when what they actually wanted was review of the merits of the decision.\textsuperscript{23} This recognition that citizens wanted external review in the form of merits review is a good example of the Kerr Committee moving seamlessly from what was wrong with the existing system to what was needed in a new system and what types of reforms were warranted.

The wholesale dismissal of the existing administrative law system as inadequate freed the Kerr Committee to recommend a radical reform agenda that would both remedy the serious failings in the existing judicial review procedures and introduce a comprehensive system of external review of administrative decision comprising merits review, judicial review and ombudsman review.

(b) The Kerr Committee’s Vision — Tipping the Balance in Favour of the Citizen

The Kerr Committee stated toward the end of its report that:

In order to deal with our terms of reference, we have found it essential to develop views upon the system of administrative law that should exist in Australia to provide the general context in which our recommendations would operate (emphasis added).\textsuperscript{24}

The comment shows that the Kerr Committee was deliberately pursuing a particular reform agenda with a view to securing a specific type of new administrative law system for Australia. The Kerr Committee’s vision was to introduce a modern,

\textsuperscript{22} Kerr Committee Report, above n 1, 3 [10].

\textsuperscript{23} Kerr Committee Report, above n 1, 9 [20]. See also reference in Ellicott Committee Report, above n 2, above n 2, 5 [16] noting the emphasis given by the Kerr Committee to the fact that, ‘review of administrative decisions could not, as a general rule, be obtained on the merits and that this was usually what the aggrieved citizen was seeking’.

\textsuperscript{24} Kerr Committee Report, above n 1, 112 [389].
general administrative law system for Australia.\textsuperscript{25} The committee believed that it was essential that the New Administrative Law System reconciled three legal ideals: justice for citizens; acceptance of the wide and growing power of the administration; and the efficient and fair exercise of that power in a democratic society.\textsuperscript{26} This last argument was made so frequently throughout the report that it comprises the key theme of the report ('the balancing of interests theme').

When the committee first expressed the balancing of interests theme in its introduction, it took pains to emphasise the tension that exists between citizens and the executive. The committee significantly said that it was unwilling to elevate administrative efficiency over administrative justice for citizens:

\begin{quote}
[w]e have taken the view that at a time where there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him, not only by obtaining an authoritative judgment on whether the decision has been made according to law but also in appropriate cases by obtaining a review of that decision.
\end{quote}

We have been mindful that it is essential to achieve a balance between the desirability of achieving justice to the individual and the preservation of the efficiency of the administrative process. In approaching that question it is necessary to keep in mind that, \textit{although administrative efficiency is a dominant objective of the administrative process, nevertheless the achievement of that objective should be consistent with the attainment of justice to the individual} (emphasis added).\textsuperscript{27}

It is important to note that when the Kerr Committee spoke of efficiency, it was concerned with the efficient and effective functioning of the executive rather than

\begin{itemize}
\item \textsuperscript{25} Ibid 105 [357]; 117 [390], Recommendation 30.
\item \textsuperscript{26} Ibid 107 [364]; 112 [389]: '[O]ur proposals, we believe, reconcile basic ideas of justice, acceptance of the wide and growing power of the administration and efficient and fair exercise of that power in a democratic society'.
\item \textsuperscript{27} Ibid 3 [11–12].
\end{itemize}
simple cost efficiency. Their concern was to avoid introducing a system that unduly slowed down executive decision-making or in any other way compromised the role of the executive.

This balancing of interests theme was repeated in the last chapter of the report, immediately before the recommendations were listed, when the committee concluded that its recommendations would see the establishment of, 'modern administrative institutions able to reconcile the requirements of efficiency of administration and justice to the citizen'.

The Kerr Committee's reform agenda involved creating an entirely new administrative law system that rebalanced the legal relationship between citizens and the executive in favour of the citizen while showing as much deference as possible to the need for executive efficiency.

7 A Critical Analysis of the Kerr Committee Report — Tables 1–4

The four reform issues of the Kerr Committee Report that I have identified are drawn from the reports balancing of interests theme.

- The executive must be more accountable (table 1);
- Citizens must be empowered to seek review of decisions affecting their rights (table 2);
- Efficiency of government administration is a priority (table 3); and
- Maintenance of Australia's democratic traditions is also a priority (table 4).

I will use these four reform issues to order my critical textual analysis of the Kerr Committee Report, the detail of which can be found in tables 1–4. In addition to tables 1–4, I have included a brief narrative designed to complement the tables by commenting on points that could not readily be tabulated and summarising the key significance of each table. The tables and narrative should be read in conjunction.

[^28]: Ibid 112 [389].
[^29]: Ibid 107 [364]; 112 [389].
(a) Table 1 — The Executive Must Be More Accountable

The Kerr Committee felt that the burgeoning size of the executive and the expansion of its decision-making role demanded the introduction of new accountability measures. Its three main proposals to hold the executive more accountable were to: introduce a statutory right to judicial review in order to simplify the process and allow a citizen to challenge the legality of executive decisions; introduce a system of merits review of executive decisions to allow a citizen to challenge the decision on its merits; and introduce a system of ombudsman's review for executive decisions that do not lend themselves to judicial review or merits review. These three proposals belong both in table 1 (the executive must be more accountable) and table 2 (citizens must be empowered to seek review of decisions affecting their rights). To avoid duplication, I have discussed introducing a statutory right to judicial review in table 1 and the introduction of merits review and ombudsman review in table 2.

In table 1, the Kerr Committee's concern to ensure legality of executive decision-making by empowering citizens to more effectively 'participate' in the administrative review system by making the judicial review process more 'open' and 'accessible' are considered in terms of the pursuit of administrative law values.

(b) Table 2 — Citizens Must Be Empowered to Seek Review of Decisions Affecting Their Rights

The Kerr Committee believed that the system of administrative law review must be reformed to provide redress to citizens in relation to executive decisions affecting them directly. It readily acknowledged that the existing system of judicial review was of limited utility, available only to challenge the legality of a decision and even when illegality was found, a decision was not necessarily replaced. Even if a simplified statutory system of judicial review was to be introduced, as the Kerr Committee recommended, citizens would still not be able to challenge the fairness of decisions, where there was no illegality. It was in this context that the Kerr Committee embraced the concept of merits review by an 'Administrative Review Tribunal' (‘ART’). Moreover, recognising that not all decisions would be suitable for merits review, and with the aim of instigating a comprehensive system of independent administrative review available to all citizens not simply those able to fund and
organise a court or tribunal challenge, the Kerr Committee recommended the establishment of the Ombudsman’s office (or a General Counsel for Grievances) who would report to the Parliament but be firmly viewed as being within the executive arm of government. The commitment to providing citizens with a range of administrative review options was perhaps the key achievement of the Kerr Committee Report.

Table 2 demonstrates that the establishment of the merits reviews system and the Ombudsman’s office were designed to build fairness and participation into the administrative review system.

(c) Table 3 — Efficiency of Government Administration Is Also a Priority

The third reform issue the Kerr Committee pursued was to ensure that the implementation of the New Administrative Law System did not undermine the efficiency of the executive. Oddly, while often referencing the importance of maintaining executive efficiency, the Kerr Committee made no obvious efforts to minimise the impact of the reform agenda on the executive besides making general recommendations that the new Administrative Court, the tribunals and the Ombudsman adopt simple procedures. The executive were cajoled into accepting the reforms with statements praising their professionalism and predicting that there would not be many challenges given that the quality of decision-making in the public service was of such a high quality.

It cannot be suggested that the Kerr Committee was concerned with cost efficiency as we have come to understand that term post-1990s. The Kerr Committee said that they could not possibly estimate the costs as there were too many variables. However, they argued, any costs would be warranted because if executive decision-making was of a predictably high standard then the number of decisions challenged would be relatively small. Conversely, if the cost was high, then Australia should bear the costs, ‘because it would be intolerable for citizens to have to bear the consequences of a high degree of administrative error’.

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30 Ibid 105 [354–5].
31 Ibid 108–9 [371, 373].
32 Ibid 108 [365–9].
33 Ibid 108 [370].
The Kerr Committee also recommended the establishment of the Administrative Review Council (‘ARC’) to advise government on matters pertaining to administrative law generally but particularly in relation to the decisions that should be reviewable by the Administrative Review Tribunal (‘Administrative Tribunal’).

Table 3 shows that efficiency was an administrative law value of which the Kerr Committee was cognisant and which it wanted to promote. However, its focus on providing review options for citizens involved elevating the administrative law values of legality, fairness and participation above efficiency.

(d) Table 4 — Maintenance of Australia’s Democratic Traditions Is Also a Priority

The Kerr Committee was acutely aware that any reforms must complement, and in no way compromise, Australia’s democratic system of governance. To this end a number of its recommendations were specifically drafted to comply with key constitutional values such as the rule of law, independence of the judiciary and responsible government. The manner in which the pursuit of administrative law values was tempered by reference to constitutional law values is a good example of the utility of using a values discourse: it enables one to weigh up competing objectives or ideals in a transparent fashion.

Table 4 lists the constitutional values that the Kerr Committee was mindful of safeguarding while designing the New Administrative Law System.

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34 Ibid, 105 [354–5].
35 See, eg, chapter II, part B, table 4 at 71-2.
Table 1 — The Executive Must Be More Accountable (page 1)

<table>
<thead>
<tr>
<th>Kerr Committee Arguments</th>
<th>Recommendations</th>
<th>Identifying Administrative Law Values</th>
</tr>
</thead>
<tbody>
<tr>
<td>• [W]e have taken the view that at a time when there is vested in the administration a vast range of powers and discretion the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him ...</td>
<td>• <strong>Extend judicial review jurisdiction</strong> to the Commonwealth Superior Court (or Commonwealth Administrative Court) for a more cost effective and accessible form of judicial review.</td>
<td><strong>Legality — Accountability</strong>&lt;br&gt;• It is not acceptable or rational to simply wait for the executive to admit that it has erred.</td>
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<tr>
<td>• ‘Parliamentary procedures (question time; Parliamentary Committees etc) and responsible government can sometimes protect citizens’ rights against the executive but only if the administration first concedes that it has erred.’</td>
<td>• <strong>Simplified judicial review (including right to reasons):</strong> The procedure for initiating judicial review should be simplified: any person aggrieved to be entitled to initiate proceedings by an originating summons; adoption of a broad definition of what comprises a decision; and automatic access to reasons for a decision for the aggrieved person.</td>
<td>• Reforms must allow for the correction of administrative error by the executive (broadly defined) in relation to a broad range of activities and decision-making.</td>
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<td>• <strong>Stipulate the grounds of review:</strong> Expressly list the possible grounds of review for an administrative decision, and the range of available remedies, in a statute to reduce complexity and cost and to encourage citizens seeking redress.</td>
<td>• Grant jurisdiction to the Federal Court for judicial review on legal grounds.</td>
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<td>• Stipulate legal grounds for review in legislation (along with simplified procedures — see table 2).</td>
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<td>• The executive should not be able to avoid accountability in the form of judicial review:</td>
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<td>- Abolish privative clauses.</td>
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<td>- Define decision broadly — all decisions that affect individuals are subject to review.</td>
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<td>• Establish ARC to provide independent advice to government.</td>
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Table 1 — The Executive Must Be More Accountable (page 2)

<table>
<thead>
<tr>
<th>Kerr Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
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</thead>
<tbody>
<tr>
<td>'Stated broadly, our view is that the work of the Court should be complementary to a system of review on the merits.'^</td>
<td>Ensure the following are included as grounds for judicial review: natural justice, failure to observe prescribed procedures, want or excess of jurisdiction, <em>ultra vires</em> action, error of law, fraud, failure to reach a decision when there is a duty to do so, unreasonable delay.®</td>
<td>Participation — accessibility, openness, explanation</td>
</tr>
<tr>
<td>Given the power exercised by the executive, the time has come for it to accept responsibility to correct administrative error and the improper exercise of administrative power. ... nowadays, the exercise of administrative power affecting citizens requires corrective machinery.'m</td>
<td>Scrutinise the full range of executive activity including all executive decision-making, reporting and recommendations made by ministers, public servants and administrative tribunals.®</td>
<td>• Citizens must be able to seek redress — administrative justice requires it and it will also promote executive accountability:</td>
</tr>
<tr>
<td>'... the purpose in extending the scope of administrative review is ... to permit the correction of error or impropriety in the making of administrative decisions affecting a citizen's rights ...'n</td>
<td>Privative clauses in legislation should be, as far as possible, abolished to facilitate effective administrative review.®</td>
<td>‒ Expressly list the grounds for judicial review such that executive action is illegal that denies natural justice; is fraudulent; is beyond power; manifests a legal error; or is untimely (note, the grounds of judicial review reflect the legality and fairness values).</td>
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<td></td>
<td>Establish Administrative Review Councilf</td>
<td>‒ Ensure simple processes for commencing judicial review.</td>
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<td></td>
<td>Merits review (considered below in table 2).^</td>
<td>‒ Automatic right to reasons.</td>
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<td></td>
<td>Ombudsman review (considered below in table 2).^</td>
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</tbody>
</table>
a Kerr Committee Report, above n 1, above n 1, 3 [11].

b Ibid 107 [363].

c Ibid 112–114 [390], Recommendations 1–2 and 10; 74–5 [247–9].

d Ibid 91 [306].

e Ibid 113 [390], Recommendation 5.

f Ibid 113 [390], Recommendation 4; 76–78 [253–65].

g Ibid 113 [390], Recommendation 8.

h Ibid 113 [390], Recommendation 3.

j Ibid 113 [390], Recommendation 7.

k Ibid 113 [390], Recommendation 3, 5; 75 [248]; 78 [265].

l Ibid 86 [291].

m Ibid 105 [357].

n Ibid 107 [363].

o Ibid 105 [354].

p Ibid 105 [390], Recommendation 6. The Ellicott Committee recommended the addition of two further grounds of review: unreasonableness and no evidence.

q Ibid 76 [253]; 113 [390], Recommendation 4.

r Ibid 105 [390], Recommendation 14.

s Ibid 114 [12].

s Merits review could be discussed in this table, but is more aptly dealt with in ‘Table 2 — Citizens must be empowered to seek review of decisions affecting their rights’.

t Ombudsman review could be discussed in this table, but is more aptly dealt with in ‘Table 2 — Citizens must be empowered to seek review of decisions affecting their rights’.
Table 2 — Citizens Must Be Empowered to Seek Review of Decisions Affecting Their Rights (page 1)

<table>
<thead>
<tr>
<th>Kerr Committee Arguments</th>
<th>Recommendations</th>
<th>Identifying Administrative Law Values</th>
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</thead>
<tbody>
<tr>
<td>• Recently there has been a considerable expansion in the range of activities the executive regulates, and in the volume and range of services it provides to citizens. This expansion has necessarily resulted in the executive being given increased powers and discretions, the exercise of which affects citizens in many aspects of daily life.</td>
<td><strong>Merits review:</strong> A general policy of providing for a review of administrative decisions on the merits should be adopted on a much broader basis than now exists. Jurisdiction should be granted to 'a general Administrative Review Tribunal' ('Administrative Tribunal') to enable it to review fact-finding and the improper or unjust exercise of discretionary power. Merits review of a broad range of administrative decisions to be allowed.</td>
<td><strong>Fairness — rationality, impartiality, consistency, honesty, incorruptibility, objectivity and reasoned conclusions</strong></td>
</tr>
<tr>
<td>• 'The objective fact, in the modern world, is that administrators have great power to affect the rights and liberties of citizens ...'</td>
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<td>• Citizens should be able to have a decision reviewed on its merits not just when there is legal error:</td>
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<tr>
<td>• Tensions between the administration and citizens can be reconciled through the introduction of a balanced system of administrative law involving the independent review of administrative decision-making.</td>
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<td>- Grant merits review jurisdiction to a general tribunal and permit merits review of a very wide range of executive decisions.</td>
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<td>- Permit merits review of the improper or unjust exercise of discretionary power by executive decision-makers.</td>
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<td>- Empower the ARC to carry out an oversight role of tribunals.</td>
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<td></td>
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<td>- Grant review jurisdiction to the Ombudsman.</td>
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</table>
### Kerr Committee Arguments
- 'The basic fault of the entire structure is... that review cannot as a general rule, in the absence of special statutory provisions, be obtained 'on the merits' — and this is usually what the aggrieved citizen is seeking.'
- '... provide for review of decisions affecting citizens' rights whenever this is possible and where appropriate by a general Administrative Review Tribunal.'
- 'It is apparent that the scheme outlined so far would not be comprehensive [some decisions too small etc] this is the area in which an ombudsman should be appointed.'
- '[W]e favour ... locating a grievance man within the system of administrative review rather than in the parliament–executive context.'

### Recommendations
- **Administrative Review Council ('ARC')** to be created to oversee procedures and the functionality of tribunals and to make recommendations, independent of the executive, on what decisions should be subject to merits review.
- **Freedom of Information.** Legislative provision should be made for greater disclosure of official documents.
- **Simplified judicial review procedure** (considered above in table 1)

### Identified Administrative Law Values

<table>
<thead>
<tr>
<th>Participation — accessibility, openness, natural justice, explanation</th>
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<tbody>
<tr>
<td>Executive must be encouraged to be accountable for all decision-making affecting individuals, not just for errors of law:</td>
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<tr>
<td>- Grant jurisdiction to a general tribunal to review cases on their merits.</td>
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<tr>
<td>- Grant jurisdiction to the Ombudsman to review administrative decisions.</td>
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<tr>
<td>Citizens cannot be expected to challenge executive decision-making effectively if they do not have access to information:</td>
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<tr>
<td>- Provide reasons for all administrative decisions to an aggrieved citizen.</td>
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<tr>
<td>- Provide access to a range of other government documents.</td>
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<tr>
<td>Citizens to be empowered to pursue judicial review by simplifying the procedures and enumerating the grounds of review (table 1).</td>
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</tbody>
</table>
The term 'freedom of information' is being used anachronistically to refer to the type of reforms that were later enacted in the *Freedom of Information Act 1982* (Cth).
Table 3 — Efficiency of Government Administration is a Priority (page 1)

<table>
<thead>
<tr>
<th>Kerr Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
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</table>
| • The executive bears the burden of power and duty thrust upon it by circumstances and the legislature and has important duties to perform in the public interest.  
• ‘Administrative efficiency is a dominant objective of the administrative process nevertheless the achievement of that objective should be consistent with the attainment of justice to the individual.’  
• ‘More comprehensive review of administrative decisions will not, necessarily, lead to inefficiency in the administrative process provided the new system and procedures are adapted to the achievement of justice in such a way that administrative efficiency is maintained.’ | • Independent advisory body needed to facilitate smooth implementation of reforms: The ARC should be established to advise government on procedures of Commonwealth administrative tribunals and to advise government on how best to implement recommendations — in particular, which decisions made under Commonwealth enactments should be subject to merits review.  
• Merits review to be a simplified form of review: Merits review by the Administrative Tribunal will be granted appropriate powers (fact-finding review and review of improper or unjust use of discretionary power) and will adopt appropriate procedures to facilitate accessible, quick, effective merits review. | Efficiency — effectiveness  
• The implementation of the proposed reform agenda need not affect executive efficiency unduly.  
• Make every effort to simplify review procedures in courts, tribunals and in review by the Ombudsman.  
• Appoint the ARC to oversee effective implementation of reform implementation process.  
• Remind executive that making legal, correct, fair decisions is the best way to minimise any inconvenience associated with administrative review. |
### Table 3 — Efficiency of Government Administration Is a Priority (page 2)

<table>
<thead>
<tr>
<th>Kerr Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
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</table>
| • 'The existence of new administrative law institutions will tend to minimise the amount of administrative error. If as a result citizens look more critically at and have the right to challenge administrative decisions, this should stimulate administrative efficiency.'  
• Cost is not an issue of overriding importance. Either there is minimal executive error, in which case the costs will be small. Or there is extensive error, in which case the expenditure is warranted to protect citizens and Australia's democracy.  

  
  a Kerr Committee Report, above n 1,107 [363].  
  b Ibid 106 [361]. | • Recognition of oversight role of Attorney-General: The Attorney-General has the right to intervene in any proceedings to protect the interests of the government.  
• Administrative Tribunal to assist the executive: The Administrative Tribunal could be used for special inquiries of investigations needed by the government from time to time.  

  
  a Kerr Committee Report, above n 1,107 [363].  
  b Ibid 106 [361]. |  

c Ibid 3 [11–12].
d Ibid 3 [12].

f Ibid 114 [390], Recommendation 12.

h Ibid above n 1, 107 [364].
i Ibid 108 [370].

j Ibid 114 [390], Recommendation 9.
Kerr Committee Arguments | Recommendations | Identified Administrative Law Values
---|---|---
- 'When consideration is being given to a system of law to be applicable to the members of one of the important branches of government it is impossible to avoid proposals which, in the broadest sense, have political implications.'^a
- The traditional democratic methods of bringing possible injustices to notice seem ... inadequate. They depend on the administration conceding error and do not ensure independent review.'
- Review by 'outsiders' is not antithetical to democracy, though it is often considered an unwelcome intrusion into administration.'
- With expanded administration, ministerial responsibility cannot adequately protect citizens.'
- High Court’s role acknowledged: Self-evidently, the constitutional jurisdiction of the High Court remains unaffected by reform proposals.'
- **Merits review by tribunals not courts:** primarily because of concern over the constitutionality of such a course of action.'
  - [we] would conclude that in Australia, both for constitutional and other reasons, a superior court should not be used, except in special cases, for review on the merits.'
- **All executive decisions affecting individuals to be reviewable** including judicial review of ministers, tribunals and reports and recommendations made by public servants.'
- **Independence of Governor-General:** Judicial review of decisions of Governor-General not permitted.'
- Constitutional values / Australian democratic values:
  - **Judicial independence:**
    - The High Court’s jurisdiction with respect to s 75 review is expressly stated to be unaffected by reforms.'
    - **Merits review to be carried out by tribunals and not courts.**
    - Members of Commonwealth administrative tribunals are not judicial officers, nor necessarily lawyers.'
  - **Role of Governor-General:** In the Australian democratic tradition, the Governor-General makes decisions following government advice. Accordingly, review of a decision made by the Governor-General is more appropriately challenged at an earlier stage in the process, ie the relevant decision by the department or minister.'
<table>
<thead>
<tr>
<th>Kerr Committee’s Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
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<tr>
<td>• 'The purpose of extending the scope of administrative review is not to permit the</td>
<td></td>
<td>• <strong>Responsible government:</strong> This doctrine does not adequately protect citizen’s from wrong</td>
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<tr>
<td>review of decisions settling government policy or the change of established administrative policies but to permit the correction of error or impropriety in the making of administrative decisions affecting a citizen’s rights ...</td>
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<td>decisions by the executive. Proposed amendments are nevertheless ‘democratic in spirit’. '</td>
</tr>
<tr>
<td>• The government has the right to exclude from administrative review certain areas of administration (eg those involving policy consideration).</td>
<td></td>
<td>• <strong>Rule of Law:</strong> ‘Corrective machinery’ is needed to allow for correction of error in relation to the exercise of administrative power and the executive must acknowledge this need.</td>
</tr>
<tr>
<td>• 'Where the decision ... involves non-justiciable issues, a comprehensive review of that decision cannot be committed to the courts ... for constitutional reasons there can be no review by a court on the merits ...</td>
<td></td>
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</tr>
</tbody>
</table>
Kerr Committee Report, above n 1, 106 [361].

Ibid 8 [19].

Ibid 105 [355].

Ibid 33 [105]. See also at 7–8 [19]; 106 [362], 107 [363].

Ibid 113 [390], Recommendation 10.

Ibid 112 [390], Recommendation 2; 24 [68]; 73–74 [246]; 87 [293].

Ibid Chapter 4 ‘Constitutional Aspects of Administrative Law’; 21–4; 114–115 [390], Recommendation 15–16. The Kerr Committee also noted, however, that it was desirable to involve tribunal members with relevant administrative experience: 74 [247].

Ibid 68 [228]. Note the alternative, of allowing courts to play a limited role in relation to merits review was canvassed.

Ibid 76 [253].

Ibid 113 [390], Recommendation 4.

Ibid 113 [390], Recommendation 10.


The Governor-General exercise of prerogative powers has been held to be reviewable in relation to common law judicial review: Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24.

Ibid 105 [354].

Ibid 106 [358, 360].

Ibid 24 [68].

Ibid 7–8 [19]; 106 [362]; 107, 363.

Ibid 107 [363].
Providing for the participation of the citizenry in the New Administrative Law System was a priority of the Kerr Committee, as it clearly saw the need for citizens to be empowered to effectively challenge the legality and fairness of the burgeoning number of executive decisions affecting them. The Kerr Committee was also cognisant of the need to, and desirability of, minimising the impact of these major reforms on the efficiency of the executive, but this did not prevent them from consistently prioritising participation, fairness and legality over efficiency. The Kerr Committee was at pains to ensure that the proposed reforms did not interfere with constitutional values; one possible exception being that they recognised that identifying the need for a new mechanism to provide for effective review of the executive was an implicit criticism of the effectiveness of ministerial responsibility or responsible government.

Table 5 — Summary of Administrative Law Values in the Kerr Committee Report

<table>
<thead>
<tr>
<th>The Kerr Committee’s Reform Issues</th>
<th>Most Relevant Administrative Law Values — Ranked</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table 1 — The executive must be more accountable</td>
<td>Legality — accountability</td>
</tr>
<tr>
<td></td>
<td>Participation — accessibility, openness, explanation</td>
</tr>
<tr>
<td>Table 2 — Citizens must be empowered to seek review of decisions affecting their rights</td>
<td>Fairness — rationality, impartiality, consistency, honesty, incorruptibility, objectivity and reasoned conclusions.</td>
</tr>
<tr>
<td></td>
<td>Participation — accessibility, openness, natural justice, explanation</td>
</tr>
<tr>
<td>Table 3 — Efficiency of government administration is also a priority</td>
<td>Efficiency — effectiveness</td>
</tr>
<tr>
<td>Table 4 — Maintenance of Australia’s democratic traditions is also a priority</td>
<td>Constitutional values — judicial independence, rule of law, constitutionalism</td>
</tr>
</tbody>
</table>
Implementing the Kerr Committee Report

The Kerr Committee Report was submitted to the House of Representatives by the then Prime Minister, William McMahon, on 14 October 1971. The Prime Minister informed the House that there would be two further reviews undertaken. The first, the Bland Committee review, would make recommendations to government in relation to which discretionary decisions should be able to be reviewed on their merits. The second, the Ellicott Committee review, would make recommendations as to the adequacy of the current system of judicial review available in the courts and accessible by the prerogative writ procedures.

The purpose of these subsequent reviews was to determine how best to implement the Kerr Committee Report recommendations. Accordingly, the subsequent reports do not focus on justifying or expounding the need for radical reform of the Australian administrative law system, rather they adopt the Kerr Committee Report as their starting point and concern themselves with how to most appropriately, most expediently, most effectively implement the recommendations.

C The Bland Committee Report

The Bland Committee undertook the detailed work necessary to translate the objectives and recommendations of the Kerr Committee into an implementable reform agenda. In particular, it was tasked with identifying all of the discretionary decisions in Commonwealth legislation and advising on whether or not they should be subjected to merits review and review by the Ombudsman. It carried out its work in close consultation with the departments and agencies of the executive that would be most affected by the New Administrative Law System. The Bland Committee started its work in December 1971, four months after the Kerr Committee had submitted its report to the government, and proceeded to hand down its interim report in January 1973 and its final report in October 1973. While the two year

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36 Ellicott Committee Report, above n 2, above n 2, 1 [2].
37 The Kerr Committee Report was finalised on 25 August 1971 and presented by Command and ordered to be printed on 14 October 1971. Prime Minister McMahon presented the Kerr Committee Report to the House of Representatives on 14 October 1971. Note however that there is a typographical error suggesting that the report was not presented to Parliament until 14 October 1972: Bland Committee Interim Report, above n 2, 1 [1].
timeframe may seem excessive, it must be considered in the context of the small number of staff at its disposal and the magnitude of the task the committee was undertaking: identifying all executive discretionary administrative decisions suitable for merits review. Moreover, soon after the Bland Committee started its work, there was a change in government and its terms of reference were altered and it was asked to submit an interim report focusing on options for ombudsman review.  

10 Membership and Terms of Reference

The Bland Committee comprised Sir Henry Bland, a former secretary of the Department of Defence as Chairman, Professor Harry Whitmore, Professor of Law, ANU and Peter Bailey (Deputy Secretary, Department of Prime Minister and Cabinet). Notably, while the Kerr Committee comprised two judges, a Queen's Counsel and a legal academic, the Bland Committee comprised two public servants (one extant and one retired) and the same legal academic. This weighting of committee member expertise away from judicial officers and towards public servants, although legally trained, is significant. The government turned to legal experts outside of the executive to conceive the reform agenda but to public servants to advise on the preferred method of implementation.

The Bland Committee was issued with its initial terms of reference in December 1971 and was tasked with examining the:

existing administrative discretions under Commonwealth statutes and regulations and to advise as to those in respect of which it appeared that a review on the merits should be provided.

After a change in government, the incoming Attorney-General, Lionel Murphy, recast the terms of reference and in so doing shifted the emphasis from simply introducing merits review to introducing merits review and other appropriate forms of external review. He asked the committee to:

report on those administrative discretions [under Commonwealth statutes and regulations] in respect of which [the committee] considered there should

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38 Ibid 1 [1].
39 Ibid.
be some external review and on the character of the review it considered appropriate in each case.  

Additionally, and as a matter of urgency, the Attorney-General asked the Bland Committee to submit an interim report on 'the Ombudsman type process and the discretions to which it should apply'.

In the introduction to the Bland Committee Interim Report, the alteration to the terms of reference is explained as being in response to a progress briefing given by Henry Bland to the incoming Attorney-General. At that briefing Bland stated that the committee was of the initial opinion that merits review was but one effective form of external review, desirable in relation to some, but not all, discretionary decisions and that the instigation of the Office of Ombudsman could provide another effective means of external review.

The broadening of the Bland Committee’s terms of reference is significant. It allowed the Bland Committee to change its focus from merits review alone to recommending the most appropriate form of review. Accordingly, the Bland Committee made recommendations regarding the adequacy of existing forms of internal review and parliamentary oversight; the advisability of having certain decisions only reviewable by the Ombudsman or via judicial review; and the desirability of tackling the scourge of broadly drafted discretionary decisions as well as recommendations regarding merits review.

11 The Bland Committee Interim Report

The Bland Committee Interim Report was requested post-haste as the incoming Attorney-General, Lionel Murphy, was keen to introduce legislation establishing the Office of the Ombudsman. The Kerr Committee had recommended establishing a ‘General Counsel for Grievances’ and the Interim Report by the Bland Committee was to make recommendations as to the discretionary decisions that would fall

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40 Ibid.
41 Ibid 1 [2].
42 Ibid.
43 Ibid.
44 Kerr Committee Report, above n 1, 115–16, 118 [390], Recommendations 22–5, 31.
within the Ombudsman’s jurisdiction.

Most of the Bland Committee’s recommendations with respect to the establishment of the office of the Ombudsman and the jurisdiction of the Ombudsman appear in the committee’s interim report. In this report, besides setting out its recommendations with respect to the establishment of a Commonwealth Ombudsman, the Bland Committee chose to foreshadow many of the issues that they would be raising by way of recommendation in its final report. One can only speculate as to why it chose to do this. It may be because the recommendations it made in relation to the Ombudsman were best understood in a broader context, or it could have been the knowledge that, with the change in government, the impetus for administrative law reform had picked up speed and that, with the Ellicott Committee due to hand down its report imminently, there was an eager audience waiting for direction as to how to implement the Kerr Committee Report’s broadly drawn reform initiatives. Whatever the reason, the result is that there is a good deal of duplication between the interim and final reports of the Bland Committee.

12 The Approach of the Bland Committee

The Bland Committee displayed a greater sense of deference to the executive than was evident in either the Kerr Committee Report or the Ellicott Committee Report. Perhaps this is not surprising given the composition of the committee (discussed above). Moreover, the committee’s terms of reference required it to work closely with the administration in order to identify the discretionary decisions made under enactment within each department accurately and comprehensively.\(^{45}\) Extended and collaborative contact with the administration meant that the Bland Committee was cognisant of the existing accountability measures in place within departments and agencies; the impact the proposed reforms would have on administration within departments; and the preferred method of implementing the Kerr Committee’s recommendations from the executive’s perspective.\(^{46}\)

\(^{45}\) See, for example, the Bland Committee’s report of how the administration had responded to the reform agenda, which is apologist in tone: Bland Committee Interim Report, above n 2, 3–4 [15].

\(^{46}\) See the manner in which the broad reform agenda of the Kerr Committee was reduced to a manageable implantation agenda by agencies: Ibid 4 [15].
After reading the Bland Committee reports, my sense is that the Bland Committee saw itself, at least to some extent, as an advocate for the administration. This is not to say that it was not committed to the reform agenda, simply that, given the reform agenda had been accepted, it saw its task as ensuring that its implementation appropriately recognised the expertise, workload and professionalism of the administration. The Bland Committee was certainly concerned with promoting efficiency as a key administrative law value in the context of the implementation of the reform agenda.

For example, the Bland Committee recommended against allowing merits review of social security decisions even after acknowledging that it was a category of decision that very immediately and seriously affected citizens. In making its recommendation, it emphasised the number of decisions that would be open to challenge, the complexity of the legislation, the breadth of discretionary decisions involved, the existing professionalism of staff, the efficacy of existing internal review mechanisms, and the potential transformation of a benevolent department into a cautious department if decisions were subject to merits review. Instead it recommended that the Ombudsman be granted jurisdiction in relation to these decisions and an expanded complaints procedure be established.

We say, at once, that experience may point to the desirability of giving the General Administrative Tribunal a wider authority in this whole field than we now propose. Yet we would hope that adoption of our proposal will prove to supply the necessary avenues of recourse, with satisfaction to persons aggrieved and at the same time without prejudicing the smooth and speedy administration of this legislation. (emphasis added)

13 A Critical Analysis of the Bland Committee Reports

Above, in relation to my critical analysis of the Kerr Committee Report, I explained the format of the tables I am using in this chapter. Those comments are equally applicable to this section, the important point being that the tables are not simply

47 Ibid 9 [45].
49 Ibid 13 [72].
50 Above at 52.
summaries but have been crafted in order to facilitate the identification of the administrative law values underpinning particular reform issues. I considered the Bland Committee Interim Report and Bland Committee Final Report together for the purpose of conducting the critical textual analysis and have concentrated on the thrust of the recommendations and arguments rather than the detail.\(^51\)

I have chosen not to include reference to a body of arguments and recommendations the Bland Committee made strongly regarding the need to remove broadly worded discretions from legislation and regulation. The Bland Committee was obviously frustrated by the number of decisions that would prove, in effect, unreviewable because of the breadth of discretion given to the decision-maker. It expressed this concern by reference to the resulting uncertainty for citizens (ie being contrary to the administrative law values of fairness and participation).\(^52\) In effect it recommended that the government take a series of steps\(^53\) to prohibit the inclusion of broadly worded discretions and to police and enforce compliance. These arguments and recommendations have been omitted, as they were not strictly within the Bland Committee’s terms of reference and were not immediately picked-up on in the 1970s Reform Reports.\(^54\)

I have divided my critical analysis of the Bland Committee Reports into four sections corresponding to the main contributions to the New Administrative Law System the Bland Committee made:

- Review by Ombudsman (table 6);
- Merits review (table 7);

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\(^51\) For example, I have not included reference to arguments and recommendations pertinent to individual departments or to the Australian Capital Territory or Papua New Guinea.

\(^52\) Bland Committee Final Report, above n 2, 38 [191(c)].

\(^53\) For example, the review and amendment of existing broadly worded discretions; instructions to Parliamentary Counsel to avoid drafting broadly worded discretions; mandatory reporting on broadly worded discretions in annual reports and to an oversight committee etc: ibid 38 [191(c)]; 38 [195]; 46 [229], Recommendation (xvi). See, also, at 46 [229], Recommendation (xvii); 37–39 [191–200]; 48 [229], Recommendation (xvii).

\(^54\) Aronson has noted that discretionary power was seen as the great problem of administrative law: Mark Aronson, ‘A Public Lawyer’s Responses to Privatisation and Outsourcing’ in Michael Taggart (ed), The Province of Administrative Law (1997) 40, 40.
• Establishment of the General Administrative Tribunal (table 8); and
• Government policy and ministerial decisions (table 9);

Tables 7–8 are obviously closely linked. In table 7 I have focused on the Bland Committee’s conceptualisation of merits review and the type of decisions that it thought should be subject to merits review. In table 8 I have focused on the structure of the tribunals, including their review functions and procedures.

(a) **Table 6 — Review by Ombudsman**

The Bland Committee concluded that review by the Ombudsman was the preferred form of external review for a wide range of decisions departments made that affected individuals. In particular, in departments where the volume of decision-making was high, such as in the area of social security, they considered the Ombudsman the best option for dealing with grievances. However, the Ombudsman was not to have the power to review ministerial decisions or decisions pertaining to government policy. The Ombudsman’s jurisdiction would be limited to cases of maladministration, which, while to be left undefined, was envisaged to encompass grounds of review akin to broad *ultra vires* but not extending to merits review.

The Bland Committee clearly ranked external review by the Ombudsman as less intrusive to executive efficiency than merits review, presumably because the

55 Bland Committee Interim Report, above n 2, 30 [134], Recommendation (b).
56 Ibid 12 [65]: ‘We think he [the Ombudsman] will provide eminently the best vehicle for dealing with the great bulk of grievances. And, because there will be an Ombudsman, we have concluded that, at this stage, we should advise against direct access to a formal tribunal by person aggrieved by decisions in exercise of administrative discretions under the social security and welfare legislation.’
57 The Bland Committee was clearly willing to consider Ombudsman review of certain ministerial decisions, and canvassed a number of options (eg minister issuing, where necessary, conclusive certificates to exclude certain decisions from review). See, Ibid 17–22 [82–99]. However, in its final report, it recorded that the Attorney-General, Lionel Murphy, was emphatically opposed to any review of ministerial decisions by the Ombudsman: at 6 [33].
58 See for example, the introductory remarks of the Bland Committee, Ibid 1 [2]. See also at 21 [109]: ‘the Government’s decision to legislate for an Ombudsman has enabled and
Ombudsman would not replace decisions but would only have the power to make reports and recommendations to Parliament.

While the overall tone of the Bland Committee's interim report was supportive of establishing an office of the Ombudsman, the committee clearly also held some reservations about whether the individual, holding the position of Ombudsman would show appropriate deference to the executive except where he or she identified maladministration. This reservation amounts to a concern as to how independent review by the Ombudsman would slot into the existing system of executive oversight and also a concern about how the Ombudsman's maladministration jurisdiction could be exercised without erring into merits review. One example may serve to illustrate how the Bland Committee raised this type of reservation.

He must not see himself as the scourge of departments, a super administrator or a super censor, nor attempt to usurp the role of Parliament. Nor imagine himself the donee of some God given capabilities to reach a more 'right' conclusion than that under review. He has no role permitting him to take over the responsibilities of departments; he must never forget that accountability, particularly financial accountability, remains with them and their Ministers and that political accountability rests with Ministers.®®

In terms of the administrative law values implicit in these arguments and recommendations, the emphasis was on facilitating citizens' participation in the administrative review process and the overall fairness of administrative decisions, as it was with the Kerr Committee's recommendations on the establishment of an Ombudsman's office, but the Bland Committee demonstrated a far greater concern for maintaining and facilitating executive efficiency.

(b) Table 7 — Merits Review

The Bland Committee embraced the concept of merits review as relevant for most decisions in departments that affect individuals in a significant way, excluding social

justified a much more selective approach to the nomination of those administrative discretions [to be subject to merits review].

®® Ibid 14 [68].
security and welfare decisions. The Bland Committee's aim was to design a merits review system (which it defined as involving a reconsideration of a decision entitling the reviewing body to substitute its decision for that reviewed\(^{60}\)) that was balanced such that the executive strove to involve the citizen in the decision-making process and to make fair decisions (rational, impartial, independent, consistent, objective etc) because it was conscious that if it failed to do so, the citizen would be empowered to have the matter re-decided.

One of the Bland Committee's particular concerns was to ensure that high-volume decision-making and minor decision-making were not subject to merits review, which, if not excluded, would affect the efficiency of certain departments. Another concern was to ensure that ministerial decisions and decisions that could relate to the implementation of government policy were not subject to merits review. With regard to efficiency, the Bland Committee realistically acknowledged, in a way that the Kerr Committee did not, that the imposition of an external merits review system would have a cost in terms of departmental expenditure and workload.

The Bland Committee emphasised that 'not every discretionary power affects the citizen nor the relationship between the governors and the governed'\(^{61}\) and therefore, it reasoned, not every decision will lend itself to review by a formal tribunal.\(^{62}\)

Review on the merits, depending on the interpretation placed on that phrase, may not in some cases be warranted or appropriate, or, in other cases, practicable or meaningful. Yet that is not to say that there should be no review at all in those cases.\(^{63}\)

It was open to the Bland Committee to recommend that all discretionary decisions a department or agency made, affecting individuals in their personal capacity, should be subject to merits review (which mirrors the recommendation the Bland Committee made in relation to the preferred jurisdiction of the Ombudsman). This would have alleviated the need for the Bland Committee to enumerate every

\(^{60}\) Ibid 6 [25].
\(^{61}\) Ibid 6 [22].
\(^{62}\) Bland Committee Final Report, above n 2, 3 [22].
\(^{63}\) Bland Committee Interim Report, above n 2, 7 [24].
discretionary decision a department or agency made that it felt should be the subject of merits review. Instead it opted for a more limited system of merits review that applied only to enumerated decisions.

With respect to future legislation, the Bland Committee noted that the onus would be on Parliament to remain vigilant to ensure that the executive was earmarking appropriate discretionary decisions for merits review.

Finally, the detail of the Bland Committee's interactions with individual departments evidences its commitment to bring key departmental decisions within the jurisdiction of the General Administrative Tribunal ("Administrative Tribunal"). For example, the Department of Migration informed the committee that it was not opposed to independent external review provided it was only available to Australian citizens or residents. The Bland Committee asked the department to reconsider its position but no change was forthcoming. Regardless of the department's opposition, the Bland Committee recommended that persons who had resided in Australia for a period of 10 years should be entitled to merits review, with those residing for less time entitled to review by the Ombudsman. I have included this example to help paint a more nuanced picture of the balance between the administrative law values of fairness and participation and efficiency that the Bland Committee was endeavouring to construct. While its recommendation to exclude social security and welfare decisions from merits review suggests that efficiency considerations were more pressing, its recommendations to subject a vast number of key departmental decisions to merits review demonstrates the prioritisation of fairness and participation.

(c) Table 8 — Establishment of General Administrative Tribunal

While the Kerr Committee Report made only a cursory mention of the financial implications of the reform agenda it had proposed, the Bland Committee made

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64 Bland Committee Final Report, above n 2, 17 [87–8].
65 Ibid 18 [95].
66 Ibid 18 [95] (this was not captured in the final list of recommendations).
67 The Kerr Committee included a brief chapter on the organisational and cost aspects of the proposed scheme but this chapter contained no substantial analysis and amounted to telling
The spectre of large, cumbersome and expensive tribunals was laboured by the Bland Committee. For example, when the Bland Committee was considering what type of effective external review could be provided in relation to social security decisions, where thousands of discretionary decisions were being made daily, it used the experience of the War Pension Entitlement and Assessment Appeals Tribunals in the year 1971–72 as a cautionary tale. It reported that 25,000 decisions of the Repatriation Department were appealed to the War Pension Entitlement and Assessment Appeals Tribunals in the year 1971–72. This vast number was in spite of the decreasing number of clients and a 'hyper-benevolent' attitude to its clients, which was also reflected in its calculations of entitlements. This 'intimidating example' was used to argue that merits review of social security decisions would simply not be logistically or financially viable, regardless of the impact the decisions would have on citizens or that, in theory, it was desirable for a citizen affected by executive decisions to have access to merits review.

More subtly, in relation to the financial implications of implementing the Kerr Committee recommendations, the Bland Committee indicated that a wholesale implementation of the reform agenda would result in an overall increase in public administration costs as departments sought to improve the quality of their decision-making.

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68 Bland Committee Final Report, above n 2, 10 [61].
69 Ibid 46 [229], Recommendation xix; 24–5 [123–9].
70 Bland Committee Final Report, above n 2, 29 [157–165]; 30 [166–170].
71 Bland Committee Final Report, above n 2, 12 [64].
72 Ibid.
73 Ibid 12 [67].
making, record-keeping and community liaison to avoid external review challenges.\textsuperscript{74}

The above discussions and argumentation regarding the cost of the reform agenda did not result in specific recommendations but rather comprises the backdrop against which the recommendations on the role of the Administrative Tribunal can be better understood.

The Bland Committee recommended that the Administrative Tribunal have the power to conduct merits review as well as lesser forms of review, where the tribunal was only able to make recommendations.\textsuperscript{75} Providing the Administrative Tribunal with jurisdiction to make recommendatory decisions was the Bland Committee’s solution to discretionary decisions that overlapped with the implementation of government policy implementation. As the Bland Committee said, ‘the rationale for this is simply that there can be present in some cases policy elements that require that the Minister should make the final decision’.\textsuperscript{76}

The Bland Committee accepted the recommendations of the Kerr Committee Report with respect to the powers and procedures of the Administrative Tribunal. The aim at all times was to make merits review by the tribunals a simple process that citizens could, and would, initiate themselves. The Bland Committee recommendations on the awarding of costs also reflect this desire to remove the hurdles and barriers that might prevent a reasonable citizen from seeking merits review.

Finally, the Bland Committee rejected the Kerr Committee recommendation that the Administrative Tribunal should be presided over by a federal judge. It preferred instead to have the Administrative Tribunal legally and symbolically located within the executive arm of government, though, of course, functioning under the supervisory jurisdiction of the High Court.\textsuperscript{77} The Kerr Committee had acknowledged that there was a potential risk in having a judge as president in that a controversy surrounding the adjudication of an administrative matter could ‘extend to or involve

\begin{itemize}
  \item \textsuperscript{74} Ibid 12 [62].
  \item \textsuperscript{75} Ibid 47 [229], Recommendation xxxiii; 30 [171].
  \item \textsuperscript{76} Ibid 32 [172(e)].
  \item \textsuperscript{77} Ibid 31 [171].
\end{itemize}
However, it thought the risk exaggerated. The Kerr Committee concluded that:

[W]e think that the advantages of having a person, who is a judge, presiding outweigh any alleged disadvantages... The status of the Administrative Review Tribunal would be raised, the judge could rule on all questions of law and the acceptability of the decisions made would be greater.  

(d) Table 9 — Government Policy and Ministerial Decisions

The Kerr Committee left open the issue of whether or not discretionary decisions made by ministers, or involving the implementation of government policy, should be subject to external review. The Bland Committee in its interim report had recommended that a minister’s decision not be subject to review by the Ombudsman. Moreover, recommendations to ministers and decisions made by officials based on ministerial or Cabinet policy decisions, and a raft of policy-related decisions were not to be reviewed by the Ombudsman.

In the Bland Committee Final Report, the committee recommended that the Administrative Tribunal should not be entitled to question government policy. However, discretionary decisions of ministers that were of an administrative nature were to be made subject to merits review. Moreover, the Bland Committee invited Parliament to voluntarily list some ministerial decisions that touched on policy matters that should be subject to review by the Administrative Tribunal, arguing that this would demonstrate a commitment to subjecting discretionary powers to review and would be consistent with open government. The Bland Committee also

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78 Kerr Committee Report, above n 1, 87 [293].
79 Ibid 87–8 [293].
80 Bland Committee Interim Report 17–22 [83–97]; 30 [134], Recommendation (i).
81 Ibid 30 [134], Recommendation (j).
82 Ibid 30 [134], Recommendation (k).
83 Ibid above n 2, 22 [99]; p31 [134], Recommendation (l).
84 Bland Committee Final Report, above n 2, 48 [229], Recommendation (xl); 36 [183].
85 Ibid 6 [32]. See also Appendix H where the Bland Committee lists the discretionary decisions of ministers that it deems to be administrative rather than policy decisions and which it recommends should be subject to merits review.
86 Ibid 6 [32].
recommended that reports and recommendations provided as part of a decision-making process should be able to be challenged but noted that, in order to make review of such documents meaningful, they should be published in advance of a decision being made.

Table 9 seeks to demonstrate how concerns over the reviewability of ministerial decisions, decisions pertaining to government policy, and the review of reports and recommendations were difficult issues for the Bland Committee because the final decision involved balancing constitutional values against a pantheon of best-practice administrative law values.
### Bland Committee Arguments

- '[The Bland Committee] is in no doubt of the desirability of introducing an ombudsman type review process in respect of those decisions, recommendations or acts done or omitted relating to a matter of administration, which it is appropriate to subject to review, affecting any person or body in his or its personal capacity in or by the departments of the Commonwealth, and perhaps some of its instrumentalities, in the exercise of any power or function conferred by or arising under any enactment.\(^a\)

- 'We understand that the decision has been taken that all departments should be subject, \textit{ab initio}, to the Ombudsman's jurisdiction.\(^b\)"

### Implementation Recommendations

- A single Ombudsman for Australia to ensure uniformity.\(^c\)
- The qualities of the Ombudsman are demanding and close attention should be paid to recruiting the right person.\(^d\)

### Jurisdiction and powers of the Ombudsman.\(^e\)

- Introduce ombudsman review of decisions, recommendations and acts of departments and instrumentalities affecting a person or body in a personal capacity, arising under statute\(^f\) and where there is maladministration.\(^g\)

### Identified Administrative Law Values

<table>
<thead>
<tr>
<th>Efficiency — cost effectiveness</th>
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<tbody>
<tr>
<td>- The Ombudsman must be respectful of executive decision-making context; it is affected by the availability of resources and competing priorities.</td>
</tr>
<tr>
<td>- The introduction of ombudsman review will affect executive efficiency — decision-making likely to be slower and more costly.</td>
</tr>
<tr>
<td>- The Ombudsman must know their place: he or she is an adjunct to the existing system of administrative review:</td>
</tr>
</tbody>
</table>
  - Ombudsman will not be able to investigate on own motion. |
  - Ombudsman will not have jurisdiction where matters are before a court or tribunal. |
### Table 6 — Review by an Ombudsman (page 2)

<table>
<thead>
<tr>
<th>Bland Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
</table>
| • 'Fundamentally, we have seen the role of the Ombudsman ... as one of primary concern with protection of the rights of the citizens in relation with the bureaucracy in its exercise of legislative discretionary powers.'\(^n\) | - The Ombudsman should be empowered to:  
  - Decline to investigate a claim that is trivial or the like.\(^k\)  
  - Recommend that a case before him or her warrants the department remitting a question to an appropriate tribunal or court.\(^l\)  
  - Initiate investigations of statutory authorities listed in Appendix A, which should be subject to the Ombudsman's jurisdiction.\(^m\)  
  - conduct investigations and report.\(^n\) | - The Ombudsman must know their place (cont)  
  - Ombudsman to report to Parliament rather than independently.  
  - Ombudsman not to review ministerial decisions or policy decisions. |
| • '[The Bland Committee agrees] the Ombudsman should be seen as an adjunct to existing methods of Parliamentary scrutiny of the executive ... enhancing, but not replacing existing methods.'\(^n\) | • An Ombudsman is not to be thought of as a one-man court of appeal against every decision and accordingly his or her power should not extend to what he or she considers a wrong decision.\(^l\) | Fairness — rationality, impartiality, independence, consistency, honesty, incorruptibility, objectivity |
| • The Ombudsman should have no power to:  
  - Carry out merits review of a decision where there is no maladministration.\(^o\) | | • Giving the Ombudsman jurisdiction to deal with 'maladministration' (but not policy decisions) is a way of looking at the legality and/or procedural regularity of a decision.  
• The Ombudsman’s jurisdiction is to apply to decisions that are marred by bias, incompetence, perversity, arbitrariness, turpitude. |
### Bland Committee Arguments
- There will be a price for having an Ombudsman in the form of slower decision-making in departments; higher administration costs; the need to allocate more personnel; and 'some rigidities creeping in as precedents are established where earlier an infinite flexibility was [exercised].'
- '[T]here is no certainty or probability that an Ombudsman ... after reviewing the same material will reach a more satisfactory or 'right' decision than the official making the decision under review and carrying the responsibility for implementing it.'

### Implementation Recommendations
- The Ombudsman should have no power to (cont):
  - Examine policy decisions of ministers' or matters pertaining to government policy.\(^8\)
  - Investigate a range of excluded matters; publish reports independently;\(^9\)
  - Recommend repeal or amendment of legislation.\(^7\)
  - Initiate investigations if a citizen has alternative remedies (Interim Report)\(^6\) — if matters are before a court or tribunal (Final Report).\(^x\)
  - Intervene in proceedings before a tribunal or Court.\(^y\)

### Identified Administrative Law Values
- **Legality — accountability**
- **Participation — accessibility**
- Creating the office of Ombudsman provides citizens with review options where merits review and/or judicial review are not available.
- Jurisdiction should extend to the majority of decisions affecting a person/body individually for which alternative review mechanisms don't exist.

---

\(^a\) Bland Committee Interim Report, above n 2, 13 [63] (original emphasis).
\(^b\) Bland Committee Final Report, above n 2, 3 [20].
This list is not complete, but rather strives to include the major inclusions and exclusions of jurisdiction for the Ombudsman.

The government announced that the Ombudsman would have jurisdiction in relation to all decisions made within departments prior to the release of the Bland Committee Final Report: see Bland Committee Final Report, above n 2, 45 [229]; Recommendation (vii).

See also Bland Committee Final Report, above n 2, 44 [227]; 11–12 [61–33].

For example, matters such as employment of public servants and commercial dealings of departments. The complete list can be found at 22 [99].
Ibid 31 [134], Recommendation (n).

Ibid 31 [134], Recommendation (m). Note that the recommendation was to give the Ombudsman some discretion in relation to this matter.

Bland Committee Final Report, above n 2, 49 [229], Recommendation (xlix).

Ibid 49, [229], Recommendation (xlix).
Table 7 — Merits Review (page 1)

<table>
<thead>
<tr>
<th>Bland Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 'The citizen should not always have to go to the courts to establish that an administrative decision is wrong.'(^a)</td>
<td>• What discretionary decisions should be made subject to merits review?</td>
<td>Efficiency</td>
</tr>
<tr>
<td>• The significance of discretionary decisions to citizens varies from insignificant to very significant(^b) and insignificant decisions do not warrant or lend themselves to review by a tribunal.(^c)</td>
<td>- Tribunals to be expressly granted jurisdiction in relation to identified decisions in Acts and regulations.(^f)</td>
<td>- Not all discretionary decisions made by the executive affect individual citizens, or affect them in a significant way, and such decisions need not be subject to merits review.</td>
</tr>
<tr>
<td>• 'We believe that one thread of the argument that the rights of the citizen require that administrative discretions should be subject to review is that decision-makers can be uninformed and unconcerned about the effect of their decisions on the individual.'(^d)</td>
<td>- Appendix D — Lists decisions currently able to be appealed to a court — includes recommendations that some decisions be reviewed by Administrative Tribunal.</td>
<td>- List all discretionary decisions that will attract merits review.</td>
</tr>
<tr>
<td>• In the absence of merits review, the exercise of discretionary powers are not unfettered (judicial review and parliamentary oversight).(^e)</td>
<td>- Appendix E — Lists decisions currently able to be appealed to some review, other than by courts — includes recommendations that some decisions be reviewed by Administrative Tribunal.</td>
<td>- Ensure that future legislation provides for merits review of significant discretionary executive decisions.</td>
</tr>
<tr>
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<td></td>
<td>- Some discretionary decisions affect individual citizens in significant ways and yet cannot be subject to review for a range of reasons.</td>
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<td></td>
<td>- The volume of such decisions and existence of internal review mechanisms (eg social security and welfare decisions).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- The breadth of discretion granted to decision-maker.</td>
</tr>
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<td>- The decision relates to government policy.</td>
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</tbody>
</table>
Table 7 — Merits Review (page 2)

<table>
<thead>
<tr>
<th>Bland Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
</table>
| • '[T]he Government's decision to legislate for an Ombudsman has enabled and justified a much more selective approach to the nomination of those administrative discretions [to be subject to merits review].' | - Appendix H lists discretionary decisions that should be open to administrative review either by the Administrative Tribunal, the Ombudsman or through improved internal review procedures. 
- **What decisions should not be subject to merits review?**
  - Decisions pertaining to social security and welfare legislation should not fall within the Administrative Tribunal's jurisdiction (they can seek review via the Ombudsman). 
  - Ministerial policy–related decisions — see table 9 below. 
  - Certain recommendations and reports — see table 9 below. | Participation — openness, accessibility 
Fairness — rationality, impartiality, independence, consistency, objectivity, reasoned conclusions 
- Discretionary decisions made by the executive, which significantly affect individual citizens, should generally be subject to external administrative review: 
  - Administrative Tribunal given jurisdiction to consider, on their merits, a wide range of discretionary executive decisions. 
  - Where merits review is deemed inappropriate — ombudsman review may be possible (see table 6). |
| • 'Conceivably, the introduction of any external review process could lead to an excess of caution in the administrative processing of claims, and delays in grant of benefits and payment of entitlements. This could result from the extra effort put into getting and keeping the record straight lest files were called for by a body outside the culture of the department which, in the public service, is not to be discounted. So more staff could be required and doubtless staff of a high level.' | | Constitutional values 
- Promoting increased executive accountability must be tempered by respect for responsible government. |
a Bland Committee Final Report, above n 2, 45 [229], Recommendation (x).
b Bland Committee Interim Report, above n 2, 7 [24]. See also at 6 [22].
c Bland Committee Final Report, above n 2, 3 [22]. See also Ibid 6 [22].
d Ibid 8 [40]. In context, the Bland Committee is suggesting that greater publication of internal review mechanisms may help address this perception.
e Bland Committee Interim Report, above n 2, 6 [23].
f Bland Committee Final Report, above n 2, 48 [229], Recommendations (xxxvii), (xxxviii).
g Ibid 21 [109].
h Ibid 12 [62].
i Ibid 46 [229], Recommendation (xvii). See also Appendix H, 'Administrative discretions under Statutes and Regulations without any provision for review for which a review process should be considered'. Note that Appendix H cross-references extensively to Appendix C, 'Notes on legislation administered by some departments'.
j Ibid 45 [229], Recommendation (vi).
<table>
<thead>
<tr>
<th>Bland Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
</table>
| • "[Rejecting the Kerr Committee recommendations that the Chairperson of the Administrative Tribunal should be a judge, acting in their capacity as *persona
e* designatae*[^9] the community should recognise Tribunals for what they are — not courts but tribunals whose major activities are the review of decisions under administrative discretions ... in much of their jurisdiction, an extension of the total administrative process though functioning under the supervisory Jurisdiction of the Superior Court and the High Court."[^b]" | • How many tribunals?  
  - The community cannot afford a burgeoning proliferation of tribunals, each with limited jurisdiction.[^c]  
  - Legislation should establish three tribunals:[^d] a Valuation and Compensation Tribunal, a Medical Appeals Tribunal and the Administrative Tribunal.[^e]  
  - Administrative Tribunal should sit in divisions and be composed of a chairman and two members or the chairman solely.[^f] | Participation — accessibility, natural justice  
• Tribunals need to be given the jurisdiction, powers and effective procedures to ensure effective merits review for citizens affected by decisions of departments and statutory authorities:  
  - Establish the tribunals, their jurisdiction and procedures, with a view to maximising accessibility and utility and minimising the hurdles to review.  
• Costs for proceedings in the tribunal must not be prohibitive of citizen participation:  
  - Procedures to encourage self representation — non-adversarial.  
  - No negative costs award where they are acting reasonably in pursuing their appeal. |

[^9]: [personae designatae](#)  
[^b]: [Identified Administrative Law Values](#)  
[^c]: [How many tribunals?](#)  
[^d]: [Bland Committee Arguments](#)  
[^e]: [Recommendations](#)  
[^f]: [Recommendations](#)
Table 8 — Establishment of General Administrative Tribunal (page 2)

<table>
<thead>
<tr>
<th>Bland Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 'We have not felt inhibited in making our recommendations by any of the inescapable constitutional limitations ... though ... it could have been useful to give tribunals penalty awarding powers.'</td>
<td>• Tribunals able to make recommendations rather than decisions where,(^{k}) for example, there is a policy element to a decision.(^{l})</td>
<td>Efficiency — effectiveness</td>
</tr>
<tr>
<td>• 'In most cases, the investigative or inquisitorial process would be most apposite. It should have the added consequence of shorter hearings, less need of legal representation and hopefully of better decisions, the more so when the Tribunals are acting as an extension of the administrative process.'</td>
<td>• Tribunals to deal with any 'failure to make decision' by the executive — Ombudsman to provide certificate to applicant to facilitate.(^{m})</td>
<td>• Endeavour to ensure the tribunal review mechanism is as streamlined as possible to minimise cost;</td>
</tr>
<tr>
<td>• 'Since Tribunals will, in much of their jurisdiction, be but an extension of the administrative process, a decision that is sustainable on grounds other than the reasons given for it by the original decision-maker should not be upset.'</td>
<td>• No licence or registration cancelled, affecting continuation in a profession, employment or entrepreneurial activity, without opportunity to show cause.(^{n})</td>
<td>• Limit the number of tribunals.</td>
</tr>
<tr>
<td></td>
<td>• The powers and procedures of tribunals basically per the Kerr Committee Report.(^{o})</td>
<td>• Establish the tribunals with a view to quick and effective decision-making.</td>
</tr>
<tr>
<td></td>
<td>• No costs against a citizen appealing to tribunals where recourse was justified; costs to be awarded in citizen's favour where he or she is successful.(^{p})</td>
<td>Constitutional values / democratic values — judicial independence</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• The Kerr Committee suggestion that a judicial officer sit in a non-judicial role is contrary to the strict separation of judicial power from executive power; the personaél designatae exception should not be over-utilised; but, most importantly, the tribunals must accept their role as a review agency within the executive;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Do not allow judicial officers to sit on the Administrative Tribunal in any capacity.</td>
</tr>
</tbody>
</table>
Ibid 48 [229], Recommendation (xxxvi). In relation to the need to identify the relevant sections of each Act etc in respect of which a tribunal is given jurisdiction see at 48 [229], Recommendation (xxxvii). In relation to the need for subsequent legislation to indicate the sections in respect of which review to a tribunal is possible. See also at 48 [229], Recommendation (xxxviii).

e Ibid 46 [229], Recommendation (xx). In relation to the tribunal sitting in Divisions, see at 46 [229], Recommendation (xxii–xxiii). In relation to membership and structure of the tribunals, see 47–8 [229], Recommendation (xxiv–xxxii, xxxv); 48 [229], Recommendation (xxxxi).

f Ibid 46 [229], Recommendations (xxii–xxv).

g Ibid 45 [229], Recommendation (ix).

h Ibid 44 [225]. See also at 42–3 [214–17].

i Ibid 33 [172(j)].

j Ibid 33 [172(k)].

k Ibid 47 [229], Recommendation (xxxiii).

l Ibid 47 [229], Recommendations (xxxiii and xxxiv); 32 [172(e)]; 16 [84] (Customs regulation example).

m Ibid 31 [172(a)(i)]; 46 [229], Recommendation (xxxiv).

n Ibid 48 [229], Recommendation (xxxix).

o Ibid 47 [229], Recommendation (xxxiv). The Bland Committee’s qualification to adopting the Kerr Committee recommendations outright was its finding that tribunals should have staff to liaise with departments and the Ombudsman’s office with a view to streamlining the appeals process.

p Ibid 49 [229], Recommendation (vi). The recommendations were more detailed than outlined in the table. For more details see at 42–3 [215–20].
Table 9 — Government Policy, Ministerial Decisions and Administrative Review (page 1)

<table>
<thead>
<tr>
<th>Bland Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
</table>
| • [After considering concept of ministerial responsibility in 1970s] Wherever the balance of the argument lies, straightaway we come up against the problem of whether a decision relates to policy or administration. Our own experience leaves us doubting whether any defensible line of demarcation can be drawn.^a | Policy decisions of government  
  • The Administrative Tribunal should not question government policy.\(^c\)  
  • Non-policy decisions of ministers should be examinable.\(^d\)  
  • Policy decisions etc of ministers should not be examinable by the Ombudsman.\(^e\)  
  • The Administrative Tribunal should not make a decision in relation to a case with a significant policy element, even if the decision is administrative, but instead make a recommendation.\(^f\) | Constitutional values / democratic values — responsible government  
  • In a democratic country, based on the Westminster system of government, where there is no strict separation of power between the executive and the Parliament, the issue of the reviewability of ministerial and policy decisions is vexed:  
    • Show deference to ministerial policy decisions.  
    • Neither the Ombudsman nor the tribunals should be empowered to review policy decisions of ministers.  
    • Recognise that it will be difficult to differentiate policy from administrative decisions but that this can be achieved through clear drafting of legislation or by adoption of an ‘issuance of conclusive certificate by the minister’ process. |
| • [There are three choices] First to say dogmatically that no [ministerial] decision should be examinable. Second to take the pragmatic line that since it is impossible to separate precisely decisions of policy from decisions of administration, no decision should be examinable. Third to say that decision should be examinable, if the minister considers his decision is not one of policy and he consents.\(^b\) | Reports and recommendations  
  • Review of reports and recommendations should be limited to such matters of administration required to be made by legislation as a basis for decision-making by a minister.\(^g\) |                                                                                                       |
### Table 9 — Government Policy, Ministerial Decisions and Administrative Review (page 2)

<table>
<thead>
<tr>
<th>Bland Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
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</thead>
</table>
| 'Discretions vested in ministers can often be distinguished as clearly directed to matters of policy. For the rest, some bear the stamp “administrative”, others lie in the grey area. ... Ministerial discretions whose exercise is directed to establishing general norms without differentiation among individuals are more likely to fall in the policy area and those whose exercise involves primarily the application of general rules or could involve differentiating among individuals are more likely to fall in the administrative area.'
| 'We do not agree that a Tribunal should be entitled to express opinions on government policy. ... It should do no more than identify the government policy on which the decision is based.' | To ensure review of reports and recommendations required to be made by legislation are effectively subject to review, legislative provision should be made to have such reports and recommendations published in advance of a decision being made.¹ | Participation — openness, accessibility |
|                             |                 | Fairness — rationality, impartiality, independence, consistency, objectivity, reasoned conclusions |
|                             |                 | - Discretionary decisions, not involving government policy, made by a minister, which significantly affect individual citizens, should generally be subject to external administrative review:
|                             |                 |   - The Administrative Tribunal given jurisdiction to consider, on their merits, a wide range of discretionary ministerial decisions. |
|                             |                 | - Reports or recommendations given to a minister in advance of a discretionary decision should be subject to review. |
|                             |                 | - Reports or recommendations given to a minister in advance of a discretionary decision should be published. |

¹ Reports or recommendations given to a minister in advance of a discretionary decision should be published.
a Bland Committee Interim Report, above n 2, 21 [97(a)].

b Ibid 21 [97(a)].

c Bland Committee Final Report, above n 2, 48 [229], Recommendation (xl).

d Ibid 6 [32]; see also at 46 [229], Recommendation xvii and Appendix H where the Bland Committee lists the discretionary decisions of ministers that it deems administrative rather than policy decisions and which it recommends should be subject to merits review.

e Bland Committee Interim Report, above n 2, 23–31 [134], Recommendations (i)–(k); 20 [97(a)]; Bland Committee Final Report, above n 2, 6 [33].

f Bland Committee Final Report, above n 2, 47 [229], Recommendations (xxxiii and xxxiv); 32 [172(e)]; 16 [84] (Customs regulation example).

g Ibid 49 [229] Recommendation (xlvi).

h Ibid 5 [29].

Ibid 33 [17(g)(iii)]. See also at 36 [183].

j Ibid 49 [229], Recommendation (xlvi).
The Bland Committee was undoubtedly committed to the reform agenda and was therefore concerned to ensure that citizens had access to a range of appropriate review mechanisms. What makes the Bland Committee report different from that of the Kerr Committee, in terms of administrative law values, is that executive efficiency concerns weighed heavily on the Bland Committee with the result that the balance tipped in relation to some issues. The point at which the scales tipped is evident from looking at the Bland Committee's decision not to allow merits review of social security and welfare decisions not to allow the Ombudsman an own-motion jurisdiction etc.

Table 10 — Summary of Administrative Law Values in Bland Committee Reports

<table>
<thead>
<tr>
<th>The Bland Committee Reform Issues</th>
<th>Most Relevant Administrative Law Values — Ranked</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table 6 — Review by Ombudsman</td>
<td>• Participation — openness, accessibility</td>
</tr>
<tr>
<td></td>
<td>• Fairness — rationality, impartiality,</td>
</tr>
<tr>
<td></td>
<td>independence, consistency, objectivity,</td>
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<td></td>
<td>reasoned conclusions</td>
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<tr>
<td></td>
<td>• Legality — accountability</td>
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<td></td>
<td>• Efficiency</td>
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<td>• Constitutional values — responsible</td>
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<td>government</td>
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<tr>
<td>Table 7 — Merits review</td>
<td>• Fairness — rationality, impartiality,</td>
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<tr>
<td></td>
<td>independence, consistency, honesty,</td>
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<tr>
<td></td>
<td>incorruptibility, objectivity</td>
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<tr>
<td></td>
<td>• Participation — accessibility</td>
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<tr>
<td></td>
<td>• Efficiency — effectiveness</td>
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<tr>
<td>Table 8 — The role of the General Administrative Tribunal</td>
<td>• Efficiency — effectiveness</td>
</tr>
<tr>
<td></td>
<td>• Participation — accessibility, natural</td>
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<tr>
<td></td>
<td>justice</td>
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<tr>
<td></td>
<td>• Constitutional values — judicial</td>
</tr>
<tr>
<td></td>
<td>independence</td>
</tr>
<tr>
<td>Table 9 — Government policy and ministerial decisions</td>
<td>• Constitutional values — responsible</td>
</tr>
<tr>
<td></td>
<td>government</td>
</tr>
</tbody>
</table>
The Bland Committee’s contribution to the New Administrative Law System was to translate some of the broad reform initiatives that the Kerr Committee Report proposed, in particular the introduction of merits review and review by the Ombudsman, into a deliverable reform package that had the support of the executive. In so doing the Bland Committee was clearly concerned with ensuring citizens had effective and appropriate access (participation) to appropriate external review mechanisms.

While the Kerr Committee’s vision for a modern administrative law system was expressed in a flourish and hinted at reformist zeal, the Bland Committee’s reform vision was rather pedestrian:

[W]e would hope that the adoption of our proposals will prove to supply the necessary avenues of recourse, with satisfaction to person aggrieved and at the same time without prejudicing the smooth and speedy administration of the legislation.®

The Bland Committee clearly identified with the public service and with its financial, operational and institutional constraints. While the Kerr Committee acknowledged that executive efficiency was a priority, it was not willing to compromise its reform agenda by prioritising executive efficiency. By contrast the Bland Committee’s recommendations were ever mindful of maintaining executive efficiency and tempered the Kerr reform agenda with executive realism.

D Ellicott Committee Report

Membership and Terms of Reference

In October 1971, when the then Prime Minister, William (Billy) McMahon, presented the Kerr Committee Report to the House of Representatives and announced that the Bland Committee had been constituted, he also announced that the Attorney-

——

87 Bland Committee Final Report, above n 2, 13 [72].
General, Ivor Greenwood, was to convene another review committee to focus on the efficacy of judicial review of administrative decisions:

[T]he Government has decided to ... institute a review of the prerogative writ procedures available in the courts. We accept the comment of the [Kerr] Committee that the legal grounds on which remedies can at present be obtained are limited and often complicated. The Attorney-General’s review of remedies available in the courts ... should also lead to recommendations which the Government will consider.

The Attorney-General appointed Frank Mahoney, Deputy Secretary, Commonwealth Attorney-General’s Department; L J McAuley, Assistant Deputy Crown Solicitor, Sydney; and Robert (Bob) Ellicott QC, Solicitor-General, to undertake this review. Mr Ellicott acted as Chairman to the committee.

The Ellicott Committee interpreted its terms of reference to mean that, in the light of the Kerr Committee recommendations, it was to consider and report on:

(a) the deficiencies in the present procedures available for judicial review of administrative decisions;
(b) what improved procedures should be adopted for the judicial review of administrative decisions;
(c) the Kerr Committee recommendations;
(d) how the improved procedures for judicial review could be implemented; and
(e) when the improved procedures for judicial review could be implemented. 88,89

The Ellicott Committee made short work of all but its second and third terms of reference. 90

---

88 Ellicott Committee Report, above n 2, 1 [4–5].
89 It dealt with its last term of reference by advising the government that it could implement the Kerr Committee recommendations regarding judicial review immediately and that it was not necessary to wait for the final report of the Bland Committee to be completed: Ibid 11–12 [48–9, 51].
The Ellicott Committee Report is only 12 pages long and is a ringing endorsement of the Kerr Committee recommendations in relation to the introduction of a statutory system of judicial review of administrative decisions. The substantive contributions of the Ellicott Committee were limited to elaborating on particular Kerr Committee recommendations regarding creating a right to reasons; the preferable enumeration of the grounds for legislative judicial review; and the nature of administrative decisions that should be exempt from review. The perfunctory nature of this report suggests that the reform agenda that the Kerr Committee proposed was, in so far as it related to providing for legislative judicial review, uncontroversial.

A Critical Analysis of the Ellicott Committee Report

The three key reform issues in the Ellicott Committee Report are:

- what decisions should be exempt from judicial review (table 11);
- should there be additional grounds of legislative judicial review to those the Kerr Committee recommended; and
- what form should a right to reasons take?

Of these reform issues, the Ellicott Committee only deals with the first in enough detail to warrant compiling a table to facilitate a critical textual analysis. I will undertake a critical textual analysis of the other two reform issues but will present the results in narrative form.

---

90 In dealing with its first terms of reference, it did, however, provide the most cogent summary of the shortcomings of the existing administrative review system; something that was lacking in the Kerr Committee Report.

91 See, eg Ellicott Committee Report, above n 2, 3 [13]; 5 [19]; 6 [21]; 10 [47] where the Committee simply adopts the position expounded in the Kerr Committee Report. Also note the convenient summary of the Kerr Committee recommendations at 3–5 [15].
The Ellicott Committee recommended that executive accountability extend to citizens being able to generally secure relief against ministers. More specifically, it acknowledged that while discretionary decisions that ministers and public servants made could often involve matters of government policy, that in itself was not enough to justify exclusion from judicial review. This, it said, would be contrary to open government. Instead it suggested a number of areas of 'high government policy', comprising defence, national security, relations with other countries, criminal investigations, the administration of justice and the public service, that should be exempted from legislative judicial review.

At the time of writing its report the Ellicott Committee had the benefit of reading the Bland Committee Interim Report and in particular the recommendation that the Ombudsman not be able to review decisions of a minister involving matters of government policy. In recommending that ministerial discretionary decisions pertaining to government policy be subject to judicial review, it appreciated that it had reached a different conclusion to the Bland Committee and felt the need to justify reaching a contrary conclusion. The Ellicott Committee explained that review by the Ombudsman is designed to consider the correctness of a decision as a whole whereas judicial review is more confined in its scope.

Table 11 suggests that the arguments and recommendations of the Ellicott Committee as to which decisions should be subject to judicial review can, by and large, be traced back to a concern to ensure the legality of all executive decision-making. However, the decision to recommend that decisions of the Governor-General not be subjected to judicial review runs counter to the other recommendations and can only be explained as being motivated by a concern to uphold 'constitutional values'.

---

92 Ibid 6 [22-7].
93 Ibid 7 [27]; 8 [36]. These categories of exception are easily recognisable today as classes of decision which are excluded from review by the Administrative Review Act.
94 Ellicott Committee Report, above n 2, 7 [29].
(b) **Additional Grounds of Judicial Review**

The Ellicott Committee endorsed the grounds of review that the Kerr Committee proposed,\(^{95}\) which it considered accurately codified the existing grounds on which the court would intervene on an application for a prerogative writ.\(^{96}\) The Committee went on, however, to recommend two new grounds of review. The Ellicott committee credits its decision to recommend the inclusion of the 'no evidence' and 'contrary to law' grounds of review\(^{97}\) to a particular discussion at the Attorney-General's Department in 1972 with Professor Wade, a visiting British administrative law expert. The committee commented that it was inclined to the suggestion to include a 'contrary to law' ground of review because it thought that there was merit in leaving the grounds of review open-ended.\(^{98}\)

In administrative law terms, the codification of the grounds for judicial review can be viewed as a concern to ensure the legality of executive decision-making.

(c) **What Form Should a Right to Reasons Take?**

The Ellicott Committee recommended that, on application, a citizen should be provided with reasons for an adverse administrative decision.\(^{99}\) The Ellicott Committee acknowledged that reasons would not have to be provided in relation to, once again, matters of 'high government policy' such as defence and national security.\(^{100}\) In making this recommendation, the committee was concerned about participation and efficiency, which is evident from one of the few expansive arguments in the report:

---

\(^{95}\) The grounds listed in the Kerr Committee Report were denial of natural justice; failure to observe prescribed procedures; want or excess of jurisdiction; *ultra vires* action; error in law; fraud; failure to reach a decision where there is a duty to do so; unreasonable delay in reaching a decision. Ibid 8 [34].

\(^{96}\) Ibid 9 [40].

\(^{97}\) Ibid 9–10 [41–3].

\(^{98}\) Ibid 9 [42–4]. Note that they ignored Professor Wade’s warning that enumerating the grounds of review could give the appearance of having enacted a code.

\(^{99}\) Ibid 8 [34–5].

\(^{100}\) Ibid 8 [36].
To confer [a right to reasons] would clearly alter the existing law. However, it seems to us desirable that this recommendation be implemented. We think it is in the interest not only of the citizen but also of efficiency in the public service. It may also have the effect that persons who feel that they have been wronged by an administrative decision will abandon their claim when the reasons are known. The recommendation is also in accordance with the principles of open government.\textsuperscript{101}

\textsuperscript{101} Ibid 8 [34].
Table 11 — What Decisions Should Be Exempt from Judicial Review? (page 1)

<table>
<thead>
<tr>
<th>Ellicott Committee Arguments</th>
<th>Recommendations</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
<tbody>
<tr>
<td>'Before going on to a consideration of the extent to which decisions of ministers should be subject to judicial review, it is important to keep in mind that the decisions in question are &quot;administrative decisions under Commonwealth law&quot;... and not, for example, political decisions.'</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Because so many discretions are reposed by laws in ministers, it seems to us desirable that, as a general rule, an effective system of judicial review should provide for relief in respect of their exercise if the minister acts contrary to the law. | Minister's decisions:  
- 'We think that it is desirable that these decisions should be subject to judicial review even though the exercise of the minister's discretion may involve considerations of policy, or be an implementation of policy.'  
- 'Discretions which ... might be excluded would include some relating to defence, national security, relations with other countries, criminal investigation, the administration of justice and the public service.'  
- Decision should include reports and recommendations' and failure to make decisions. | Legality — accountability  
- The overall accountability of the executive would be compromised, and would be contrary to the rule of law, if the multifarious discretionary decisions made by ministers were not subject to judicial review:  
  - Ministerial decisions (including reports and recommendations) to be subject to judicial review.  
  - Some exceptions for areas of sensitivity in terms of policy should be recognised.  
- Also:  
  - Public service, agency and tribunal decisions (including reports and recommendations) to be subject to judicial review.  
  - Some exceptions for areas of sensitivity in terms of policy should be recognised. |
Table 11 — What Decisions Should Be Exempt from Judicial Review? (page 2)

<table>
<thead>
<tr>
<th>Ellicott Committee Arguments</th>
<th>Recommendations(^9)</th>
<th>Identified Administrative Law Values</th>
</tr>
</thead>
</table>
| • 'There may, however, be some discretions exercised by the ministers which ought not to be subjected to a general system of judicial review because of their policy content ... . Discretions which ... might be excluded would include some relating to defence, national security, relations with other countries, criminal investigation, the administration of justice and the public service.'\(^h\)  
• 'There is not the same need to exclude from judicial review all those discretions from which the Ombudsman might be excluded. It should be a cardinal rule that all officers and tribunals should act according to law.'\(^i\) | Governor-General’s decisions:  
• Should not be subject to review.\(^j\)  
Discretionary decisions by executive involving policy:  
• As a general rule, all discretionary decisions of public servants, authorities and tribunals should be subject to judicial review.\(^k\)  
• Exemptions additional to those listed above in relation to ministers may be warranted such as in relation to employment matters and perhaps tenders.\(^l\)  
• Decisions should include reports and recommendations.\(^m\)  
Reports and recommendations:  
• Decisions should be defined to include reports and recommendations made pursuant to law.\(^n\) | Constitutional values  
• Promoting increased executive accountability must be tempered by respect for responsible government.  
• Review of decisions by Governor-General should not be permitted. |
There is no distinct list of recommendations in the Ellicott Committee Report, above n 2, presumably because of the short length of the report.

Ellicott Committee Report, above n 2, 6 [22].

Ibid 7 [26].

Ibid.

Ibid 7 [27].

Ibid 7–8 [31].

There is no distinct list of recommendations in the Ellicott Committee Report, above n 2, presumably because of the short length of the report.

Ellicott Committee Report, above n 2, 7 [27].

Ibid 7 [30].

Ibid 8 [32].

Ibid 7 [28–30].

Ibid.

Ibid 7–8 [31].

Ibid 7–8 [31].
The summary table below demonstrates that the Ellicott Committee was primarily concerned with reforming the judicial review process in Australia in order to ensure the legality and participation of executive decision-making. I was not unmindful of issues that would affect executive efficiency, though this was not its priority. In relation to exempting decisions of the Governor-General from judicial review, I found fidelity with constitutional values more relevant than fidelity with administrative law values. Given the meagre argumentation in the Ellicott Committee Report it is difficult to be more specific.

In more general terms, however, the Ellicott Committee Report states in its introductory section that 'judicial review of Commonwealth administrative decisions is deficient and in need of reform and simplification'. If one was to surmise from this meagre argumentation what administrative law values motivated the Ellicott Committee in making its recommendations one would infer legality (deficient) and perhaps participation and fairness (simplification). Some later comments on the overall effect of implementing is proposed recommendations support this conclusion.

Table 12 — Summary of Administrative Law Values in Ellicott Committee Report

<table>
<thead>
<tr>
<th>The Ellicott Committee Reform Issues</th>
<th>Most Relevant Administrative Law Values — Ranked</th>
</tr>
</thead>
<tbody>
<tr>
<td>What decisions should be exempt from judicial review?</td>
<td>Legality — accountability</td>
</tr>
<tr>
<td></td>
<td>Constitutional values</td>
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<td>Additional grounds of judicial review</td>
<td>Legality — accountability</td>
</tr>
<tr>
<td></td>
<td>Participation</td>
</tr>
<tr>
<td>What form should a right to reasons take?</td>
<td>Participation</td>
</tr>
<tr>
<td></td>
<td>Efficiency</td>
</tr>
</tbody>
</table>

102 Ellicott Committee Report, above n 2, 3 [13].
103 Ibid 5–6 [19].
Concluding Comments on the Ellicott Committee Report

From the perspective of the creation of the New Administrative Law System, the Ellicott Committee’s contribution was twofold. Firstly, it contributed the ‘no evidence’ and ‘contrary to law’ grounds of review that would later be enshrined in the Administrative Review Act. Secondly, it endorsed the principle of open government by recommending that all discretionary decisions should be subject to judicial review and that the executive provide reasons for decisions, except in those circumstances where there was a matter of high government policy involved. By so recommending, it ensured a more accessible system of judicial review for Australia (participation). It was hoped that improved access to judicial review would in turn safeguard the legality of administrative decision-making.

Discussion of the Critical Textual Analyses

In the preceding three parts, I have presented the results of my empirical research on each of the three reports of the 1970s Reform Reports and identified the administrative law values that motivated particular reform issues and recommendations. These 1970s Reform Reports collectively formed the New Administrative Law reform agenda and it is therefore appropriate to consider what the reports tell us collectively about the administrative law values that buttressed that agenda.

The critical textual analyses I undertook demonstrate that citizens were to be the immediate, primary and intended beneficiaries of the reform agenda as set out in the 1970s Reform Reports.\(^{104}\) Citizens were to be empowered to seek review of

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\(^{104}\) Murray Gleeson has argued that there has been a shift in emphasis in the years since the New Administrative Law System was introduced from the duties of public officials to the rights of citizens. I would disagree, as I perceive this focus on the rights of citizens to be at the very heart of the reforms that became the New Administrative Law System: ‘Outcome, Process and the Rule of Law’ (Speech delivered at the 30\(^{\text{th}}\) Anniversary of Administrative Appeals Tribunal, Canberra, 2 August 2006) <http://www.aat.gov.au/SpeechesPapersAndResearch/30thAnniversary/OutcomeProcessRuleLawAugust2006.htm> at 3 March 2010.
unfavourable decisions that were marred by illegality, unfairness or maladministration, or that were simply not preferable in the circumstances. Embedding the principle of participation (openness, natural justice, transparency, accessibility and explanation) into the New Administrative Law reform agenda was therefore primarily viewed as a means of achieving administrative justice for individual citizens. Of course, the potential long-term benefits of the reforms, in terms of improved executive decision and openness of government, were also acknowledged and welcomed — but they were secondary benefits.

The reform agenda was designed to recalibrate the relationship between the citizen and the executive and in so doing to hold the executive to greater legal account. In terms of administrative law values this meant striking a new balance between the efficiency of the executive on the one hand and participation, fairness and legality on the other. Clearly everyone benefits from ongoing executive efficiency (speed of government, responsiveness of government, cost of government) but there is also a need to ensure that when this large and powerful arm of government acts, it is ever mindful of the impact its decisions have on individuals. Traditionally, the administrative law value of legality was embedded in judicial review, to safeguard individuals. When the judicial review system ossified, there was a lacuna in terms of executive oversight and also in terms of options for seeking review of executive decisions. The 1970s Reform Reports recommended addressing this lacuna by embedding legality, fairness and participation in new, weighty but far more citizen-friendly administrative review mechanisms.

The aim was not to tip the scales away from executive efficiency, though the Bland Committee acknowledged there cannot be reforms of this nature without efficiency losses, but rather to tip the scales towards a more accessible, fairer and more just system for reviewing executive action.

F Were the 1970s Reform Reports Substantively Implemented?

The question considered in this part is whether the administrative law values that drove the 1970s Reform Reports were the same administrative law values that were ultimately embedded in the enactments that comprise the New Administrative Law
System. The reform agenda set out in the 1970s Reform Reports translated directly into the Administrative Review Act and the AAT Act. However, in relation to the establishment of the office of the Ombudsman, there were two significant issues on which the Kerr and Bland Committees were at odds: the role and powers of the Ombudsman and the jurisdiction of the Ombudsman. In this part, the focus will be on analysing these different conceptions of the Ombudsman’s office by reference to administrative law values.

21 Role and Powers of the Ombudsman

The Kerr Committee recommended that in order to facilitate a comprehensive system of administrative law for Australia, the Ombudsman should be located ‘within the system of administrative review rather than in the Parliament–executive context’. The Ombudsman would thus be closely associated with the workings of the Administrative Review Tribunal and other review institutions. He or she could exercise this role by: investigating complaints; bringing cases before the relevant tribunal or court on behalf of a complainant; investigating a matter referred by a member of Parliament; or investigating a matter they had identified themselves. The Bland Committee agreed that the Ombudsman should be viewed as part of the administrative review system but thought that the Ombudsman needed to be firmly

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105 Some of the systemic reforms that were envisaged to be undertaken by the ARC, however, were not undertaken. For example, the recommendations the Bland Committee made regarding the elimination of broadly worded discretions in legislation were ignored: Bland Committee Final Report, above n 2, 49 [229], Recommendation (liv); 19 [96]. See also Bland Committee Interim Report, above n 2, 4 [16]. This reform initiative was aimed at minimising the number of decisions that were placed outside the reach of independent external review.

106 Remembering that the Kerr Committee referred to the General Counsel for Grievances rather than the Ombudsman.

107 Kerr Committee Report, above n 1, 93 [313].

108 Ibid.

109 Ibid. The role envisaged goes well beyond referring particular questions to the AAT as per s 10A of the Ombudsman Act.
integrated into the executive–parliamentary system. The Bland Committee did not support the empowerment of the Ombudsman to bring cases before a relevant tribunal or court nor did it support the Ombudsman being able to initiate investigations without a complaint.

The government accepted the bulk of the Bland Committee's recommendations and created an office of the Ombudsman who was not closely 'associated' with tribunals and courts and that was firmly located in the executive context. The Ombudsman was accordingly granted investigation, recommendation and report powers but was not granted the power to bring cases before a tribunal or court. The Parliament, however, contrary to the Bland Committee recommendations, did grant the Ombudsman an 'own motion' jurisdiction rather than limiting him to issues brought to his attention through complaints.

While the Kerr and Bland Committees shared a vision for the establishment of the office of the Ombudsman, they clearly had different conceptions of how the Ombudsman could most effectively carry out their review role. The Kerr Committee was seeking to enhance citizen participation in the review system by effectively putting the Ombudsman at the disposal of aggrieved citizens to agitate complaints in a tribunal or court, if necessary. By contrast, the Bland Committee thought it enough for citizens to have access to the Ombudsman for him or her to investigate complaints, follow up matters with the executive and then report to the relevant department and if necessary the Parliament.

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110 Bland Committee Interim Report, above n 2, 14 [67]. The Ombudsman today sits squarely in the executive arena, with some arguing it would have been better to locate the Ombudsman in the parliamentary arena: Dennis Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in Robin Creyke and John McMillan (eds), The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark (1998) 54, 68.
111 Ibid 32 [134], Recommendation (v).
112 This is evidenced by the line of reporting provided for in the Ombudsman Act — to the relevant department (s 14) and if necessary, to the Prime Minister (s 15) or Parliament (s 16).
113 Ombudsman Act, s 5(1).
In terms of securing fairness and legality in executive decision-making, the Kerr Committee thought that the Ombudsman required powers that extended beyond investigation and recommendation and included the power to bring the matter before a tribunal for a re-decision or before a court of law to be declared unlawful. The Bland Committee did not think such wide-ranging powers necessary and thought that working closely with the department would be less costly, less time-consuming and more effective. Moreover, the Bland Committee was fearful of the impact on executive efficiency if an ombudsman with wide-ranging powers became a crusader rather than an independent reviewer. Ultimately the government adopted the Bland Committee's position. The difference of opinion between the committees on this point amounts to a difference of opinion on how to give best effect to certain values (participation, legality and fairness) through the design of the office of the Ombudsman and how to balance these values against the desirability of maintaining executive efficiency.

22 Jurisdiction of the Ombudsman

The Kerr Committee envisaged the Ombudsman's jurisdiction extending to review of decisions where: there was procedural unfairness; the decision or action was contrary to law; a finding of fact on which a decision was based was manifestly erroneous; there had been an improper exercise of discretionary power; the decision complained of was manifestly wrong on its merits; or a particular decision had been unduly delayed. By contrast, the Bland Committee recommended that the Ombudsman not be empowered to carry our merits review of any description but only to investigate a decision if it affected a person in a personal capacity and where 'a decision was manifestly wrong because it had ... elements of maladministration'. While it recommended that the term maladministration not be defined it acknowledged that it would include where the decision was marred by bias, unreasonableness, procedural unfairness, improper purpose, bad faith, unlawful discrimination, failure to observe procedural requirements, irrelevant considerations, failure to consider relevant considerations, failure to give reason for

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114 Kerr Committee Report, above n 1, 94 [314].
115 Bland Committee Interim Report, above n 2, 26 [109]; 31 [134], Recommendation (o).
a decision contrary to good administration, undue delay, or failure to make a
decision.\textsuperscript{116}

The primary difference between the grounds of review that the Kerr Committee and
the Bland Committee proposed is that the latter were limited to decisions marred by
maladministration, which is not a term that encompasses merits review. The Bland
Committee could barely contain its alarm at the Kerr Committee recommendations
regarding the breadth of the Ombudsman’s powers of review. The Ombudsman
must not be a ‘one man Court of Appeal against every decision .... he considers a
wrong decision’\textsuperscript{117} nor was it to be imagined that ‘an Ombudsman ... after reviewing
the same material will reach a more satisfactory or ‘right’ decision than the official
making the decision under review and carrying the responsibility for implementing
it’.\textsuperscript{118} The government ultimately adopted the Bland Committee’s recommendations
and gave the Ombudsman a very broad jurisdiction but one which fell short of
allowing for merits review.\textsuperscript{119}

In terms of administrative law values, the disagreement about the jurisdiction that
should be granted to the Ombudsman was a disagreement about the type of
fairness in decisions that needed safeguarding. The Bland Committee was
advocating in favour of the Ombudsman reviewing a decision to ensure that it was
fair in the sense that it was made in accordance with fair procedures and by a fair
decision-maker. If there was procedural unfairness, then the decision would be
manifestly wrong and the Ombudsman’s jurisdiction could be exercised. In contrast,
the Kerr Committee was advocating in favour of reviewing the substantive fairness
of a decision, which would have involved the Ombudsman conducting merits review
and if necessary taking legal action before a court or tribunal on behalf of a
complainant. The Bland Committee’s strong opposition, to the Kerr Committee’s
recommendations can be understood in terms of efficiency. They argued that the
executive bears the financial and political responsibility for exercising discretions

\textsuperscript{116} Ibid 26 [109]. See also definitions of maladministration from the United Kingdom and
Northern Ireland contexts that the Bland Committee endorsed: at 10 [40–1].
\textsuperscript{117} Ibid 31 [134], Recommendation (o); 26 [107].
\textsuperscript{118} Ibid 26 [108].
\textsuperscript{119} See s 8, Ombudsman Act.
appropriately, not only the legal responsibility, and it would unacceptably affect the functioning of the executive if the Ombudsman’s jurisdiction was to extend beyond considering the legality of a decision.

The Government agreed with the Bland Committee that review by the Ombudsman had the potential to severely curtail executive operations if it was not clearly recognised as being an adjunct of the executive process and if the powers vested in the Ombudsman were not clearly limited to making recommendations and reports to departments and, if necessary, to Parliament. The Kerr Committee recommendations in relation to the role and jurisdiction of the Ombudsman had sought to promote participation and fairness but had, in the view of the Bland Committee and the government, gone too far. Had its recommendations been accepted it was thought that executive efficiency would have suffered unduly.

23 Concluding Comments to Part F

In terms of values, the debate regarding the Ombudsman’s role and jurisdiction amounts to a disagreement over the relative weighting that should be given to efficiency as against participation, legality and fairness. There was no dispute between the Kerr Committee, the Bland Committee or the government about the relevant values or the priority the values should be given (the Bland Committee fully supported the establishment of the Ombudsman’s office and at no time suggested that participation, legality and fairness should not be prioritised). The issue was simply the degree to which the Ombudsman should be able to impinge on executive efficiency. The compromise that was struck is not inconsistent with the administrative law values advocated in the 1970s Reform Reports, when those reports are viewed collectively.

G Have the Administrative Law Values Survived Intervening Reforms?

Since the commencement of the New Administrative Law Reforms there have been numerous significant amendments to the Administrative Review Act, the AAT Act

\(^{120}\) Bland Committee Interim Report, above n 2, 14 [68].
and the Ombudsman Act. It is necessary to consider the nature and extent of those major amendments in order to analyse whether they were consistent with, or contrary to, the original values embodied in the New Administrative Law System.

24 Administrative Review Act

The Administrative Review Act has been amended 119 times since its enactment, with most of those amendments comprising additions, deletions or variations to Schedule 1 (decisions excluded from review) and Schedule 2 (decisions excluded from giving reasons). Other amendments have been made to ensure that the Act remains current given other legal and political developments and these do not need to be discussed in detail in this section. Into this category fall amendments to tidy up Commonwealth statute law generally; respond to the introduction of the Federal Magistrates Court/Service; respond to the High Court’s decision in Re Wakim; and respond to Northern Territory self-government or ACT self-government. There are also many consequential amendments to the Administrative Review Act, which have only resulted in changed wording rather than any substantive changes.

Surprisingly, there are only two significant amendments to the body of the Administrative Review Act in 30 years and both will be considered below in order to

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121 There were, in fact, amendments to the Administrative Review Act even before it commenced: below at 122–5.
122 While items can be added to schs 1 and 2 by regulation (see s 19(1) of the Administrative Review Act) the convention seems to be to make the amendments legislatively. Note also that omitting items from schs 1 and 2 can only be achieved legislatively, a point that the ARC brought to the government’s attention in 1980.
123 See eg, Statute Law Revision Act 1996 (Cth).
124 Federal Magistrates (Consequential Amendments) Act 1999 (Cth) and Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001 (Cth).
125 Re Wakim; Ex parte McNally (1999) 198 CLR 511.
128 See eg, Ombudsman (Miscellaneous Amendments) Act 1983; Corporations (Repeals, Consequentials and Transitionals) Act 2001 (Cth); Law Enforcement (AFP Professional Standards and Related Measures) Act 2006 (Cth).
ascertain if the amendments represent a shift in the underlying administrative law values. I will also consider the collective amendments to Schedule 1 and consider whether the decisions now excluded from legislative judicial review are consistent with those that were initially excluded.

(a) Administrative Decisions (Judicial Review) Amendment Act 1980 (Cth)

On 28 April 1977, the government forwarded a copy of the Administrative Decisions (Judicial Review) Bill 1977 (Cth) to the ARC and sought its advice ‘as to the classes of decisions, if any, that the Council thinks ought to be excluded from the scope of the Bill by regulation’. The ARC responded on 13 October 1978, but, by that stage, the Administrative Review Act had been enacted. The government, however, had decided not to proclaim the Administrative Review Act until it had finalised the schedule to the Act, in which it would list the decisions that would not be subject to review (Schedule 1) and decisions for which departments would not have to provide reasons (Schedule 2). Compiling the schedules, in consultation with the executive, took three years.

The government introduced the Administrative Decisions (Judicial Review) Amendment Bill 1980 (Cth) in April 1980, which contained the long awaited Schedules 1 and 2 to the Administrative Review Act.

Both the Kerr Committee and the Ellicott Committee had recognised the need to exclude certain categories of decisions, with the Ellicott Committee noting that the decisions to be excluded would include those pertaining to national security, relations with other countries, criminal investigations and employment in the public service. When the ARC reported on the categories of decisions that should be excluded from review in 1978, it came up with some additional categories.

130 The Administrative Review Act was assented to on 16 June 1977 but did not commence until 1 October 1980 (Gazette, 1980, No. S210).
131 Kerr Committee Report, above n 1, 106 [358].
132 Ellicott Committee Report, above n 2, 7 [27–30].
including: the administration of criminal justice (broader than just criminal investigations); decisions relating to conciliation and arbitration; decisions pertaining to internal finances of government; disciplinary decisions made by Department of Defence; and decisions regarding assessment of taxation. To put the ARC’s list of excluded decisions in context, it is relevant to note that the ARC also considered, but ultimately rejected, requests from departments to exclude from review decisions of statutory authorities in competition with private enterprise; decisions relating to public service employment (except decisions about promotion, which were to be excluded from review); decisions pertaining to visa processing entry permits and citizenship applications; and many other administrative decisions. The ARC’s more expansive list of exempt decisions should not be viewed as inconsistent with the 1970s Reform Reports, simply more developed, for the following reasons: the Kerr Committee envisaged the ARC’s role to include ‘evolving’ the reform agenda into a legislative agenda; the ARC was motivated by a desire to ensure as many decisions as possible were subject to review; and because the Kerr and Ellicott Committees foresaw the need for some decisions to be excluded from review, but did not attempt to provide an exhaustive list.

133 For a full list of decisions recommended for exclusion see Administrative Review Council, Administrative Decisions — Exclusions, above n 128, 6–7.

134 Ibid 29. Note that the majority did, however, recommend that a handful of decisions related to the administration of the criminal justice system were to be subject to review: for example, the issuance of search warrants.

135 Ibid 38–9.

136 Ibid 47–4. Also included in this category are decisions by Remuneration Tribunal and the Commonwealth Grants Commission: at 40.

137 Ibid 46–7.

138 Ibid 60.

139 Ibid 26. The recommendation not to exempt statutory corporations in competition with private enterprises was passed by a slim majority. Those in the minority were themselves split over whether the exemption should apply to all decisions or just decisions regarding competitive activity.

140 Ibid 32–8.

141 Ibid 51–3.

142 Kerr Committee Report, above n 1, 103–4.

Ultimately, the government accepted the recommendations of the ARC regarding which decisions to exclude; however, it went on to exempt additional decisions made by certain joint Commonwealth–State bodies; decisions under the *Foreign Takeovers Act 1975* (Cth); and a slightly broader range of customs, excise and tax acts. In its follow-up report on the 1980 Amendment Bill, the ARC noted that some of the additional exemptions that the government proposed ‘appear on a tentative examination to be inconsistent with the bases of the Council’s previous recommendations’. However, the ARC did not reiterate its objections or labour the point. The 1980 Amendment Act was enacted by the government and proclaimed, concurrently with the Administrative Review Act, on 1 October 1980. The Administrative Review Act was thus not operational until late in 1980.

The specific decisions that the government excluded from review, additional to those the ARC recommended, all had the same tenor as those the ARC recommended for exclusion. After reading the ARC’s initial report, it seems likely that the ARC’s refusal to recommend more exclusions lay in its conviction that departments were seeking exemptions for decisions that a court would never consider administrative, or which involved discretions so broad that judicial review of those decisions would be unlikely to be challenged. The ARC doubtless saw no need to give departments comfort by excluding decisions which, in all likelihood, were not reviewable decisions. It seems that by contrast the government thought that in relation to certain decisions, it was preferable to avoid any doubt over whether a decision was reviewable by having it included in Schedule 1. When you

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144 See eg, the Joint Coal Board. See comments of ARC suggesting that joint Commonwealth–State bodies should not be exempt: Ibid 22.


146 *Administrative Decisions (Judicial Review) Act 1980* (Cth), s 10 (inserting sch 1).


148 Ibid. By way of example, some of the decisions excluded from review included: decisions of taxation boards of review and decisions related to calculating tax or duties in relation to a number of acts.

149 Ibid 27–8.

150 See, Ibid 46.
consider the decisions the ARC recommended for exclusion and those excluded in the original Schedule 1, there is a striking similarity and certainly no decisions included for which there is not a countervailing public policy reason (commercial decision, sovereign decision etc).

At the time of enactment, therefore, while there was a lengthier list of decisions excluded from judicial review than those the Kerr and Ellicott Committees proposed, the ARC and the government had remained faithful to the original reform conception, which was that citizens should be able to seek judicial review of an executive decision affecting them. The emphasis of both the ARC and government was on exempting only decisions where there was a compelling public policy reason for so doing. In terms of values, the emphasis of the ARC and government was still squarely on ensuring the legality of all government decisions affecting the rights of individuals and on enabling citizens to seek review (participation).

The 1980 Amendment Act also amended s 13 regarding rights to reasons and inserted a new s 13A which limited the types of information that could not be included in a statement of reasons. The amendment to s 13 and introduction of s 13A were designed to ensure that reasons for a decision would be given in the majority of cases except where competing objectives such as third party confidentiality (personal or commercial) came into play. These amendments represent the government's preferred way of implementing the Kerr Committee's vision to provide a right to reasons. The amendments do not detract from the Kerr Committee recommendations in any significant way but simply enable a new right to reasons to sit comfortably with the government's pre-existing legal obligations to third parties.

(b) Decisions Excluded from Review by Inclusion in Schedule 1

As mentioned above, Schedule 1 to the Administrative Review Act has been amended many times in the last 30 plus years. A review of Schedule 1 of the current Administrative Review Act shows that while the specific decisions and Acts named have changed extensively, the decisions excluded overwhelmingly continue to fall within the categories that the Ellicott Committee, the ARC and the government identified as warranting exclusion at the time the Administrative Review Act was
proclaimed. The following new excluded decisions in Schedule 1, however, cannot readily be considered to fall within those existing categories of exclusion:

- (s) decision of the Child Support Registrar under Part 6A, Child Support (Assessment) Act 1988 (Cth) — relating to quantum of child support payable by a parent;
- (ha) decision of minister under Division 1 of Part 7.4 of the Corporations Act 2001 (Cth) — limits on control of certain licencees operating in financial markets in Australia;
- (hb) decisions under Part 7.5 of the Corporations Act 2001 (Cth) — compensation regimes for financial markets;
- (gb) decisions in Division 2, Part 5 of the Renewable Energy (Electricity) Act 2000 (Cth) — assessments by regulator relating to renewable energy shortfalls;
- (da), (db) privative clause decision, or a purported privative clause decision, within the meaning of ss 474(2) 5E of the Migration Act 1958 (Cth);
- (hc) decisions under ss 62ZZ, 62ZZJ(2), Division 3, Part VC, Insurance Act 1973 (Cth);
- (t), (u), (v), (va), (zb) removal of decisions of private companies, that had previously been government controlled from scope of Administrative Review Act — Qantas Airways Limited, Snowy Mountains Engineering Corporation Limited, CSL Limited, Telstra Corporation Limited, Snowy Hydro Limited; and
- (zc) decision under ss 3a, 3C or 7 pertaining to nominations, under the Commonwealth Radioactive Waste Management Act 2005 (Cth).

The first thing to note is that the excluded decisions listed above are not numerous enough to suggest that a major floodgate has opened and that vastly different numbers or types of administrative decisions are now excluded from legislative judicial review. By categorising the above decisions I have compiled the following list of new categories of exemption from legislative judicial review:

- decisions where adequate alternative review is provided for in legislation in relation to highly specialised decisions;\(^{151}\)

\(^{151}\) Item (s) decisions of Child Support Registrar under pt 6A, Child Support (Assessment) Act 1988 (Cth); item (gb) decisions in div 2, pt 5, Renewable Energy (Electricity) Act 2000
• decisions pertaining to companies privatised by government;
• highly political decisions of government with major budgetary or defence ramifications;\textsuperscript{152}
• a broader range of decisions pertaining to the regulation of companies operating in financial markets; and
• privative clause decisions in the migration area designed to stem the flow of cases going before the Federal Court and thereby allow for quicker processing of high volume refugee and visa application cases.

Of the above new categories of excluded decisions, it is the exclusion of privative clause decisions from judicial review that has perhaps the greatest potential to impact on individuals and which therefore represents perhaps the most striking new category of excluded decision in terms of this dissertation. It can of course be argued that in the case of migration decisions there are compelling, countervailing public policy issues that the government must consider such as the efficient administration of justice and efficient border control management.

To the extent that they reduce a citizen’s (or individuals) ability to access judicial review, these new categories of exclusion represent, in terms of fidelity to the originally embedded administrative law values, a small but significant retreat from participation and fairness. However, one can also appreciate that each of the new categories either represents an extension of an existing category (eg the

\textsuperscript{152} Item (zc) — where to locate a nuclear storage facility — falls within this category. Also item (hc) partially falls into this category — with respect to decisions of the minister pursuant to s 62ZZ — however, the decision of the Australian Prudential Regulation Authority (APRA) pursuant to s 62ZZJ(2) on whether a particular claimant has met the claim conditions would not fit in this new category. The APRA decision is the type of decision affecting an individual that should be subject to judicial review. Part VC, Financial Claims Schemes for Policy Holders with Insolvent General Insurers, was added to the \textit{Insurance Act 1973} (Cth) in 2008 in the wake of the HIH insurance failure.
Corporation Law exclusions) or the government considers necessary to effectively manage sovereign risks (national security, treatment of aliens etc).

(c) National Security and Terrorism Amendments 2004–2005

In the wake of the terrorist attack on 11 September 2001, there were extensive reviews and eventually reforms to the national security framework in Australia. The National Security (Criminal and Civil Proceedings) Act 2004 (Cth) (‘National Security Act 2004’) was enacted and then amended twice in quick succession. The rolling out of this Act and its amendments entailed significant amendment of the Administrative Review Act.

The particular reforms that need to be discussed in the context of the Administrative Review Act relate to the empowerment of the Attorney-General to issue certificates for the protection of information that could prejudice national security in federal criminal and civil proceedings. The Court considers these certificates in accordance with the National Security Act 2004 and it is ultimately the Court that decides what orders to make regarding evidence and witnesses that are the subject of a certificate from the Attorney-General. In other words the certificates are conclusive as to the fact that there is a national security issue but not conclusive as to how the courts will deal with evidence pertaining to national security.

The National Security Amendment Act 2004 ensured that a defendant could not seek legislative judicial review in relation to ‘related criminal justice process decision’, which was defined to include a decision by the Attorney-General to issue a certificate stating that evidence or a planned witness raises issues of national security. The National Security Amendments 2005 basically replicated the earlier

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156 National Security Amendment Act 2004, sch 1, item 1 which inserted a new s 9A(4) — a definition of a ‘related criminal justice process decision’ — into the Administrative Review Act.
amendments, but with respect to civil proceedings. Provision was also made in these amendments to ensure that persons affected by the Attorney-General's issuance of a certificate could not seek reasons in relation to that decision.

These amendments were highly controversial, with some groups arguing that protection for individuals (and in particular defendants) must be paramount while other groups argued that the far greater need was to ensure national security.

These amendments carve out a larger area of exemption from the Administrative Review Act, in the name of protection of national security, than has been the case to date and in so doing leave those involved, knowingly or inadvertently, in matters that threaten national security, without the ability to seek legislative judicial review of associated administrative decisions. Nevertheless, as the Ellicott Committee noted in 1978, there is a need for certain decisions pertaining to national security to be exempted from legislative judicial review. In an age of heightened concern about national security, having a broader range of decisions excluded from the scope of the Administrative Review Act, while running contrary to those originally embedded administrative law values of fairness, legality and participation, was always foreseen as a necessary compromise and does not undermine the ongoing relevance of the administrative law values to the Administrative Review Act.

158 See sch 2 of the Administrative Review Act, items (da), (db).
There have been 39 amendments to the Ombudsman’s Act since its enactment. These amendments have, in general, extended the jurisdiction and powers of the Ombudsman rather than curtailed them. It seems uncontroversial, therefore, to assert that since its enactment, the amendments to the Ombudsman Act complement rather than undermine the overall thrust of the Act, which has consistently been to provide efficient, cost-free access to review when it is alleged that an agency has behaved unlawfully or unfairly. The major amendments can be classified into three categories for ease of discussion.

(a) **New Roles for the Ombudsman**

Some of the key new jurisdictions granted to the Commonwealth Ombudsman include acting as the Defence Force Ombudsman the Postal Industry Ombudsman and the ACT Ombudsman. Provisions have also been made for the Ombudsman to refer to himself or herself as the Taxation Ombudsman.

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161 I note that the changes to ‘prescribed authorities’ have changed — see most significantly *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994* (Cth) — but continue to exclude the majority of Commonwealth companies unless express provision is made for the Ombudsman to have jurisdiction. Regarding ongoing ‘robustness’ of the Ombudsman’s jurisdiction and powers after 25 years of operation, see Ron McLeod, ‘Twenty Five Years of the Commonwealth Ombudsman’ (2003) 36 *AIAL Forum* 15.

162 Insignificant amendments which will not be considered are, for example, *Statute (Miscellaneous Provisions) Act (No 2) 1986* (Cth); *Superannuation Legislation (Consequential Amendments and Transitional Provisions) Act 1992* (Cth) etc.

163 See Ombudsman Act, pt IIA, amended by *Defence Legislation Amendment Act (No. 1) 1995* (Cth).


165 The Ombudsman does not have Commonwealth jurisdiction to deal with ACT administrative decisions in relation to ACT government decisions (decisions made under ordinances are within the Ombudsman’s jurisdiction but not decisions made under an ACT enactment): Ombudsman Act, ss 3, 3B (definition of ‘enactment’). Rather, the Commonwealth Ombudsman’s jurisdiction in the ACT is granted through various ACT enactments: *Ombudsman Act 1989* (ACT); *Public Interest Disclosure Act 1994* (ACT); *Freedom of Information Act 1989* (ACT).
Immigration Ombudsman and Law Enforcement Ombudsman in relation to complaints from particular offices or departments.\textsuperscript{166} The Ombudsman also has a role in processing complaints regarding access given to documents under the \textit{Freedom of Information Act 1982 (Cth)}\textsuperscript{167} and a monitoring role in relation to telecommunications interception,\textsuperscript{168} controlled operations\textsuperscript{169} and surveillance conducted by law enforcement bodies.\textsuperscript{170} Another significant extension of the jurisdiction of the Ombudsman occurred in 2005 when the \textit{Migration and Ombudsman Legislation Amendment Act 2005 (Cth)} inserted s 3BA into the Ombudsman Act providing for review by the Ombudsman of a Commonwealth contractor or subcontractor who provides goods or services for or on behalf of a Commonwealth department or prescribed authority, to a non-government third party. These particular amendments will be considered in detail in chapter III, part B.

The Ombudsman Act was conceived and enacted to promote, in terms of administrative law values, participation and fairness, and the extension of the scheme to particular industries or areas is not inconsistent with these values.

\( (b) \quad \textit{Ombudsman to Work Cooperatively with Other Review and Oversight Organisations} \)

There have been a number of amendments to the Ombudsman Act designed to ensure that the Ombudsman works cooperatively with other oversight and review bodies including state bodies,\textsuperscript{171} the Australian Competition and Consumer Commission\textsuperscript{172} and the Integrity Commission.\textsuperscript{173} Amendments and administrative

\textsuperscript{166} See \textit{Ombudsman Act 1976}, s 4(3)-(5). These re-badgeings were introduced by the \textit{Law Enforcement (AFT Professional Standards and Related Measures) Act 2006 (Cth)}, \textit{Migration and Ombudsman Legislation Amendment Act 2005 (Cth)} and the \textit{Taxation Laws Amendment Act (No 1) 1995 (Cth)}.  
\textsuperscript{167} FOI Act, ss 56, 57.  
\textsuperscript{168} \textit{Telecommunications (Interception) Act 1979 (Cth)}, pt VIII.  
\textsuperscript{169} \textit{Crimes Act 1914 (Cth)}, pt 1AB, div IIA.  
\textsuperscript{170} \textit{Surveillance Devices Act 2004 (Cth)}, pt 6, div III.  
\textsuperscript{171} See \textit{Ombudsman Act}, s 8A; see also, ss 6A–6B, 8B–8C.  
\textsuperscript{172} See \textit{Ombudsman Act}, ss 6A, 8B.  
\textsuperscript{173} See \textit{Ombudsman Act}, ss 6B, 8C.
arrangements were also introduced to ensure that the overlap in jurisdiction between the Ombudsman and the AAT did not disadvantage claimants or applicants. As noted above, the original Kerr Committee Report envisaged the Ombudsman working as an adjunct to the Administrative Review System and being ‘associated with the [AAT] and other review institutions’. To that extent these new cooperative arrangements are wholly consistent with the original vision for the Australian Administrative Review Tribunal and are certainly not inconsistent with the overall thrust of the Ombudsman Act, which emphasises speed, efficiency and accessibility in relation to administrative review.

(c) New Powers of the Ombudsman

The first major amendments to the Ombudsman Act were contained in the Ombudsman Amendment Act 1983 (Cth) and included some significant extensions to the powers of the Ombudsman. For example, the Ombudsman was empowered to disclose information about investigations publicly, after certain pre-

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174 See Ombudsman Act, ss 10A, 11 granting the Ombudsman the power to recommend that a department, agency or prescribed authority seek an advisory opinion from the AAT in certain circumstances (s 11) or to seek an advisory opinion directly (s 10A). Note that in 1988 the Attorney-General's Department prepared a preliminary draft of an Administrative Review Legislation Amendment Bill, to provide for mutual referral of cases between the AAT and the Ombudsman. After objections from the Ombudsman, the AAT and the Administrative Review Council regarding the complexity of the proposed legislation, a set of administrative arrangements were arrived at to facilitate referral between the AAT and Ombudsman; these arrangements specified the criteria relevant to the Ombudsman's exercise of power of referral to AAT; and provided for the Ombudsman's powers of review to be drawn to the attention of AAT applicants in certain circumstances: Administrative Review Council, Summary: The Relationship Between the Ombudsman and the Administrative Appeals Tribunal, Report No 22 (1985).

175 Kerr Committee Report, above n 1, 93 [313]. Note that the Kerr Committee referred to the Administrative Review Tribunal rather than the AAT.

176 There had been earlier amendments to the Ombudsman Act but those had simply been responding to Northern Territory self-government and a change in name of the ACT from Legislative Assembly to House of Assembly; changes resulting from the establishment of the Australian Federal Police in 1979; and an inconsequential change of tense in s 28(5).
conditions were met and was expressly empowered to conduct preliminary inquiries prior to determining whether or not an investigation could, or should, be undertaken. These types of amendments are clearly aimed at ensuring that the Ombudsman has the flexibility to respond appropriately to individual complaints or other examples of maladministration uncovered through own motion investigations. Amendments such as expressly granting the Ombudsman the power to conduct preliminary inquiries improves the efficiency of the office of the Ombudsman in processing complaints, which is good for both complainants and the agencies about which they are complaining. The mere existence of the power to speak publicly about investigations, in certain circumstances, empowers the Ombudsman to pursue appropriate responses from agencies in the wake of investigations. Collectively, these extensions to the Ombudsman's powers contribute to improving the efficiency of the administrative review system but can also be viewed as improving citizen's participation in the review process by ensuring that complaints are able to be dealt with promptly, appropriately and without the complainant having to marshall resources or fund the review. These types of amendments are thoroughly consistent with the original values which underpinned the initial Ombudsman Act.

26 AAT Act

There have been 62 amendments to the AAT Act and, given the length and complexity of the Act, I will only be considering a selection of key sections in Part IV of the AAT Act — Review of Decisions by the AAT. The key sets of amendments are contained in the five Administrative Appeals Tribunal Amendment Acts of 1977, 1978, 1979, 1983 and 2005 respectively and the Statute Law (Miscellaneous Amendments to the AAT Act) Act 1980.

177 See Ombudsman Act, s 35A: originally inserted by Ombudsman Amendment Act 1983 (Cth).
178 See Ombudsman Act, s 7A: originally inserted by Ombudsman Amendment Act 1983 (Cth).
179 Other Parts of the AAT Act that have been extensively amended including: pt 2 — Establishment of the Administrative Appeals Tribunal; pt 3 — Organisation of the Tribunal; pt IIIA — Management of Tribunal.
180 Administrative Appeals Tribunal Amendment Acts 1977 (Cth); Administrative Appeals Tribunal Amendment Acts 1978 (Cth); Administrative Appeals Tribunal Amendment Acts 1979 (Cth); Administrative Appeals Tribunal Amendment Acts 1983 (Cth); Administrative Appeals Tribunal Amendment Acts 2005 (Cth).
Amendments) Act (No. 1) 1982 (Cth). My aim is to present a representative group of amendments that demonstrate the flavour and scope of the amendments to the AAT Act. Above in chapter II, I concluded that the dominant values underlying the enactment of the AAT Act were efficiency and fairness. Through looking at these particular sections, it should be possible to see if the amendments to the AAT Act have collectively enhanced, extended or undermined these values in the 30 plus years since the enactment of the AAT Act.

(a) Application for Review of Decision

Section 25 is the provision that stipulates that the AAT can only review decisions if it has been granted jurisdiction under an enactment in relation to a particular decision. The essence of this section has not changed since enactment but many minor amendments have been necessary to clarify the AAT’s jurisdiction in particular situations. For example, where a decision-making power has been granted to a particular individual, or incumbent of a particular position, amendments have been made to ensure that this decision is reviewable even if the decision is made by a delegate, someone acting in a position, or someone otherwise authorised to make the decision. Also, a specific amendment to the section was necessary to clarify when a failure to make a particular decision was to be deemed a decision capable of enlivening jurisdiction granted under an enactment. One of the key 2005 amendments to s 25 was the inclusion of a section clarifying that the AAT alone was empowered to determine the scope of review in relation to any given decision.

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1979 (Cth); Administrative Appeals Tribunal Amendment Acts 1983 (Cth); Administrative Appeals Tribunal Amendment Acts 2005 (Cth).

181 As with the sections above on the Administrative Review Act and the Ombudsman Act, inconsequential amendments, in terms of tracing administrative law values, will be ignored.

182 Above at chapter II, part C, section 13, table 8.

183 AAT Act, s 25(3A), amended by Administrative Appeals Tribunal Amendment Act 1977 (Cth).

184 Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth).

185 AAT Act, s 25(4A), amended by Administrative Appeals Amendment Act 2005 (Cth). Also, s 25(6)–(6A) was inserted into the AAT Act. Another of the 2005 amendments revised s 25(6), which allows Parliament to modify the scope of review in relation to a particular decision by stating that certain sections in the AAT Act are to be excluded, limited or
Section 28 enables a person affected by a decision to seek reasons for that decision. The key features of amendments to this section have been an ongoing struggle to balance fairness to both applicants\(^{186}\) and decision-makers\(^{187}\) through imposing certain, reasonable and flexible timeframes. For example, the section has been amended to allow the decision-maker to refuse to provide reasons if they have already been given previously; if the applicant has been too tardy,\(^{188}\) or if the decision was made by the Security Appeals Division (or its equivalent over time).\(^{189}\) However, if the reasons granted to an Applicant are inadequate\(^{190}\) or if a decision-maker refuses to provide reasons,\(^{191}\) the AAT has been empowered to act to rectify the situation.

Section 29 sets out the manner of applying for review and the trend of amendments since enactment has consistently been away from prescriptive processes towards modified. The sections of the AAT Act that can be modified by an enactment granting jurisdiction to the AAT are ss 27, 29, 32, 33, 35, 41(1), 43(1), 43(2).

\(^{186}\) AAT Act, s 28(4), amended by *Administrative Appeals Tribunal Amendment Act 1977 (Cth).*

\(^{187}\) For example, the time the decision-maker has to respond has gone from 14 days to 'as soon as practicable and in any case within 28 days': AAT Act, s 28(1A), amended by *Administrative Appeals Tribunal Amendment Act 1979 (Cth).*

\(^{188}\) AAT Act, s 28(1A)–(1B), amended by *Administrative Appeals Tribunal Amendment Act 1977 (Cth).*

\(^{189}\) AAT Act, s 28(1AAA), amended by *Administrative Appeals Tribunal Amendment Act 1977 (Cth).* Security Appeals Tribunal changed to Security Review Tribunal and then ultimately to Security Appeals Division by the *Law and Justice Legislation Amendment Act (No 1) 1995 (Cth).* Section 28(2) has always allowed for the issuance of certificates by the Attorney-General stipulating that certain decisions are not reviewable by the AAT because, for example, they pertain to national security, international relations, or involve Cabinet decisions.

\(^{190}\) AAT Act, s 28(5), added by *Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth).*

\(^{191}\) AAT Act, s 28(1A)–(1AB), amended by *Administrative Appeals Tribunal Amendment Act 1977 (Cth)*; the scheme was later elaborated on — AAT Act, s 28(1AA)–(1AC) amended by *Statute Law (Miscellaneous Amendments) Act (No. 1) 1982 (Cth)*; also s 28(2)–(3) were repealed and substituted.
processes that are more accessible. For example, applications no longer have to be on a prescribed form; time limits have been relaxed and extensions of time expressly provided for; a note has been added to highlight that the Tribunal is not bound by the rules of evidence; etc.

The amendments to ss 28 and 29 of the AAT Act, demonstrate that it is an ongoing challenge to better balance executive efficiency with fairness for an applicant.

(b) Alternative Dispute Resolution

The introduction of a comprehensive alternative dispute resolution section into the AAT was only achieved in 2010. The original AAT Act contained s 34 that provided for a preliminary conference, at the election of the parties, where a negotiated settlement could be agreed between the parties. In 1982 s 34 was amended such that the AAT was empowered to direct the holding of a conference regardless of the wishes of the parties and in 1993, s 34 was further amended to enable the AAT to insist on a preliminary conference even before it had considered any evidence. Given the emphasis on the efficient, informal resolution

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192 AAT Act, s 29(1)(b), inserted by Administrative Appeals Tribunal Amendment Act 1977 (Cth).
193 AAT Act, s 29(2)-(11), inserted by Administrative Appeals Tribunal Amendment Act 1977 (Cth). AAT Act, s 29(8), inserted by Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth): making it clear that an extension could be granted even after the time limit had expired.
194 AAT Act, note inserted at the beginning of s 25(5) by Administrative Appeals Tribunal Amendment Act 2005 (Cth).
195 Other minor amendments include the right of an applicant to provide a service address after an application is made: s 29(1A) inserted by Administrative Appeals Tribunal Amendment Act 1993 (Cth).
196 AAT Act, ss 34, 34A were repealed and substituted and ss 34, 34A, 34B, 34C, 34D, 34E, 34F, 34G, 34H were amended by Administrative Appeals Tribunal Act 2005 (Cth).
197 See AAT Act, (No 191 of 1975), s 34.
198 AAT Act, s 34(1) repealed and substituted by Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth).
199 AAT Act, s 34(1), amended by Administrative Appeals Tribunal Amendment Act 1993 (Cth).
applications for merits review, it is surprising that amendments to facilitate a broader range of alternative dispute resolution were not introduced prior to 2005. In terms of participation, fairness and efficiency such developments are wholly consistent with the original values embedded in the AAT Act.

(c) Procedural Powers of the Tribunal

Section 41 in the original AAT Act was a section that provided for a decision to be stayed. It was amended in 1979 to deal with the broader issue — the operation and implementation of a decision that is before the AAT for review. The 1979 amendments revised s 41(1) to clearly state that a decision being challenged remains in operation and can be implemented. The fact that a decision is not automatically 'on hold' while an AAT review is pending removes administrative uncertainty and enables the agency responsible for making a decision to decide on the appropriate interim response. At the same time, the ability for the AAT to order a stay in relation to a decision allows an applicant's interests to be protected, where necessary. While the provisions in s 41 have been elaborated on, the intent of the section remains unchanged from 1975: the decision is operational (facilitating executive efficiency) but provision is made for a citizen to stay decisions (fairness).

(d) Tribunal's Decision on Review

Section 43 deals with the manner in which the AAT must go about making its decision on review and the status of the decision. While the AAT has always been required to provide reasons for its decisions, amendments have been made to clarify the type of reasons that have to be provided; for example, provision has been made for reasons to be provided orally rather than in writing (though written reasons can be requested). Sections 43(5)–(6) have also been extensively amended to clarify how and when an AAT review decision will become operative: the major issue being that there are sometimes good reasons for an AAT review decision not

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200 See Administrative Appeals Tribunal Amendment Act 1979 (Cth), s 6 that inserted a new s 37(1)–(6).

201 AAT Act, s 43(2) was repealed and substituted and s 43(2A)–(2B) was amended by Statute Law Miscellaneous Amendments Act (No. 1) 1982 (Cth). See also Administrative Appeals Tribunal Amendment Act 1977 (Cth), s 27 which amended s 43(2) of the AAT Act.
to take effect immediately. Again, the emphasis of these amendments has been on enabling the AAT to carry out its functions in a timely and flexible fashion, which in turn, from a citizen’s perspective, is seen as promoting fairness and participation and, from an executive perspective, enhances efficiency.

(e) Concluding Comments on Amendments to the AAT

The explanatory memorandum to the 2005 amendments stated that ‘the primary objective of the AAT is to provide a mechanism for review that is fair, just, economical, informal and quick’ and that the purpose of the amendments was to reinforce this objective. The review above has not identified one amendment that derogates from the administrative law values embedded in the original AAT Act — fairness, accessibility and efficiency.

27 Concluding Comments on Part G

In part G the significant amendments to the Administrative Review Act and Ombudsman Act since their enactment, and selected significant amendments to the AAT Act since its enactment, were assessed by reference to whether or not they altered the mix and balance of administrative law values embedded in those Acts at the time of enactment. The answer is that the amendments to the AAT Act and Ombudsman Act over the last 30 years remain thoroughly consistent, in terms of administrative law values, with the original enactments. The Administrative Review Act remains substantially consistent though the amendments pertaining to national security and the increased categories of excluded decisions in schedule 1, quite clearly represent a diminution in the administrative law values of participation and legality in those limited circumstances.

The purpose of including parts F–G in this dissertation is to enable me to say that the administrative law values advocated in the 1970s Reform Reports are the same administrative law values that underpin our current system of administrative law.

202 AAT Act, ss 43A–43B were inserted by Administrative Appeals Tribunal Amendment Act 1979 (Cth).
203 Explanatory Memorandum, Administrative Appeals Tribunal Amendment Bill 2004 (Cth), General Outline.
Chapter II Conclusion

There are four overlapping themes from the empirical research presented above that I would like to draw-out by way of conclusion to this chapter.

(i) Citizen’s Right to Review Through Participation Prioritised

The main thrust of the 1970s Reform Reports was to realign the relationship between the executive and the citizen. The citizen was granted: the right to seek judicial review of certain decisions; the right to seek review of some decisions on their merits; and the right to complain to the Ombudsman regarding executive decision. This ‘citizen-centric’ approach was driven by the conviction that the expansion of the executive in the preceding decades was impinging on the lives of citizens in increasingly intrusive ways and citizens therefore needed to be granted avenues to seek redress. Spigelman has noted that it was through the process of granting extensive rights of administrative review to individuals, subjects became citizens.204

(ii) Participation, Legality and Fairness are to be Prioritised Over Efficiency

The 1970s Reform committees and then Parliament prioritised the administrative law values of participation, legality and fairness over executive efficiency in order to prioritise granting administrative law review rights to citizens. While citizen participation was the linchpin of the reforms, it was always coupled with either fairness or legality, or both.

This is not to say that the 1970s Reform Committees or Parliament were unconcerned with issues of efficiency, simply that the objectives of the reform agenda — to reset the accountability relationship between citizens and the executive — did not permit efficiency being prioritised above the other administrative law values. It was recognised that the introduction of the new administrative law system, as with the introduction of any new executive review

mechanism, would impact on executive efficiency at least in terms of time and resources and perhaps in terms of all of the 'countervailing risks' warned of by the Bland Committee such as delays resulting from administrators exercising an 'excess of caution'.^205 What is important is that the new administrative law system was recognised as impacting on executive efficiency but introduced and supported regardless.

(iii) Balance

Balance is the key to understanding how administrative law values buttress the administrative law system. In particular, it is important to ascertain the weighting or priority given to particular values or value-types and to ascertain in whose favour the overall accountability balance is tipped. In chapter I, I discussed Davies definition of accountability which involves an account giver who has responsibility for doing X and a caller to account who is affected by how X is done.^206 The key to ensuring an accountability relationship between the two is to ensure that the balance is tipped in favour of the caller to account. The administrative law system, when introduced, recalibrated the relationship between the citizen and the executive by introducing new mechanisms through which the citizen could seek review of a wide range of executive decisions, and in so doing the balance was tipped in favour of the citizen.

(iv) Focus on Delivering Outcomes to Citizens

Judicial review represents a significant right of review but, even when a citizen is successful and granted a remedy, there is no guarantee that the remedy will deliver what the citizen wants — a different decision.^207 This was one of the key observations that the Kerr Committee was responding to in recommending the

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205 Bland Committee Final Report, above n 2, 13–14.
206 Above at 26-27.
207 I note, however, that recent research has demonstrated that in over 75% of judicial review cases decided in favour of an applicant, and sent by the court back to the agency for reconsideration, the decision made on reconsideration favours the applicant: Creyke, Robin, 'Administrative Justice — Towards Integrity in Government' (2007) 31(3) Melbourne University Law Review 705, 721–2.
introduction of an extensive merits review system. The issue boils down to how best to respond to administrative injustice. Is the answer to ensure that the systems and processes in place are fair and systemically policed (distributive administrative justice) or is the answer to provide for fairness to individuals by responding to their particular grievances (individual administrative justice). Of course the likely answer is a mix of the two, but the administrative law system is tipped toward the latter. By introducing merits review and ombudsman review, Parliament was providing for citizens to have their grievances heard by reference to the rightness or fairness of the decision, not simply by reference to the legality.

In chapter III, having identified the administrative law values that underpin the administrative law system, I consider whether the concept of publicisation has utility in the Australian context. More particularly, I consider whether it provides an effective way of evaluating the control, review and accountability mechanisms that are created in response to outsourcing and whether administrative law values are embedded in these mechanisms. The themes identified above may have relevance in determining what it means, or what it should mean, to extend administrative law values into new mechanisms. For example, does the balance still need to favour participation, fairness and legality over efficiency? Does the mechanism have to deliver accountability outcomes – if so, for whom? I will return to consider the above themes in the conclusion to the dissertation.

208 Kerr Committee Report, above n 1, 9.
CHAPTER III
VALUES BENCHMARKING: EVIDENCE OF PUBLICISATION?

The recent emphasis on public law values allows the influence of administrative law doctrine and values to transcend the limited and uncertain contours of judicial review, and to cast a long shadow over the recently levelled terrain of what was once called public administration.¹

1 Introduction

In the Introduction to this dissertation, I discussed the concept of publicisation, popularised by Jody Freeman, as a process by which public or democratic norms are made applicable in the outsourcing context through incorporation in new types of review and accountability mechanisms. I also noted that there were two substantial stumbling-blocks to evaluating the concept of publicisation in the Australian context. The purpose of chapters I and II was to address the first stumbling block by identifying the norms that, in the Australian context, should be extended in relation to outsourcing. The second stumbling block was the need to identify an appropriate way to look for evidence of publicisation and, in particular, how to avoid a random or 'cherry-picking-type' approach. This second stumbling block is addressed in part A of this chapter. The remainder of this chapter presents two studies undertaken firstly, to look for evidence of publicisation in the Australian context and, secondly, to see if the concept of publicisation provides a useful way of looking afresh at outsourcing and whether or not it is subject to adequate control and accountability mechanisms.

In part A of this chapter, I argue that a standards benchmarking methodology² — using administrative law values identified in chapter II as the relevant standard — would be an appropriate methodology to use when looking for evidence of publicisation. I think of this type of benchmarking as 'values benchmarking' and will

² Also referred to as 'best practice standards benchmarking'.
be using this term in parts B–D. Of course this methodology is but one of many that could be used to look for evidence of publicisation.

By utilising a values benchmarking framework to look for evidence of publicisation, I am doing two things. Firstly, given that benchmarking is about identifying improvement, I am equating evidence of publicisation (extension of administrative law values in new control and accountability mechanisms applicable in the outsourcing context) with an improvement. Secondly, I am promoting values benchmarking as a useful way for the disparate groups involved in outsourcing (Parliament, executive, citizens, private business, judiciary) to re-conceptualise their approach to outsourcing in terms of values. In this way, values benchmarking can be seen as a tool for promoting an express values discourse.

Parts B and C of this chapter comprise two specific values benchmarking exercises carried out with a view to assessing whether evidence of publicisation is apparent in the law-making and decision-making of the Parliament and judiciary respectively. My aim in conducting these limited values benchmarking exercises is to identify and evaluate some examples of publicisation in the Australian context. As importantly, the two values benchmarking exercises will assist me to answer my overarching research question, which is whether or not publicisation provides a useful way of evaluating the adequacy of disparate control, review and accountability mechanisms that apply in the context of outsourcing (part D).

In the first values benchmarking exercise, I focus on the 2005 amendments to the Ombudsman Act 1976 (Cth) ('Ombudsman Act') and the proposed amendments to the Freedom of Information Act 1982 (Cth) ('FOI Act') that are currently before Parliament. I chose these amendments because I was confident that both amendments could, prima facie, be characterised as evidence of publicisation and would therefore provide me with the opportunity to consider how the values have been embedded in the mechanism; for example, the weight that has been given to competing values.

By way of contrast, the second benchmarking exercise considers the jurisprudence that has precedential value for citizens who wish to seek judicial review of

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3 Migration and Ombudsman Legislation Amendment Act 2005 (Cth).
4 Freedom of Information Amendment (Reform) Bill 2009 (Cth).
outsourcing grievances. The question is whether the jurisprudence evidences publicisation in the form of the judiciary developing the law by reference to administrative law values.

Clearly, these values benchmarking exercises represent only an initial attempt at conceptualising responses to outsourcing in terms of publicisation. It remains for others to look for evidence of publicisation in regulatory mechanisms; internal review mechanisms; parliamentary oversight mechanisms; contractual mechanisms; self-regulation mechanisms etc.

A Values Benchmarking

2 Benchmarking as a Means of Identifying Examples of Publicisation

A benchmark is historically a surveyor’s mark cut in a wall and used as a reference point in measuring elevations. From this beginning, the word ‘benchmark’ became synonymous with the word ‘goal’ or ‘target’ representing an aspirational criterion against which real achievements can be measured. Benchmarking, as a management tool for measuring improvement, has a history dating back to the 1940s but was popularised in the 1980s by companies that relied on benchmarking as a means of, ‘finding and implementing the best business practices.’ Lund has suggested that, essentially, benchmarking is about enabling organisations to think outside of the box.

Trosa and Williams differentiate between ‘standards benchmarking’, ‘process benchmarking’ and ‘results benchmarking.’ Process benchmarking is utilised to

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improve the processes and activities used to turn inputs into outputs\(^9\) while results benchmarking is utilised to compare the actual performance of different organisations using performance indicators to compare outcomes or outputs. Process and results benchmarking are relied on extensively in both the private and public sector to improve efficiency. For example, by comparing service delivery outcomes in the states and territories, the Commonwealth hopes to improve overall efficiency in the delivery of services by Australian governments.\(^{10}\)

By contrast, standards benchmarking, which is the type of benchmarking that will be used in this dissertation, involves the promotion of outcomes that are consistent with agreed, standards, ideals or norms. Trosa and Williams note that the standards are often drawn from ‘the field of social activities’\(^{11}\) as opposed to economic or fiscal activities. The motivation for undertaking standards benchmarking is typically to improve effectiveness more than efficiency. While it is possible to spend a lot of time analysing the difference between efficiency and effectiveness, it is enough, as Robert Cornall, Secretary of the Attorney-General’s Department said recently, ‘that effectiveness means we are achieving the desired outcome and efficiency means we are doing so with a minimum of cost, effort and fuss.’\(^{12}\) ‘Effectiveness’ is often also used as shorthand for the pursuit and achievement of all other public sector objectives (eg. providing a social services safety net, being responsive to citizens, governmental accountability), that counter-balance the pursuit of efficiency.

In the public sector, standards benchmarking exercises are undertaken regularly in response to complex issues that have reached an impasse. For example, standards benchmarking has been used to improve the delivery of services to Indigenous Australians;\(^{13}\) Australia’s intergovernmental fiscal arrangements;\(^{14}\) and harmonising

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\(9\) Trosa and Williams, above n 8, 46.
\(10\) See, Productivity Commission, above n 8.
\(11\) Productivity Commission, above n 8, 47.
\(13\) In 1998, the Council for Aboriginal Reconciliation, which had its secretariat within the Department of Prime Minister and Cabinet, convened a conference to develop a Framework for Service Delivery to Indigenous Australians. The hope was to use benchmarking to promote improved service delivery to Indigenous Australians. The conference proceedings reveal that a complex standards benchmarking model was being advocated that would simultaneously measure service delivery standards, service delivery processes and service
business regulation throughout Australia. When standards benchmarking is used to address complex problems such as these, the aim is most often diagnostic in the sense that it facilitates rethinking intransigent problems and identifying new solutions. Standards benchmarking exercises often have a political dimension, with different stakeholders having a vested interest in securing different outcomes.

As noted above, as I will be using administrative law values as the relevant standard, I will use the term values benchmarking to describe the benchmarking exercises undertaken in parts B–D. Values benchmarking should be viewed as a category of standards benchmarking.

3 Addressing Criticisms of Public Sector Benchmarking

One hurdle to conducting a credible values benchmarking exercise is reluctance within the legal discipline to view benchmarking as anything other than an ideological tool of the New Public Management ('NPM') reforms of the late 1980s and early 1990s. Benchmarking was promoted by NPM pundits as a tool for promoting efficiency and was used — and then overused — within the public sector during the 1990s.

With the passage of time some commentators are now concluding that the benefits of NPM were 'patchy, equivocal, or worse illusory.' As trends in public administration cycle away from NPM, benchmarking has ceased to be a panacea to be administered liberally throughout the public sector and its use is now limited to competitive benchmarking and standards benchmarking. Competitive benchmarking, which is a type of performance benchmarking, is used to compare delivery outputs: Council for Aboriginal Reconciliation, Department of Prime Minister and Cabinet, Commonwealth, Towards a Benchmarking Framework for Service Delivery to Indigenous Australians (1998).

15 See, Productivity Commission, above n 8.
16 By reference to the yearly number of publications on benchmarking listed in the National Library of Australia catalogue, it would seem that interest in benchmarking peaked in the mid–1990s.
how agencies are performing vis-à-vis other public sector, or private sector, organisations. Significantly, as discussed briefly above, standards benchmarking is still used regularly to diagnose problems in complex government systems and is viewed as a means of introducing, advancing or framing reform agendas. Concrete examples of the ongoing utility of values benchmarking in the Commonwealth public sector, can be found before and after the change of government in December 2007. My argument therefore is that, irrespective of the decline in the NPM agenda, standards benchmarking continues to be seen within the public sector as a useful way to systematically highlight the shortfall between a system’s existing processes or outcomes and relevant standards.

Another more specific criticism of benchmarking was made by Marcia Neave in 1999. She argued that performance benchmarking, with its emphasis on things that can be readily measured and quantified, can only tell us how to deliver administrative justice more quickly and cheaply. While Neave acknowledged that cost and speed are important elements of administrative justice she argued that improvement in these areas alone will not be enough to deliver improved administrative justice (increasing the accountability of government departments, agencies and ministers to Parliament and the public). I would not dispute Neave’s criticisms of performance benchmarking in relation to a heavily value laden service such as the functioning of the Administrative Appeals Tribunal (‘AAT’) but I would

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18 Benchmarking exercises within the public sector continued right up until the demise of the Howard Government in November 2007. For example, February 2006, saw the Council of Australian Governments committing to ‘the adoption of a common framework for benchmarking, measuring and reporting on the regulatory burden on business’: Productivity Commission, Performance Benchmarking of Australian Business Regulation — Stage 2, Information Paper (2007). The current Rudd government appears equally comfortable with the concept and utility of benchmarking. For example, Rudd has spoken of the need for a national school curriculum in the light of student performance against benchmarks: Julia Gillard and Kevin Rudd, ‘First Steps towards a National Curriculum’ (Joint Media Release, 30 January 2008). Other benchmarking exercises are underway in the areas of healthcare and defence.


20 See also, critique of performance benchmarking in relation to the delivery of value laden service delivery, in this case police services in New York, can be found in Mark Moore,
emphasise that her criticisms relate specifically to performance benchmarking rather than to standards benchmarking. Performance benchmarking requires quantifiable performance measures and aims to improve efficiency whereas, by comparison, standards benchmarking necessitates identifying agreed standards that can then be used to reflect on the effectiveness of a system in achieving those standards. Neave’s pleas for a nuanced, non-linear way to measure performance could in fact be read as an endorsement of standards benchmarking, which is specifically designed for use in relation to value laden service delivery.

4 How Do you Undertake a Values Benchmarking Exercise?

Values benchmarking is a useful tool for looking at systems and their outcomes, and, I argue, for promoting a values discourse. It is not, however, a precise science and there is no set way for structuring or reporting on a values benchmarking exercise. The key is to juxtapose the system that is being assessed against the values that have been chosen as the relevant benchmark. In the benchmarking exercises that follow, I will begin by summarising the selected legislative reforms (part B) and jurisprudence (part C) that may provide evidence of publicisation in relation to outsourcing. Where appropriate I will include some limited commentary to emphasise key features. I will then analyse the results by reference to administrative law values and draw a conclusion about whether developments in jurisprudence or legislative reform provide evidence of publicisation.


21 Neave, above n 19,131. The form of performance review Neave advocates correlates with a standards benchmarking approach: ‘[w]e need to treat performance measurement as a complex, non-linear process which takes account of the value judgments and ambiguities which arise in considering the relationships between government, the bureaucracy and the community which are the concern of administrative law. This requires recognition of the competing objectives of stakeholders in the system and identification of the ways in which performance measurement could reflect and not silence their different perspectives’.

22 There is a growing trend to use values benchmarking to analyse public sector outcomes, rather than systems: Moore, above n 20, 101–03.
One of the potential downfalls of publicisation is that it can be used as a label to describe the extension of any administrative law values into new control and accountability mechanisms. If the concept of publicisation is to provide a useful way of comparing and evaluating the adequacy of disparate control and accountability mechanisms applicable to outsourcing, then it needs to do more than describe the presence or absence of embedded administrative law values; it needs to promote a values discourse which involves discussing values in terms of balance, overlap competition and continuums.

In chapters I and II, I have argued and demonstrated that it is the relationship between participation on the one hand and fairness and legality on the other, and the way that these values are prioritised over efficiency, that delivers administrative justice and executive accountability in the administrative law system. If this so, then new mechanisms that do not evidence the same relationships and balance are likely to deliver different outcomes. Are these mechanisms nevertheless evidence of publicisation? For example, a right to phone a complaint clearance house in India is not the same as a right to merits review before the AAT: both mechanisms manifest participation and fairness values, but not equally strongly.\(^\text{23}\) Consider the contract that exists between an executive agency and a contractor. It is certainly a mechanism promoting control and accountability in the outsourcing context, and is likely to include clauses requiring the contractor to act legally and fairly, but if it does not adequately or meaningfully provide for citizen participation (openness, procedural fairness, transparency, accessibility and explanation) does it comprise evidence of publicisation?

One of the keys to using the four value-types identified in chapter II — participation, fairness, legality and efficiency — as standards is to remember that they are being used as shorthand for a broader range of values.\(^\text{24}\) A large degree of overlap between value-types is therefore to be expected and it will be necessary, in some instances, to drill down from value-types to particular values.

\(^\text{23}\) Of course, if the Indian contractor solves the complaint then, in terms of efficiency (time and cost) it may be the preferable mechanism. The suitability of the mechanism depends on a range of factors, perhaps most particularly the degree of impact on a citizen.

\(^\text{24}\) See above at 44 (table 3).
A second key is to consider how particular values define relationships between public law protagonists: citizens, executive government, Parliament and the courts. For example, the value of explanation (grouped with the value-type participation) in the context of the administrative law system involves Parliament providing for the executive to give account to the citizen. However, explanation could equally well involve the executive voluntarily providing account. The value of legality archetypically manifests in judicial review with the judiciary insisting on the executive making lawful decisions when a citizen successfully brings a matter before the court. Of course, issues of illegality are regularly and effectively dealt with by citizens bringing matters to the attention of the agency (internal review), the Ombudsman, or a tribunal. One of the potentialities of the concept of publicisation is that it may provide a way for companies and other private actors who act as agents for the executive to come into relationship with the traditional protagonists of the administrative law system, through displaying a commitment to administrative law values.

Before commencing the benchmarking exercises it is prudent to recap on the key features of the value-types identified in chapters I and II concentrating on how these value-types manifest in the administrative law system.

(a) Participation of Citizen – Openness of Executive

The value-type 'participation' encapsulates the values that enable a citizen to call the executive to account - openness, natural justice, procedural fairness, transparency, accessibility and explanation. In chapter I, I noted that this value-type could equally well be named openness. Participation was chosen to describe the value-type because it emphasised the key role that the engaged citizen plays in the administrative law system and in this respect reflects the emphasis of the 1970s reform reports. By comparison, openness emphasises the culture or attitude that is required of the executive. The administrative law system is an example of Parliament legislating to insist on openness and provide for participation. Parliament has, of course, not always been the protagonist safeguarding openness and participation. Traditionally, at common law, safeguarding participation and insisting on openness was a role of the courts. In recent decades the accountability matrix has shifted and the executive can now increasingly be found taking the lead in
pursuing openness and facilitating participation, independently of the administrative law system.\textsuperscript{25}

(b) Fairness of Decision-Maker

Fairness, as a value-type, encompasses rationality, impartiality, independence, consistency, honesty, incorruptibility, objectivity and reasoned conclusions. These values focus on the capacity of the decision-maker to act fairly and to thereby make a substantively fair decision. The 1970s Reform Reports stressed the need to prioritise the delivery of fairness within the administrative law system and, in their opinion, this meant creating review bodies with the jurisdiction to hear complaints of unfairness and making these review options readily accessible to citizens. The AAT exercises its merits review jurisdiction by considering decisions de novo and deciding on the correct and preferable decision. In this respect merits review can be viewed as the most obvious manifestation of fairness in our administrative law system. Nowadays, however, the fairness of a decision can generally be reviewed in a myriad of ways: by the agency internally, by a tribunal, by the Ombudsman or by a court (provided the unfairness in question amounts to an error of law) and there is recognition within the executive that fairness is a value that must be promoted systemically through policies, training etc.

In the Australian context there are constitutional reasons for maintaining a distinction between the fairness and the legality of decisions. The separation of

\textsuperscript{25} The changing role of Parliament, the executive and the courts in promoting and safeguarding administrative law values is discussed in John McMillan, 'Future Directions for Australian Administrative Law — The Ombudsman' (Address by Commonwealth Ombudsman delivered to the AIAL National Administrative Law Forum, Canberra, 3–4 July 2003), 3, 8–10: '[T]he constitutional and common law foundations of 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 n itself of the maturation of the legal and political system.'
powers doctrine, implicit in the Australian Constitution, prohibits federal courts from exercising anything other than judicial power and therefore prohibits courts from adjudicating on the substantive fairness of a decision as this would require courts exercising non-judicial powers (governmental or administrative powers). While a distinction must therefore be maintained between what comprises a legal and what comprises a fair decision, this does not mean that there is not substantial overlap. For example, if the decision-maker is bias, he is not manifesting the value of objectivity and the decision can be classified as both unfair and illegal (in the sense that there has been an error of law). While the value-types of legality and fairness do not have to mirror the judicial review-merits review divide in Australian administrative law, this context is relevant to their interpretation.

(c) Legality of Decision

Legality, as an administrative law value, has traditionally focused attention on the character of the decision that is made by the executive and the role of the courts in overseeing executive decision-making through judicial review. The scope of judicial review ensures that executive powers 'are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised'. Decisions that are found wanting, can be characterised as illegal. The pursuit of legality traditionally pits the courts against the executive government and Parliament. Characterising the dynamic of judicial review in this way omits the critical role played by the citizen. Before illegality can be checked, there must be a citizen willing to petition the court, asking them to firstly characterise a particular decision as subject to judicial review and secondly to find the decision illegal.

Given that judicial review is a last recourse mechanism in the Australian administrative law accountability matrix, it is preferable to take a broader view of legality and recognise that it is a value that requires the executive to demonstrate and justify their actions in terms of legality to citizens, Parliament, the courts, internal review bodies, tribunals, the Ombudsman, the Auditor-General etc.

26 James Spigelman, ‘Judicial Review and the Integrity Branch of Government Address’ (Speech delivered at the World Jurist Association Congress, Shanghai, 8 September 2005).
(d) Efficiency

As discussed in chapter I, efficiency can be characterised as an administrative law value or a public administration value but regardless of its classification its purpose in the administrative law context is to ensure that the pursuit of participation, legality and fairness are tempered by considerations of the effect on executive efficiency in terms of cost, timeliness, resources etc. While the 1970s reforms clearly prioritised participation, fairness and legality above efficiency, they did so to redress an historic imbalance in accountability relationship between the citizen and the executive. This imbalance was addressed through the implementation of the administrative law system. Some would argue that the executive’s decision to change modes of public administration — from direct service delivery to outsourced service delivery — may have created a further imbalance that now needs redressing. In the context of administrative law values, efficiency continues to act as a touchstone that focuses attention on the need to prioritise not only administrative justice and accountability but also good administration in terms of allowing the executive to effectively and efficiently manage its limited resources in order to implement government policy and deliver government services.

B First Benchmarking Exercise — Publicisation Evidenced in Recent Amendments?

In this part I will look at the 2005 amendment to the Ombudsman Act and the proposed amendments to the FOI Act, as they relate to outsourcing. Both of these amendments represent recognition by Parliament that the functions and powers exercised by government contractors have the requisite public nexus to warrant public oversight through the introduction of appropriate review and accountability mechanisms. As mentioned above, I have chosen these two examples because they appear to be prima facie examples of an extension of administrative law values by Parliament, into new control mechanisms, in response to outsourcing. This will enable me to focus, not so much on whether there is some evidence of publicisation, but on the manner in which the values are embedded in the new mechanisms. In particular, whether the new mechanisms prioritise participation, legality and fairness over efficiency and whether the balance is weighted in favour of the citizen being able to call the executive and/or government contractor to account. In other words, I am interested in whether the same negotiated balance between the
values that is evident in the 1970s Reform Reports and in our current administrative law system is evident in these reforms.

6 **2005 Amendments to the Ombudsman Act**

(a) **Summary of Amendments**

The Migration and Ombudsman Amendment Act 2005 ("2005 Amendments") inserted s 3BA into the Ombudsman Act, to provide the Commonwealth Ombudsman with jurisdiction to hear complaints against government contractors and their subcontractors. The definition states that a person is a 'Commonwealth service provider' if:

- there is a contract between the person, and a 'department' or 'prescribed authority' or the Commonwealth;\[^a\] and
- the terms of the contract make the person responsible for providing goods or services, for or on behalf of the department or prescribed authority, to another person (not a department or prescribed authority or the Commonwealth).\[^b\]

Significantly, the definition is linked to the existence of a contract which means that the outsourcing of decision-making functions or other responsibilities to private bodies, through administrative arrangement rather than contract, will continue to fall beyond the Ombudsman's jurisdiction.

Prior to this amendment commencing in 2005, the Ombudsman was using his 'own motion investigations' power to look at the quality of services provided by both the departments and agencies and their contractors. For example, in 2001 and again in 2002-03 the Ombudsman investigated complaints handling in the Job Network.\[^c\]

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28 Subcontractors are expressly included: Ombudsman Act, s 3BA(b).
29 Both terms are defined in Ombudsman Act, s 3.
30 Ombudsman Act, s 3BA(a).
31 Commonwealth Ombudsman's Office, 'Improving Complaint Handling in the Job Network: Ombudsman' (Media Release, 11 August 2003). In that case, the Ombudsman ultimately recommended that all of the Department of Employment and Workplace Relations contractors involved in providing services through the Job Network should have a standard
Prior to the 2005 amendments, John McMillan, the Commonwealth Ombudsman already asserted that the Ombudsman had jurisdiction in relation to government contractors to ensure that:

where the delivery of services has been outsourced to third party providers, the quality of those services is being maintained. This is becoming increasingly important as more government services are provided by the private sector under contract to government. Often the service user has no contractual interest in the arrangement since only the government agency and the individual provider are parties to the contract. ... It is therefore essential that agencies responsible for monitoring these contracts set appropriate delivery standards for providers; and have strong quality control mechanisms in place to ensure service providers are meeting these standards.\textsuperscript{32}

From the Ombudsman's perspective, the 2005 amendments therefore merely clarified his powers in relation to investigating the actions of government contractors.\textsuperscript{33}

In its current brochure \textit{Making a Complaint to the Ombudsman}, the Office of the Ombudsman describes its jurisdiction in relation to outsourcing in the following terms: '\textit{[w]e can investigate claims about ... services delivered by most private contractors for the Australian Government}'.\textsuperscript{34} In April 2009, it issued a factsheet titled, \textit{Complaint Handling: Outsourcing}. This factsheet is written for use by departments and agencies and, in relation to outsourcing advises them to:

\begin{itemize}
\item format complaint register and that the department review its contract monitoring and auditing systems with a view to improving consistency.
\end{itemize}

\textsuperscript{32} Ibid.


• ensure that all contracts for provision of services include an appropriate complaint process; complaint policy; and complaint register be established;
• require a contractor to advise citizens about complaint process and review options;
• ensure that subcontractors pass on complaint handling obligations to subcontractors;
• monitor the contractor's handling of complaints;
• receive regular reports from the contractor on complaint numbers and issues or periodically audit the contractor;
• provide staff with training in monitoring and quality assurance processes;
• regularly analyse the complaints to identify problems and trends;
• be prepared to view a failure to comply with complaint handling requirements as a serious matter; and
• include complaints received by contractors in its publicly released figures.\

Finally, if there are enough complaints about a contractor then the department or agency should investigate the matter systematically.

(b) Values Benchmarking

Participation, legality, fairness —
By extending the Ombudsman’s jurisdiction, Parliament has provided citizens who have a grievance against a government contractor with familiar administrative law review option which they can access.

In order to consider how the administrative law values are embedded in these amendments, it is firstly necessary to consider how the Ombudsman’s jurisdiction generally embodies and balances the administrative law values of participation, fairness and values. When citizens make a complaint to the Ombudsman seeking independent review, they are motivated by a need to have the unfairness or illegality of particular decisions or actions redressed. The Ombudsman has the power to decline to investigate complaints, which means that while a citizen has a right to make a complaint he or she does not have the right to insist that a review dealing

with the illegality or unfairness is ultimately undertaken. The Ombudsman also has an own motion jurisdiction that does not require a complainant at all. In terms of values, the jurisdiction of the Ombudsman is not reliant on citizen participation and does not guarantee participation. On the other hand, the jurisdiction of the Ombudsman promotes participation in other ways such as being free, non-legal, non-adversarial etc. In terms of the balance between values, the Ombudsman’s jurisdiction evidences the promotion of participation not in terms of access to courts and tribunals but in terms of access to an influential, no-cost advocate. From a citizen’s perspective, the downside is that the Ombudsman is restricted, in terms of resources, as to how many complainants his office can assist.

One of the limitations on the Ombudsman in exercising his or her jurisdiction is that only outsourcing where there is a written contract can be investigated. It is likely, however, that if a complaint arose involving an outsourcing scenario where there was no contract the Ombudsman could use his own motion powers and simply characterise the complaint as being against the agency (as he was doing with contracting-out prior to the 2005 Amendments).

The 2005 Amendments formally extend the Ombudsman’s jurisdiction such that complaints can be made against government contractors and the new jurisdiction evidences the same mix or balance of administrative law values — participation is prioritised, coupled with fairness and/or illegality, and efficiency while relevant is not elevated such that it limits or alters the form of ombudsman review available in relation to government contractors.

**Efficiency —**

One of the oft cited reasons that outsourcing has been embraced by the executive as a mode of public administration is because it is considered efficient in terms of cost and resources. The extension of the Ombudsman’s jurisdiction represents an impost on this efficiency but given that the Ombudsman’s office is itself subject to resource constraints, and must prioritise cases in terms of the seriousness of the legality and fairness issues at stake, the impost is limited. Moreover, the fact that the Ombudsman was effectively conducting reviews of government contractors through his own motion power prior to the amendments strongly suggests that the actual impact of the amendments on executive efficiency will be minimal. There is no evidence as to whether contractors are factoring in potential embroilment in a
complaint made to the Ombudsman when deciding whether or not to accept government work.

The Ombudsman is producing education material for the executive alerting them to the steps they should be taking (if they were not before) to minimise citizen complaints regarding government contractors. The publications aim to minimise the efficiency impact on the executive, by encouraging planning and proactive contract management. It is obvious however, that the Ombudsman is advocating a standard of contract management that is resource intensive and which, if heeded, will likely have efficiency ramifications for the executive. Acknowledging that reforms will impact on executive efficiency and taking steps to minimise those impacts is consistent with administrative law values as embedded and balanced in our current administrative law system, provided that primary consideration is given to promoting participation, legality and fairness. It is the imbalance in favour of the citizen’s right to demand account (in terms of legality and fairness) that is the hallmark of the administrative law system.

(c) Publicisation?

In terms of the balance between administrative law values, a key feature of our administrative law system is its reliance on citizen participation as the linchpin to holding the executive to account and delivering administrative justice. A second feature is that participation, legality and fairness are consistently prioritised over efficiency. The 2005 Amendments represent a response to outsourcing that can be described as both consistent with administrative law values generally and consistent with the balance between those values that was negotiated at the inception of the administrative law system.

The Ombudsman may, however, find it challenging to exercise the new jurisdiction granted through the 2005 Amendments given that Parliament has given no guidance on what weighting to give contractual or commercial factors that explain why an administrative decision is unfair or illegal in terms of administrative law values. For example, if a government contractor answered a complaint by arguing that they could not consider all of the information presented by the citizen to support their applications because they only had five minutes to process each application if the contract was to be profitable, what recommendations would the Ombudsman make? The issue comes down to how the Ombudsman, in exercising his
jurisdiction will himself balance the need for fairness and legality against the executive's need and right to operate efficiently through contractors.

7  Proposed Amendments to the FOI Act

For many years, obtaining information pursuant to the FOI Act has been difficult with applications for access to documents being routinely resisted and contested by the executive and the developing jurisprudence favouring the non-disclosure of information. Recommendations to fundamentally reform the FOI regime, and to more broadly promote open government, were made by the Australian Law Reform Commissions 1995 Report titled Open Government: A Review of the Federal Freedom of Information Act 1982. The Labor Party picked up on these recommendations in opposition and incorporated them into their 'open government' policy platform at the last election. The Labor government's election promise was to restore trust and integrity in government through promoting openness and transparency in government.

(a) Summary of Amendments

The Freedom of Information Amendment (Reform) Bill 2009 (Cth) (FOI Bill), along with the Information Commissioner Bill 2009, were introduced into the Federal Parliament on 26 November 2009 and are promptly sent to the Senate Finance and Public Administration Committee for inquiry. The Committee reported on 16 March


39 This Bill is proceeding through Parliament in tandem with the FOI Bill and provides for the creation of Office of the Information Commissioner.
2010 and endorsed the bills,\(^40\) which are now due to go before Parliament in the winter sitting. The FOI Bill aims to shift the culture within the executive from information secrecy to information openness. This will be achieved by amending the object of the FOI Act to make it clear that its object, and Parliament's intent, is to ensure open access to government documents and information in order to enable public participation and scrutiny of government.\(^41\) Information held by the Commonwealth is to be viewed as a national resource that is to be managed in the public interest. Perhaps the most radical shift in executive culture will be achieved by amendments that oblige departments and agencies to publish a wide range of information and documents on their web sites, including all documents released under the FOI Act.\(^42\) Also significant are those amendments that validate and give weight to the public interest value in disclosing conditionally exempt documents.\(^43\)

In relation to outsourcing, the proposed FOI Bill would bring government contractors within the scope of the FOI regime for the first time. The proposal is to insert a new s 6C into the FOI Act that will apply when a service is provided under 'a Commonwealth contract' and will oblige an agency to take 'contractual measures' to ensure that it receives a document created by, or in the possession of, a 'Commonwealth service provider'\(^44\) if the agency receives a request for the document; and the document relates to the performance of the Commonwealth contract (not entry into the contract).\(^45\)

It is proposed that the term 'Commonwealth contract' will be defined as:

\(^{40}\)Finance and Public Administration Legislation Committee, Senate, *Report on the Freedom of Information Amendment Bill 2009 and Information Commissioner Bill 2009* (2010). It made only six recommendations with only one of those substantial — the recommendation to ignore the advice of Prime Minister and Cabinet, and not stipulate where the onus of proof lies in relation to appeals from decisions of the Information Commissioner.

\(^{41}\)FOI Bill sch 1, item 1.

\(^{42}\)FOI Bill, sch 2, pt 2.

\(^{43}\)FOI Bill, sch 3, item 33.

\(^{44}\)A 'Commonwealth Service Provider' is: (a) a party to the Commonwealth contract; and (b) responsible for the provision of services under the Commonwealth contract. FOI Bill, sch 6, pt 1, item 3, s 4(1). There is also a proposed definition of subcontractor to be inserted: FOI Bill, sch 6, pt 1, item 16, s 4(1). Cf Definition of 'Commonwealth Service Provider' in Ombudsman Act, s 3BA.

\(^{45}\)FOI Bill, sch 6, pt 1, item 19, s 6C(2).
a contract to which all of the following apply:

(a) the Commonwealth or an agency is, or was, a party to the contract;
(b) under the contract, services are, or were, to be provided:
   (i) by another party;
   (ii) for or on behalf of an agency; and
   (iii) to a person who is not the Commonwealth or an agency; and
(c) the services are in connection with the performance of the functions, or the exercise of the powers, of an agency.\(^\text{46}\)

The 'contractual measures' that a department or agency will have to take to ensure that it can obtain documents from its contractors are not defined though the explanatory memorandum says it will necessitate the insertion of a 'government can request information' contractual term into all contracts.\(^\text{47}\) To be effective, 'contractual measure' needs to be interpreted broadly such that agencies are prohibited from including blanket commercial in confidence provisions that might thwart disclosure. Also, it needs to oblige agencies to include not only the mandatory 'government can request information' clause in government contracts but also the inclusion of clauses enabling government to enforce disclosure by government contractors (eg. audit of information retained by a contractor; penalty provisions for failure to provide information; and withholding of bond provisions etc).

The obvious point of contention between applicants, departments, agencies and contractors will be in relation to whether or not particular services provided by government contractors are, 'in connection with the performance of the functions, or the exercise of the powers, of an agency'. The phrase 'exercise of the powers of an agency' seems to import all of the controversies of administrative law jurisprudence with respect to judicial review and will be problematic. For example, where an agency gives a company unfettered discretion to a corporate contractor to make a decision affecting an individual — will that decision be an exercise of executive

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\(^\text{46}\) FOI Bill, sch 6, pt 1, item 2, s 4(1). Cf Definition of 'Commonwealth Service Provider' in Ombudsman Act 1976, s 3BA.

\(^\text{47}\) Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill (Cth), 52: '[t]he contractual term will be a requirement that the contracted services provider must give a copy of a relevant document to the agency upon request by the agency'. The form of this contractual term is not stipulated in the FOI Bill.
power or an exercise of corporate power (a Neat or Yarmirr like scenario)\(^ {48}\)? Where an agency’s functions are broadly stated, will specific activities that it outsources have the requisite ‘public’ nexus to be considered a function of the agency?

A new s 24A(2) is also proposed to be inserted into the FOI Act\(^ {49}\) which will likely limit the effectiveness of the new right to access information pertaining to outsourcing. Effectively, an agency may refuse a request for information held by a government contractor if it has ‘taken contractual measures to ensure that it receives the document’ but has not as a result received the document. If the culture of non-disclosure is not banished from the executive, this section will be viewed as an opt-out section. Agencies need only ensure that a contract is drafted such that the agency has included the ‘government may request information clause’ but has not included any penalties, default triggers or other enforcement provisions in support. The inclusion of s 24A will discourage agencies ensuring that contracts are drafted to ensure that contractors have appropriate information management systems in place and adequate incentives to provide information when requested.

Interestingly, in the FOI Bill Second Reading Speech, Parliamentary Secretary Anthony Byrne also announced that the government will, ‘ask the Australian Law Reform Commission to inquire into whether the FOI Act or another disclosure regime should apply to the private sector’\(^ {50}\). This reference will report prior to a review of the amendments after 2 years of operation.\(^ {51}\) The private sector is now required to comply with privacy protection laws; the rationale being that an individual’s right to privacy needs to be respected by the government and private sector alike. But a similar individual right to information does not exist, and could not be recognised without severely undermining corporate life in Australia. A lesser individual right to information in possession of a private company, partnership or sole trader, that relates to a particular individual could be usefully provided for by Parliament.

\(^{48}\) **Neat Domestic Trading Pty Limited v AWB Limited** 6 CLR 277 (‘Neat’); **Yarmirr v Australian Telecommunications Corporation** (1990) 96 ALR 739 (‘Yarmirr’). These cases are discussed below at 173-89.

\(^{49}\) FOI Bill, Sch 6, pt 1, item 33, s 24A.


(b) Values Benchmarking

Participation —
The amendments to the FOI Act, generally, aim to facilitate openness and transparency in between government and citizens with a view to improving the legitimacy of government (Parliament and executive) and building trust between the citizen and government. This emphasis clearly references the pursuit of democratic values, not simply administrative law values. Participation, as a value-type, can just as readily be described as a democratic value as an administrative law value.

At face value, the FOI Bill, including the amendments allowing access to documents held by government contractors, are squarely aimed at participation and facilitating direct accountability of the executive to the citizen. The litmus test, however, for determining whether particular amendments actually promote or embed administrative law values should be whether they deliver results in terms of desired administrative law outcomes: namely, executive accountability and administrative justice. If, for the reasons outlined above, the amendments do not actually enable citizens to access contracting-out documents then obviously the amendments can rightly be criticised as inconsistent with administrative law values. It is possible that the Bill will be amended by Parliament; though at this stage in the Rudd government's first term in office it seems more likely that the entire FOI Bill may be shelved for want of cross-bench support in the Senate.

Efficiency —
The final point to make is that any shift from secretive government to open government, will have significant efficiency implications for the executive in terms of changing operating practices and allocating staff resources. The aim is nothing short of changing executive culture. The FOI Bill represents a second attempt by Parliament at promoting this paradigm shift within the executive (the first time being in 1982) and this time it intends to provide adequate legislative guidance to the courts to enlist their support.

The FOI Bill, if passed, is an example of administrative law values, as well as democratic values, being extended into new control and accountability mechanisms. For the purposes of this benchmarking exercise and for the purposes of identifying evidence of publicisation, we are only concerned with the particular proposed amendments responding to outsourcing.

While the amendments pertaining to government contractors appear to extend administrative law values, in particular the value participation, the inclusion of clauses that allow the executive to resist releasing documents held by government contractors suggests that the proposed amendments, if passed in their current form, should not be considered substantive evidence of publicisation.

Collectively the amendments to the Ombudsman Act and the proposed amendments to the FOI Act demonstrate that Parliament has accepted that outsourcing has the requisite public nexus to warrant independent oversight and has accordingly extended the scope of the Ombudsman Act and FOI Act. Interestingly, Parliament has not found it necessary to similarly extend the Administrative Decisions (Judicial Review) Act 1977 (Cth) (‘Administrative Review Act’) jurisdiction and this would seem to indicate that while Parliament acknowledges the benefit of giving the citizen limited power to call government contractors to account (filtered through the Ombudsman) they do not want the level of review or accountability to tip the balance too far in favour of the citizen.  

Of course, deciding on the most appropriate legislative rights of review to grant is the prerogative of government. The government would undoubtedly argue that in relation to outsourcing there are additional checks and balances in place through the contract and through internal oversight by the department or agency. The degree, to which these additional checks and balances are consistent with

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53 I am referencing Davies definition of accountability where balance between the caller to account and the account giver must be tilted in favour of the former: Anne Davies, Accountability: A Public Law Analysis of Government by Contract (2001), 75–6; see also, discussion in chapter I at 26.
administrative law values, and evidence publicisation, would be interesting to analyse, but are beyond the scope of this dissertation.

C Second Benchmarking Exercise — Publicisation Evidenced in Judicial Review Jurisprudence?

The purpose of this values benchmarking exercise is to consider whether the judiciary are deciding cases pertaining to the judicial review jurisdiction of federal courts' in relation to outsourcing activities in a manner that extends administrative law values. If such evidence was to be found it would be arguable that this body of jurisprudence represents evidence of publicisation. Alternatively, it may be possible to identify lines of reasoning or emerging themes in the jurisprudence, which while perhaps not manifest in majority decisions, can be described as evidence of publicisation.

The cases that will be considered in this values benchmarking exercise chart the jurisdictional limitations that prevent citizens with grievances against government contractors, or against private entities, to which functions have been outsourced, seeking judicial review. The cases of Tang and Neat will be considered along with three other cases that illustrate particular jurisdictional limitations. The common theme in all of the cases is that the decision-maker is not part of the traditional executive (minister, agency, officer) but rather is a statutory corporation, private corporation or private body which assists the executive to fulfil their public administration responsibilities. None of the cases considered in the chapter, however, represent an archetypical outsourcing case in the sense that there is a company delivering a services on behalf of the executive pursuant to a contract.

54 Griffith University v Tang (2005) 221 CLR 99 ('Tang').
55 Neat Domestic Trading Pty Limited v AWB Limited 6 CLR 277 ('Neat').
56 I will also consider the cases of Post Office Agents Association Ltd v Australian Postal Commission (1988) 84 ALR 563; New South Wales Aboriginal Land Council and Tasmanian Aboriginal Centre Inc v Aboriginal and Torres Strait Islander Commission and Chief Executive Officer of the Aboriginal and Torres Strait Island Commission (1995) 59 FCR 369; Yarmirr v Australian Telecommunications Corporation (1990) 96 ALR 739. I have chosen these cases because they illustrate multiple jurisdictional limitations and because I have a particular interest in Indigenous law. Other cases could have been chosen to illustrate the same points.
This type of outsourcing case is, at this point in time, so clearly not amenable to judicial review that they are not brought before the court.

Readers would be aware that the jurisprudence I have selected for this exercise is not the most likely place to go in search of evidence of publicisation. My reason for looking at this particular jurisprudence is that it could explain why publicisation in the form of new judicial precedents extending the judicial review jurisdiction is not possible.

9 Judicial Review Pursuant to the Constitution

(a) Jurisdictional Limitations

A citizen’s right to seek judicial review is protected by s 75(v) of the Constitution, which recognises the original jurisdiction of the High Court in, ‘all matters — in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. Section 39B(1) of the Judiciary Act 1903 (‘Judiciary Act’) grants similar jurisdiction to the Federal Court. Both jurisdictions are limited in that an action can only be brought against a particular kind of person — ‘an officer of the Commonwealth’. An ‘officer of the Commonwealth’ has been held to include Commonwealth statutory office holders57, Federal Court judges58 and Members of federal tribunals59 but does not include state judicial and administrative officers exercising federal jurisdiction: statutory corporations,60 or indeed, any body-corporate.61

In the context of outsourcing the obvious problem is that there is a private contractor, usually a company but sometimes a private entity, interposed between the citizen and the nearest 'officer of the Commonwealth'. When a dispute arises between the citizen and the private decision-maker or service provider, the citizen cannot, given current precedents, enliven the judicial review jurisdiction of the High Court, pursuant to s 75(v) of the Constitution, or the Federal Court pursuant to s 39B(1) of the Judiciary Act. This is because their grievance is with a contractor or private entity retained by the Commonwealth rather than against an officer of the Commonwealth.

(b) Cases

A number of cases over the last twenty-five years have been brought before the court arguing that the meaning attributed to 'officer of the Commonwealth' could be extended such that it included Commonwealth statutory corporations or private bodies that are arguably exercising Commonwealth powers. The federal courts, however, have consistently held that, 'bodies outside the traditional executive appointment structure that have been given tasks to perform on behalf of the government,' are not amenable to judicial review. Two cases will suffice to illustrate the nature of the jurisdictional limitations.

In Post Office Agents Association Ltd v Australian Postal Commission, an association of government contractors running post office agencies contested a decision made by the corporatised Australian Postal Commission, which was a statutory corporation, preventing them from selling duty stamps on commission. The case is authority for the proposition that statutory corporations are not officers of the Commonwealth. In fact, in obiter comments Davies J went further and stated that individual directors, appointees etc. of a statutory corporation can also not be considered officers of the Commonwealth.

FCR 419 at 43 (Tamberlin J). See Aronson and Dyer, above n 59, 26–7 for a more extensive list of individuals and bodies that have been held not to be officers of the Commonwealth.

62 Aronson and Dyer, above n 59, 28.
63 (1988) 84 ALR 563 ('Post Office Agents').
64 Post Office Agents (1988) 84 ALR 563, 575.
In *New South Wales Aboriginal Land Council v the Aboriginal and Torres Strait Islander Commission*, the New South Wales Aboriginal Land Council (‘NSWALC’) was trying to prevent the Aboriginal and Torres Strait Islander Commission (‘ATSIC’) putting aside money exclusively for expenditure on land purchases in the Northern Territory. During the ATSIC era in Indigenous policy, the Australian Government was effectively outsourcing decision-making in relation to expenditure of Commonwealth funds on Indigenous Australians to ATSIC, which comprised elected representatives organised at the local, state and federal level. Decisions made at the various levels of the ATSIC decision-making scheme were then implemented by ATSIC’s bureaucratic arm, which had been given departmental functions by the Commonwealth. The actual decision challenged by NSWALC was made by the ATSIC Board (a national committee of elected representatives).

NSWALC’s challenge to the decision of the ATSIC Board was ultimately made pursuant to the Administrative Decision Act, or, in the alternate, upon s 39B of the Judiciary Act and, to the extent necessary, upon the associated or pendant jurisdiction of the Court. Dealing only at this stage with the attempt to enliven a judicial review jurisdiction via s 39B, Hill J held that:

> [T]he Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission, the second respondent, is clearly an officer of the

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65 *New South Wales Aboriginal Land Council and Tasmanian Aboriginal Centre Inc v Aboriginal and Torres Strait Islander Commission and Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission* (1995) 59 FCR 369 (‘NSWALC v ATSIC’).

66 The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) had a sunset clause which prevented the lodgement of land claims after 1996. ATSIC was planning to set aside the land purchase budget for exclusive use in the Northern Territory. Once bought Aboriginal owned land was able to be claimed and if the clam was successful converted into Aboriginal freehold title, which gives a right of veto with respect to mining activity.

67 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), s 8. The ATSIC elected representative forum was most often referred to as the ATSIC Board with the term ATSIC being used to denote its departmental functions. Justice Hill referred to the ATSIC Board as ATSIC in his judgment.

68 *NSWALC v ATSIC* (1995) 59 FCR 369, 383. Discussions with individuals involved in that case suggests that the NSWALC struggled to identify a suitable jurisdiction in which to air their grievance at the preferential treatment being given to Indigenous people in the Northern Territory.
Commonwealth and no submission was made to the contrary. Likewise, ATSIC is not an officer of the Commonwealth and no submission was put that it was. Thus if jurisdiction is to be attracted under s 39B, it must be because relief in the nature of mandamus, prohibition or injunction is sought against the second respondent. \(^{69}\)

"... the Chief Executive Officer had no substantive decision-making role in grant applications so that relief, whether in the nature of prohibition or injunction, would be pointless against the second respondent.\(^{70}\)"

Justice Hill accordingly held that he had no jurisdiction to hear the application for review pursuant to s 39B of the Judiciary Act.

ATSIC was a manifestation of the government's commitment to Indigenous self-determination which saw the government expressly devolve its decision-making power to elected Indigenous leaders. As a result, elected representatives were empowered to make decisions regarding resource allocation that affected their communities. In the context of the policy of self-determination, Hill J's decision to affirm that the ATSIC Board was not an 'officer of the Commonwealth' is understandable. But the entire ATSIC structure was achieved through legislation. Moreover, the decision in question was likely to affect tens of thousands of Indigenous citizens and involved tens of millions of dollars of public funds. If one accepts that self-determination does not negate the need for legal decision-making and accountability in relation to public funds, then at what point in the decision-making cycle, and through what review mechanism, could affected Indigenous citizens seek review for illegality?

Aronson and Dyer argue persuasively that the courts should give a broader interpretation to the term 'officer of the Commonwealth'.

\[^{69}\text{Ibid, 382.}\]
\[^{70}\text{Ibid, 383.}\]
is surely irrelevant to that point. This is particularly important in view of the drive to reduce the size of transitional forms of government to the core functions, while outsourcing service delivery functions.\textsuperscript{71}

In Britain, where there is no written constitution and therefore no similar constitutional constraints to the development of judicial review jurisprudence,\textsuperscript{72} the common law has developed such that non-government private bodies will be amenable to judicial review if their decisions are underpinned by governmental action or recognised by government.\textsuperscript{73} Selway has noted that similar developments have occurred in New Zealand\textsuperscript{74} and argues that the developments in both the United Kingdom and New Zealand demonstrate growing reliance on a theory of judicial review that entails identifying new common law norms that control the exercise of public power.\textsuperscript{75} Because of the different constitutional contexts, Selway has argued jurisprudence from Britain and New Zealand is irrelevant in Australia\textsuperscript{76} though favourable discussion of this comparative jurisprudence by Finkelstein\textsuperscript{77} and Spigelman\textsuperscript{78} suggests a contrary view.

\textsuperscript{71} Aronson and Dyer, above n 59, 28.

\textsuperscript{72} Textual constraints within the Australian Constitution such as judicial review only being available against an ‘officers of the Commonwealth’ or constitutional constraints such as the strict separation of powers doctrine: see, eg, Bradley Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues’ (2002) 30(2) Federal Law Review 217, 234–35.

\textsuperscript{73} See, eg, The Queen v Panel on Takeovers and Mergers: ex p Datafin [1987] 1 QB 815; (a non-government private body was performing a public duty); R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 1 WLR 909 (a non-government private body was not performing a public duty as it was in no sense governmental). See, generally, Raymond Finkelstein, ‘Crossing the Intersection: How Courts are Navigating the “Public” and “Private” in Judicial Review’ (2006) 48 AIAL Forum 1, 3–4.

\textsuperscript{74} Selway, above n 72, 224. See, eg, Electoral Commission v Cameron [1987] NZLR 421 (CA) (a body corporate was held to have public regulatory role and to exercise public power); Mercury Energy v ECNZ [1994] 2 NZLR 385 (PC) (state-owned enterprises, established by statute, and able to affect rights of individuals are in principle subject to judicial review at common law).

\textsuperscript{75} Selway, above n 72, 233.

\textsuperscript{76} Ibid, 235.

\textsuperscript{77} Ibid.

Participation and Legality —
As a review mechanism, common law judicial review relies for its efficacy on the citizen having the guaranteed right to bring grievances involving the exercise of executive authority before the court. In this respect the constitutional guarantee of judicial review is an important individual right: one of the few granted in the constitution. In relation to outsourced decision-making and conduct it is clear that citizens cannot presently access common law judicial review as it requires a direct relationship between the traditionally configured executive ('officer of the Commonwealth') and the citizen. The obvious corollary is that the courts are currently not overseeing the legality of decision-making by the entities to which the executive has outsourced functions, through common law judicial review.

It is arguable that the term 'officer of the Commonwealth' could be re-characterised to incorporate a modern conception of the executive as courts can, and do, mould and extend the law to deal with new problems. Re-characterisation could take a number of forms discussed below, but each would involve the judiciary re-emphasising the important link between citizen participation, judicial review and the rule of law, and that grievances involving modern manifestations of the executive, or agents of the executive, should not remain unaddressed for want of jurisdiction.

While the High Court has historically protected itself from executive attempts to avoid judicial review and while it is irrefutably the role of the role of the High Court to declare what the executive is for the purposes of 75(v), the current High Court's preference for legalism in judicial decision-making mitigates against any re-characterisation of s 75(v). Arguments to the effect that the current constitutional interpretation of the phrase 'officer of the Commonwealth' is anachronistic and is capable of a more contemporary interpretation (originalism or intentionalism v...

81 Ibid.
interpretivism\(^{82}\) are unlikely to be persuasive. Moreover, suggestions that the characterisation of s 75(v) could be more subtly altered by integrating an 'institutional'\(^{83}\) approach to its interpretation of s 75(v) that considered whether a citizen was able to seek review for illegality in any other jurisdiction (seeking a public or private remedy);\(^{84}\) especially in cases where the impact of the decision on the interests of a citizen was great,\(^{85}\) are also likely to be unpersuasive.

I am suggesting that when federal courts hold that they do not have judicial review jurisdiction, it should be recognised that they are concurrently saying that a citizen does not have a right to agitate grievances with government contractors or other bodies exercising functions under arrangement with the executive, by having judicial review applications heard by the courts. In terms of values, decisions with respect to jurisdiction serve to limit citizen participation.

Further, it could be argued that jurisdictional decisions say nothing about the administrative law value of legality. Looked at from a broader perspective, a decision that a court does not have jurisdiction is a finding that any illegality that


\(^{83}\) The 'institutional' approach to thinking about the rule of law in relation to 75(v) is discussed by Leighton McDonald, 'The Entrenched Minimum Provisions and the Rule of Law' (2010) 21 Public Law Review 14, 33: '[O]n this approach, the appropriate level of judicial review might — through standard techniques of statutory interpretation — be calibrated to the existence and extent of alternative institutional arrangements for keeping administrative actions legally accountable'.

\(^{84}\) The Ombudsman's jurisdiction certainly provides a suitable jurisdiction in relation to some outsourcing decisions but would not, for example, have been available in relation to Neat style outsourcing, where no contract exists. More particularly in relation to outsourcing, Finkelstein has stated that it is not acceptable that executive government be the only supervisory authority in relation to hybrid public–private bodies that make decisions affecting citizens: Finkelstein, above n 73, 7. Taggart has said he can understand, but does not agree with — 'the proposition that contracting out by government should not be colonised by judicial review if — and it is a crucial if — there are adequate protections and remedies available as a matter of private law': Michael Taggart, 'Australian Exceptionalism' in Judicial Review', Tenth Annual Geoffrey Sawyer Lecture 2007, Australian National University <http://law.anu.edu.au/Cipl/Conferences&SawerLecture2007/Sawer%20Lecture%202007/SawerLectureFinal.pdf> at 13 March 2010, 19.

\(^{85}\) Taggart, 'Australian Exceptionalism', above n 84, 12, 18–19.
may mar an impugned decision is not the type of illegality that is the concern of the administrative law system. My argument is not that the federal courts are unconcerned with issues of legality but that in jurisdictional decisions the administrative law value of legality is simply viewed as having no application. The answer may be for the citizen to agitate the same grievance by bringing an action in contract or trust or perhaps by seeking equitable remedies.

Efficiency —

Whether the executive is obtaining any meaningful efficiency gains from simply having outsourced decisions fall beyond the scope of common law judicial review depends on whether the overall burden of independent external review has been reduced or made less intrusive (for eg, review by the Ombudsman may be viewed by the executive as less intrusive than review by the courts).®® Considering the overall review burden is beyond the scope of this dissertation.

(d) Publicisation?

In Australia, unlike in the United Kingdom and New Zealand, there have been no identifiable developments in the jurisprudence pertaining to common law judicial review that would facilitate review of outsourcing decisions and there is therefore no evidence of publicisation. This is because the courts currently interpret the entities acting on behalf of the executive, through contract or administrative arrangement, as being too private, or not public enough, to fall within a traditional interpretation of ‘officer of the Commonwealth’.

While the existence of a constitutional guarantee of judicial review provides the High Court with the opportunity to respond to outsourcing by re-characterising its s 75(v) jurisdiction by reference to the need to provide for legality and participation, the legal conservatism of the current High Court, Parliament’s resistance to having contractors subject to judicial review; and the existence of other avenues to agitate grievances,® suggest that we will not be seeing evidence of publicisation in judicial review decisions in the near future.

® In this dissertation, I will not be looking at the overall review burden.

®® For example, Parliament has recently provided for review by the Ombudsman, provided there is a contract: see above at 154-5. The executive also, typically, provides complaint procedures or internal review procedures in relation to outsourced services.
10 Judicial Review Pursuant to Administrative Review Act

(a) Jurisdictional Limitations

Section 5(1) of the Administrative Review Act, provides for judicial review by the Federal Court and states that 'a person who is aggrieved by a decision to which this Act applies ... may apply to the Federal Court ... for an order of review in respect of the decision'. Sections 6 and 7 respectively extend this jurisdiction to apply to 'conduct related to making a decision' and 'failure to make decisions' as well as to decisions. The primary constraint of the jurisdiction conferred by the Administrative Review Act lies in the need to identify a relevant 'decision'. The term, 'decision to which this act applies, is defined in s 3(1) of the Administrative Review Act and requires that the decision be 'of an administrative character' that is 'proposed or required to be made ... under an enactment' (emphasis added). The term 'of an administrative character' is not defined. While the word 'enactment' is defined broadly, the composite phrase 'under an enactment' is not defined. There is also precedent holding that any decision must be final and operative as opposed to a preliminary decision.

(b) Cases

I will consider the cases by reference to jurisdictional limitations that typically prevent review of outsourcing decisions. The values benchmarking and discussion of publicisation will occur after subsection (iv).

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88 The definition goes on to include decisions of an administrative character made by a Commonwealth authority or an officer of the Commonwealth under a State or Territory law listed in Administrative Review Act, sch 3. This is not relevant for the purposes of this dissertation.

89 A decision must be an ultimate, final, or operative determination and not a mere preliminary expression of opinion or statement: Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.
(i) Decision — Must Be Final and Operative

In the case of NSWALC v ATSIC\(^{90}\) (discussed above), the NSWALC, having failed in their attempt to have their application heard by the Federal Court exercising its s 39B jurisdiction, argued in the alternative that the court could hear their matter pursuant to s 5 of the Administrative Review Act.

The jurisdictional issue identified by Hill J was whether the decision of the ATSIC Board was, ‘a final or operative and determinative’\(^{91}\) decision or merely a ‘conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision’\(^{92}\). Justice Hill concluded that the ATSIC Board’s decision did not comprise a decision for the purposes of the Administrative Review Act.

The relevant decision under an enactment which would be capable of review under the ADJR Act would be a decision, in due course, determining to grant or not to grant moneys etc to an applicant. ... A decision to allocate so much of the funds of ATSIC … in a particular way, is undoubtedly an antecedent step in the process which will ultimately lead to a decision which is reviewable, but is not of itself a reviewable decision.\(^{93}\)

Justice Hill held that the jurisdiction of the court was not attracted as the decision made by the ATSIC Board did not constitute a decision or conduct for the purposes of ss 5-6 of the Administrative Review Act.\(^{94}\) Justice Hill did not offer any comment on whether the final and operative decision would itself be amenable to legislative judicial review.\(^{95}\) This fact situation raises similar issues to those that arose in Neal\(^{96}\) in that a private body was exercising public power — the difference being that in

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\(^{91}\) Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, 337 (Mason CJ).

\(^{92}\) Ibid.


\(^{94}\) Ibid,379–82.

\(^{95}\) Was the ATSIC Board a public or private body, were they exercising public or private power?

\(^{96}\) Below at 38-41.
The determination of whether a decision is ‘made ... under an enactment’ involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be ‘made ... under an enactment’ if both these criteria are met.\(^\text{101}\)

97 Yet AWBI’s decision was considered final and operative even though it could not effect rights and interests until the Authority relied on it to refuse an export permit.

98 (2005) 221 CLR 99 (‘Tang’). Note that the majority decision, insisted on the need to view the jurisdictional requirements collectively — ‘decision of an administrative character made ... under an enactment’ — rather than as three discrete elements, but went on to acknowledge that the key issue was whether the decision was made under enactment: *Tang* (2005) 221 CLR 99, 121–22, 123, 128 (Gummow, Callinan and Heydon JJ).

99 The challenge was brought pursuant to the *Judicial Review Act 1991* (Qld) (‘Administrative Review Act (Qld)’) which borrows its structure and many of its provisions — significantly ‘decisions of an administrative character ... made under enactment’ from the Commonwealth Administrative Review Act. Moreover, s 16(1) of the Administrative Review Act Qld stipulates that it is to be interpreted consistently with the Commonwealth Administrative Review Act.

100 The finding of academic misconduct had been made by the Assessment Board Subcommittee of the Research and Postgraduate Studies Committee of Griffith University and upheld by an Appeals Committee.

Justices Gummow, Callinan and Heydon argued that the focus on 'rights or obligations' was desirable to ensure consistency between the interpretation of 'under enactment' and the phrase 'arising under any laws made by Parliament', in s 76(ii) of the Constitution. Justice Kirby, in a minority decision, argued against the new test, as a matter of preferable statutory construction and also because he thought the new test to be at odds with the original stated purpose of the Act, which was to minimise jurisdictional hurdles to judicial review and allow a broad range of decisions 'affecting' citizens to be challenged by those with a relevant interest.

Justices Gummow, Callinan and Heydon went on to hold that the court did not have jurisdiction to hear the matter as there was no decision made under enactment as Tang's legal rights had not been affected. The relationship between Tang and the University, they held, was a consensual relationship which required mutuality to continue. Aronson has commented that the High Court's characterisation of the University's relationship with Tang as 'merely consensual' is 'breath-taking'.

Chief Justice Gleeson upheld the appeal but did not adopt the majority's new 'rights and obligations' test, rather he favoured a 'proximate source of power' analysis and framed his decision in terms of whether or not the decision took its legal force from the statute.

Justice Kirby's preferred interpretation of 'under enactment' was to identify the legal source of the decision by consideration of the relevant statutory provisions and consideration of any other sources of power to make the decision. His vigorous dissent focused on the beneficial nature of the Administrative Review Act (Qld) and

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104 Ibid, 151-53 (Kirby J).
105 Ibid, 131 (Gummow, Callinan, Heydon JJ).
108 Ibid, 154-56 (Kirby J).
the need to ensure that any interpretation was consistent with its overall purpose, and also consistent with the public nature of universities given their public funding; their statutory creation; and their enjoyment of monopoly powers. Justice Kirby argued:

[T]he provision of remedies against legally flawed decision by public authorities (some of which, on legal analysis, may be no ‘decision’ at all) is, after all, simply the application to such authorities of the requirement fundamental to our system of government, namely accountability to the rule of law. It renders the recipients of public power and public funds answerable, through the courts to the people from who the power is ultimately derived and the funds ordinarily raised by taxation, and for whose interests such recipients are, in the sense, public fiduciaries.

Tang did not concurrently invoke the common law jurisdiction or bring an action at general law arguing, for example, the existence of an implied contract or a trust. Each judgment referred to other possible jurisdictions that Tang could have invoked, and Gleeson CJ alluded to the fact that common law judicial review may have been the preferable jurisdiction.

Tang has been the topic of extensive commentary, most of it critical. For example, there have been criticisms regarding the majority’s introduction of a new test requiring legal rights to be affected before jurisdiction is able to be invoked and associated criticism regarding the coupling of Administrative Review Act jurisdiction.

109 Justice Kirby went to lengths to justify his decision in terms of the appropriate statutory construction and being mindful of the purpose of the Act, 134.
111 Ibid, 153 (Kirby J).
112 Ibid, 105 (Gleeson CJ); 131 (Gummow, Callinan and Heydon JJ); 142–43, 145, 153 (Kirby J).
113 ‘... it could be that the statutory scheme, in some circumstances, provides a more restricted form of judicial review than is otherwise available’: Tang (2005) 221 CLR 99, 105 (Gleeson CJ). Chief Justice Gleeson also said, in relation to no argument being made as to the existence of a contract that, ‘[T]he silence in the evidence about this matter, which bears upon the legal nature and incidents of the relationship between the parties, is curious’: Tang (2005) 221 CLR 99, 108.
with s 72(ii) jurisdiction through requiring there to be a ‘matter’.\(^{115}\) It has been suggested that the High Court, in allowing a public university’s reliance on soft law rather than delegated legislation be determinative of the private nature of a decision, was simply avoiding the complexities of drawing a line between public and private power.\(^{116}\) This gives a flavour of the criticism but, of course, is not exhaustive.\(^{117}\)

(iii) Administrative Character ... Under Enactment

The case of *Neat Domestic Trading Pty Limited v AWB Limited*\(^ {118}\) raises the issue of the compatibility of administrative exercises of power and corporate exercises of power.

*Neat* was an exporter of durham wheat that had been denied a permit to export wheat by the Wheat Marketing Authority (the Authority) on a number of occasions. Section s 57(1) of the *Wheat Marketing Act 1989* (Cth) (the Marketing Act) stipulated that no one was permitted to export bulk wheat without permission of the Authority and moreover, the Authority could not give its permission without the approval of AWB (International) Limited (AWBI). A private company thus held a statutory veto over whether or not permits to export wheat were granted.

AWBI was a wholly-owned subsidiary company of the Australian Wheat Board (AWB Ltd) a company established in 1939, and controlled by wheat growers, for the purpose of carrying out the single desk marketing of wheat in Australia. *Neat* argued that AWBI’s decisions not to approve their export permit requests were unlawful in that it had erroneously considered irrelevant factors (the single desk marketing policy) and had not considered relevant factors (that the durham wheat market was distinct from the general wheat marketing and that exportation of durham wheat would not negatively impact other wheat growers).

\(^{115}\) Hill, above n 36, 11.


\(^{118}\) 216 CLR 277 (‘*Neat*’).
A majority of the High Court, McHugh, Hayne and Callinan JJ, in a joint decision held that the AWBI decision was not made under enactment and therefore the court did not have the jurisdiction to hear the grievance pursuant to the Administrative Review Act. The majority conceptualised the issues raised by the case as follows:

[A]t its most general this presents the question whether public law remedies may be granted against private bodies. More particularly, do public law remedies lay where AWBI fulfils the role which it plays under the 1989 Act?\textsuperscript{119}

In reaching their decision, the majority considered the nature of the power AWBI was exercising in making its decision and held that AWBI made its decision in its corporate capacity with power derived from the \textit{Corporations Act 2001 (Cth)} and consistently with its corporate duties.\textsuperscript{120} The majority concluded that it was impossible to impose public law duties on AWBI given that, as a matter of statutory construction and law, AWBI was legally bound to pursue its corporate duties or private interests.\textsuperscript{121}

Chief Justice Gleeson also rejected the appeal, deciding that the case was without administrative law merits in that AWBI did not blindly follow policy or refuse to consider the merits of the case.\textsuperscript{122} By deciding the case in this manner Gleeson CJ side-stepped the issue of whether or not the AWBI decision was made under enactment and therefore was susceptible to review under the Administrative Review Act. However, in obiter comments he stated that the decision was likely reviewable\textsuperscript{123} and that to characterise the decision as being made consistent with AWBI’s private interests rather than as being made under the Marketing Act is to, ‘leave out of account the character of what it does, which is, in substance, the exercise of statutory power to deprive the [Authority] of the capacity to consent to the bulk export of wheat in a given case’.

\textsuperscript{119} Ibid, 297 (McHugh, Hayne, Callinan JJ). The majority stated that they would not be answering the more general question as to whether public law remedies lay against private bodies.  
\textsuperscript{120} Ibid, 297–99 (McHugh, Hayne, Callinan JJ).  
\textsuperscript{121} Ibid, 300 (McHugh, Hayne, Callinan JJ).  
\textsuperscript{122} Ibid, 290 (Gleeson CJ).  
\textsuperscript{123} Ibid, 290–91 (Gleeson CJ).
Justice Kirby was in dissent in Neat, and at the commencement of his judgment characterised the issue before the court in the following terms:

[This] appeal presents an opportunity for this court to reaffirm that principle in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is 'outsourced' to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.

Given the changes in the delivery of governmental services in recent times, performed earlier and elsewhere by ministries and public agencies, question could scarcely be more important for the future of administrative law. It is a question upon which this court should not take a wrong turning (references omitted).

Justice Kirby went on to argue that the decision made by AWBI was administrative in character in that it was of a public or governmental character and involved the exercise of public power. He then forcefully argued that the decision was made under enactment, in the sense that it derived its ability to affect legal rights and duties from the enactment. Finally, Kirby J held that there was an error in that AWBI had not considered the merits of the application by Neat.

The decision in Neat has, like the Tang decision, been the subject of much criticism predominantly focusing on the fact that the High Court has too readily accepted that the Commonwealth can, through the expedient of using a corporate decision-maker,

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124 Ibid, 300 (Kirby J).
125 Ibid, 309–14 (Kirby J).
126 Ibid, 309, 316 (Kirby J): '[T]he notion that private corporation, as such, could, by it decision, control the consent-making processes of the Authority (and thereby effectively control the occasions and terms on which the other traders would be allowed to participate in the market) is unthinkable without the support of valid legislation.'
insulate itself from legal, accountability. Mantziaris has criticised the decision as a 'disappointment' and a 'wrong turn' observing that the Courts focus on formally classifying the powers being exercised, misses the point.

For the majority, incorporation under the Corporations Act was sufficient to make an entity 'private' and to put it beyond judicial review notwithstanding its position in a 'public scheme of regulation'. Gleeson CJ and Kirby J looked at the same facts but subsumed it in the broader characterisation of the regulatory statute as 'public'. That both readings were possible indicates that the true animus for the decision lay beyond the words of the statute, namely in a normative evaluation of where the boundary between the executive and a 'private' concern lay and the appropriateness of judicial review within the particular scheme.

(iv) No Breach of Grounds of Review

The 1990 case of Yarmirr v Australian Telecommunications Corporation is worthy of mention because it is an example of an applicant who successfully ran the gauntlet of jurisdictional hurdles but nevertheless was unsuccessful. The backdrop for this case was the Commonwealth government's moves to introduce competition into the telecommunications market in Australia. The case involved a decision by Telecom, at that time a statutory corporation, not to provide modern phones to

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128 Mantziaris, above n 80, 198.
129 Mantziaris, above n 80, 200.
130 (1990) 96 ALR 739 ('Yarmirr').
132 Australian Telecommunications Corporation ('ATC') was established under the Telecommunications Act 1975 (Cth) as a statutory corporation with responsibility for the maintenance and operation of telecommunication services within Australia: ss 4–5. In 1989 the ATC was corporatised and became the Australian Telecommunications Corporation (no change of acronym necessary): Australian Telecommunications Corporation Act 1989 (Cth), which was to be known as Telecom: Australian Telecommunication Corporation Act 1989 (Cth), ss 3, 12.
a remote Aboriginal community. Justice Burchett held that there was a decision of an administrative character, made under enactment but, nevertheless, there was no breach of any of the grounds of review in the Administrative Review Act because Telecom had competing corporate priorities (profitability and resource restraints) that it was legitimately pursuing. *Yarmirr* is authority for the proposition that a broad discretion given to a statutory corporation to do X is not restricted provided it gives bona fide consideration to competing priorities.

At this early stage of privatisation, while Telecom had a corporate legal personality, it was still very much an emanation of the Commonwealth: it paid dividends to the Commonwealth as its shareholder; enjoyed Crown immunity in relation to certain actions; was not subject to State laws; was required to notify the minister of ‘significant business activity’; was required to keep the minister informed; was subject to ministerial direction etc.134 Most importantly, Telecom had statutory duties and obligations including fulfillment of community service obligations (CSOs) under the *Telecommunications Act 1989*. The Applicants argued that these CSOs obliged Telecom to provide the community with DRCS technology.

Justice Burchett stated:

> [W]hen Parliament imposes on a functionary a broad duty involving the development and application of policy, to be performed nationally, the fulfillment of which must be subject to many constraints and may be achieved in many different ways, according to the measure allowed to those constraints, but cannot be achieved absolutely, if only because it involves an ideal, detailed supervision of the courts of the manner of performance of the duty is not likely have been intended.135

Clearly, Burchett J is characterising the decision-making power granted to Telecom as one involving the balancing of polycentric factors, rendering the decision

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133 Telecom had not provided the community with a digital radio concentrator system, which was the technology that replaced radio phones.

134 *Yarmirr* (1990) 96 ALR 739, 743.

135 Ibid, 749.
unamenable to judicial review. What is less clear is what weighting Burchett J gave to the fact that Telecom was a corporation who was tasked with operating its services as efficiency and economically as practicable and in a manner consistent with sound commercial practice. It seems this was, at the very least, a factor in determining that the decision of Telecom should not be amenable to review. Justice Burchett’s decision was also influenced by the fact that Parliament had given Austel a regulatory oversight role. He suggested that a presumption may be able to be drawn that Parliament intended Austel to use its supervisory role to ensure Telecom’s performance of its community service obligations.

Justice Burchett clearly recognised that Telecom was making an administrative decision, yet the amenability of that decision to judicial review was denied given the scope of the discretion given to Telecom, and I would argue, given its commercial objectives. In the later case of Neat we hear echoes of Yarmirr as the court struggles to factor-in the corporate status of a decision-maker and breadth of discretion granted. Of course in Neat the judges in the majority took a different route to the same conclusion — arguing that the decision was made by AWBI in its corporate capacity and therefore could not be characterised as being made under enactment.

(c) Values Benchmarking

What then does the above body of jurisprudence tell us about publicisation and more broadly about the fidelity of Administrative Law Act jurisprudence regarding

137 Yarmirr 96 ALR 739, 749. See Telecommunications Act 1975 (Cth), s 6(1)(ii).
139 Yarmirr 96 ALR 739, 750. Burchett J cites in support of this proposition Southward London Borough Council v Williams (1971) Ch 734 (Lord Denning — with Megaw LJ in agreement). Cf Mary Gaudron’s concern about regulators in terms of the government outsourcing its traditional responsibility for setting the law in motion: ‘Reply to Michel Troper’s paper — “The Limits of the Rule of Law”’ in Cheryl Saunders and Katherine Le Roy (eds), The Rule of Law (2003), 98, 100. See also, Arora, above n 127, 161. Arora commented on the unreasonable expectation that ASIC, whose regulatory oversight role is primarily designed to protect shareholders, would operate to safeguard citizens from illegal or unfair decisions.
the evocation of jurisdiction, with the administrative law values that were so assiduously embedded in the Administrative Review Act?

**Participation** —

The Administrative Review Act was enacted in response to the otiosity of the common law judicial review system. The Act was designed to enable citizens to challenge the legality of the full gamut of executive decisions that affected them individually, excepting only those decisions included in Schedule 1. In spite of Parliament’s clear intent to facilitate citizen participation, the judicial interpretation of ‘under enactment’, ‘decision’ and ‘administrative’ now acts to significantly limit the circumstances in which a citizen is able to access legislative judicial review. The latest insistence by the High Court majority in *Tang* that the words ‘under enactment’ require that a citizen’s rights or obligations be affected per the statute not simply, as s 5 expressly states, that the citizen is aggrieved, yet again raises the bar for citizen wishing to access statutory legislative review. With respect to this latest jurisdictional hurdle imposed by the High Court, Taggart has commented, many of the ‘evils’ that the 1970 reforms were meant to eradicate are now back.\(^\text{140}\)

Judicial review enables the federal courts to oversee the exercise of authority by the executive but only if there is firstly a citizen with a relevant grievance who can successfully invoke the court’s jurisdiction. In the cases above, individuals have conceptualised their grievance as being against a manifestation of the executive but the courts have held that this is not the case. On one view, there is a dispute between the individual applicant and the courts as to the true nature of the executive. From a citizen’s point of view, when a federal court decides that they do not have jurisdiction to hear a particular grievance, the decision can also be characterised as one that prohibits their participation in the judicial review system. From a judicial point of view, this values characterisation misses the point. The court is preoccupied not with facilitating or blocking citizen participation but rather with not overstepping its authority.

The analysis of the jurisprudence immediately above, however, does not explain why administrative law values are not evident in the jurisprudence considered in this chapter. Explaining why is best done by reference to the dominant theory of judicial review in Australia and the dominant mode of judicial decision-making. Alternatively,

\(^{140}\) Taggart, ‘Australian Exceptionalism’, above n 84, 18.
it can be approached by reference to McMillan’s arguments on the relationship between the judiciary and Parliament. Both of these explanations will be briefly considered below.

(i) Judicial Review Theory, Judicial Interpretation

In Australia, the dominant theory of judicial review focuses on the rule of law, ultra vires and statutory interpretation, and hinges on the judiciary ensuring that the executive’s exercise of power is consistent with legislation. On this view, amenability to judicial review involves the courts identifying the limits of executive decision-making intended by the legislature. The cases above demonstrate how the federal courts meticulously go about the task of interpreting a statute to identify whether or not Parliament intended the decision to be subject to judicial review. In carrying out its statutory interpretation to discern parliamentary intent, the courts clearly marshal and prioritise arguments by reference to some organising criteria but present their decisions as examples of objective statutory construction. An alternative would be for the federal courts to recognise that statutory construction is but a rubric for considering a range of relevant factors and making a well-reasoned decision. The High Court’s current formalistic, or legalistic, approach to

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142 In Yarmirr, the limitation was that Austel was the body nominated to seek review and that broadly granted discretionary decisions could not be subject to judicial review by a citizen; in Neat the limitation was that AWBI corporate form transformed a decision made under enactment into a non-reviewable decision by a corporation.

143 A list of possible relevant factors see, Finkelstein, above n 73, 7–9. As to the particular role that values can play as a point of reference, if a non-formalistic approach is taken, see Mason’s comments discussed above at 18-20.

legislative interpretation, and judicial decision-making generally, leaves little or no room for discussion of administrative law values. Taggart has colourfully captured the artifice that underlies the predominant mode of judicial decision-making of federal courts, and how it precludes consideration of values.

As with so much administrative law debate, the fig leaf is adjusted and the least dangerous branch [the judiciary] continues to operate as if he dichotomies — appeal/review, legality/merits, process/substance, discretion/law, law/policy, fact/law — actually decide particular cases. In reality, as insiders know, room remains for the values and preferences of individual judges to play a part in the identification, application and evolution of administrative law principles and techniques in the infinite range of decision-making settings. Repeating these mantras — perhaps even shibboleths — diverts attention from the manipulable nature of doctrine as applied.145

While 'Dixonian legalism' or 'formalism'146 dominates the jurisprudence of the federal courts, and particularly the High Court, Kirby J's dissents in Tang and Neat; the decisions of the Federal Court in Tang; and the extra-curial writing by Spigelman and Finkelstein remind us that different judicial approaches to the statutory interpretation and the proper scope of judicial review are possible. For example, Kirby J's approach to statutory construction in Tang and Neat engaged with legal and policy implications of 'mixed administration';147 emphasised the original intent of the Administrative Review Act to facilitate citizen participation in the administrative law system; and also emphasised the need to ensure that the rule of law extends to executive funded and supported actions (legality). As such, Kirby's framework for conducting statutory construction clearly referenced the administrative law values of participation and legality.

145 Taggart, 'Australian Exceptionalism', above n 84, 26
146 Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (Research Paper No 2009/10, Faculty of Law, Monash University, 2009), 500.
147 Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), The Province of Administrative Law (1997) 40, 53. I have used the term 'modern executive' elsewhere in this dissertation to refer to the executive working through non-executive entities to achieve executive objectives.
Looking beyond arguments about the preferable theory of judicial review or the preferable mode of statutory interpretation or judicial decision-making, MacMillan offers a different (though compatible) explanation as to why the body of jurisprudence considered in this section does not provide evidence of innovation or publicisation. McMillan has suggested that the lack of judicial innovation in the area of administrative law generally can be viewed as a judicial response to Parliament’s initiative in enacting the current administrative law system. Parliament is responsible for providing the current accountability matrix in which judicial review plays only a small role. Moreover, Parliament has, through the enactment of the Administrative Review Act, sought to clarify the criteria for lawful decision-making and to enhance citizen’s rights to seek judicial review. Given these significant parliamentary initiatives, it can be argued that judicial review in Australia now has deeper legislative roots rather than common law roots and that it is Parliament who should provide the lead if reform in response to outsourcing is necessary. In this context, the fact that Parliament has not responded to, for example, recommendations for reform of the Administrative Review Act, made by the Administrative Review Council (‘ARC’) in 1989, may be a significant fact of which the federal courts have judicial notice. A similar argument was made by Taggart but expressed in terms of judicial deference to Parliament.

MacMillan goes further and suggests that periods of judicial activism in relation to public law issues can be traced to prior legislative activism in the same area. If MacMillan is right in documenting this link, it may be that the recent amendments to the Ombudsman Act and the proposed amendments to the FOI Act, designed to

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149 In 1989, the ARC recommended that the ambit of the Administrative Review Act should be extended to certain non-statutory decisions made by Commonwealth officers, being decisions ‘under a non-statutory scheme or program the funds for which are authorised by an appropriation made by the Parliament for the purpose of that scheme or program’: ARC, Review of the Administrative Decision, above n 141, xii, recommendation 1. This amendment would have gone some way to addressing the jurisdictional limitations preventing judicial review of outsourcing decisions but ‘Commonwealth officer’ would likely have introduced all the complexities of the ‘officer of the Commonwealth’ jurisprudence.
150 Taggart, ‘Australian Exceptionalism’, above n 84, 5.
bring government contractors within the scope of these acts, may signal to the High Court that it is time to adopt a more expansive interpretation of its judicial review jurisdiction. More likely, the High Court will wait for Parliament to more clearly signal its intent through amending the Administrative Review Act.

**Efficiency —**

The executive had feared the opening of a floodgate with the introduction of the Administate Review Act, however, this did not eventuate. Certainly there was a period where the volume of migration decisions was felt to be frustrating efficiency administration. However, as the ARC noted in its review of the Administrative Review Act in 1989:

> [A]lthough one of the prime purposes of the AD(JR) Act was to make judicial review more accessible, the number of applications under the Act in recent years has remained virtually static (see chapter 1).

Moreover, Creyke has recently noted that there has been a marked decline in the use of the Administrative Review Act, and overall a diminishing importance of the courts to delivering administrative justice. The most likely reason for the declining utilisation and relevance of the Administrative Review Act is likely to be that citizens have more accessible review and complaint options available to them thanks to the modern administrative law system.

The executive and Parliament may be fearful that allowing judicial review of outsourcing decisions would result in more judicial review applications and at the

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153 Ibid, 128.
154 Robin Creyke, 'Administrative Justice — Towards Integrity in Government' (2007) 31(3) *Melbourne University Law Review* 705, 729. I note that the decline does not appear to be great. Creyke cites the figure of 176 Administrative review cases heard in 2005–06 (not including migration applications). This compares to figures ranging from 183–204 in the years 1984–88: ibid, 8.
155 Creyke’s point is that tribunals, ombudsmen and other forms of review and control are viewed as more significant: Key Centre for Ethics, Law, Justice and Governance, Griffith University and Transparency International Australia, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia’s Integrity Systems: National Integrity Systems Assessment (NISA) Final Report* (2005), 25 (table 6), 55 (table 9).
same time render contracting out, and outsourcing more generally, a less efficient mode of public administration. We have no way of knowing if the High Court is influenced by concerns about how an expansion of its legislative judicial review jurisdiction would impact on executive efficiency.

(d) **Publicisation?**

The federal courts have consistently dealt with applications for legislative judicial review, that involve an outsourcing scenario, by holding that they do not have jurisdiction to hear the matter. Neither the specific decisions considered above, nor the court's formal and legalistic approach to construing s 5 of the Administrative Review Act, demonstrate the federal courts responding to outsourcing or contracting-out in a way that extends the administrative law values of participation, legality and fairness. Until and unless Parliament takes the initiative and amends the Administrative Review Act such that a broader range of executive activity is subject to review, it is predictable that the federal courts will continue to find that they do not have the jurisdiction to decide on the substantive grievance between an individual and an entity acting on behalf of or in concert with the executive to deliver government services.

Justice Kirby in his dissenting judgments in *Tang* and *Neat* has argued that the decisions made by modern extensions of the executive are administrative in character and should be subject to judicial review. His fear is that if the court declines to exercise jurisdiction serious governmental illegality and administrative injustice may go unchecked which is contrary to the rule of law. Justice Kirby's dissents explicitly reference a wide range of relevant factors that inform his statutory construction, including reference to administrative law values, and in this respect, Kirby J's dissents can be viewed as providing some evidence of the concept of publicisation.

11  **Accrued or Pendant Jurisdiction**

(a) **Jurisdictional Limitations**

If the Federal Court is to exercise its accrued jurisdiction to decide a matter, it

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156 The High Court exercise pendant jurisdiction rather than accrued jurisdiction. As the cases I am discussing in this section are Federal Court cases I will use the term 'accrued jurisdiction'.
must firstly hold that there is a bona fide matter before it that is within jurisdiction such that the federal jurisdiction is not simply being invoked to fabricate jurisdiction.\textsuperscript{157} The legal mantra is that the accrued jurisdiction must be invoked as a ‘matter of substance, not as a matter of artificiality or subterfuge’.\textsuperscript{158} There must also be a common substratum of facts from which both claims arise. Significantly, the application that originally attracted federal jurisdiction may later be dismissed without nullifying the Court's ability to exercise its accrued jurisdiction to hear the rest of the matter.\textsuperscript{159} The issue is, in what cases will the Federal Court consider an application brought against a non-government decision-maker or service provider for judicial review as being sufficiently substantial to warrant exercising their accrued jurisdiction?

(b) Cases

In this section two cases will be discussed where applicants successfully invoked the accrued jurisdiction of the Federal Court in order to have their matter heard, having failed to invoke jurisdiction under s 39B of the Judiciary Act or under s 5 of the Administrative Review Act. Interestingly, in one case the applicant ultimately received a favourable decision.

The case of \textit{Post Office Agents}\textsuperscript{160} was discussed above in relation to the court’s refusal to hear the matter pursuant to either the Administrative Review Act or s 39B of the Judiciary Act. In spite of these findings, Davies J held that NSWALC application to seek review pursuant to the Judicial Review Act had been brought as a matter of substance and not of artificiality or subterfuge and, accordingly, it held that it could decide the matter in question exercising its accrued jurisdiction.

Justice Davies went on to consider the non-federal claim in contract and to hold that there had been adequate consultation; that there had been no breach of the contract; and that the applicant was not entitled to any remedy.\textsuperscript{161} This decision is

\begin{itemize}
  \item \textsuperscript{157} \textit{Fencott & Others v Muller & Another} (1983) 152 CLR 570.
  \item \textsuperscript{158} \textit{Post Office Agents} (1988) 84 ALR 563, 565.
  \item \textsuperscript{159} \textit{Stack v Coast Securities (No 9) Pty Ltd} (1983) 154 CLR 261, 294 (Mason, Brennan and Deane JJ).
  \item \textsuperscript{160} \textit{Post Office Agents} (1988) 84 ALR 563.
  \item \textsuperscript{161} \textit{Post Office Agents} (1988) 84 ALR 563, 575–76.
\end{itemize}
not surprising. If the contract argument had been compelling, the Association would have brought an action for breach of contract initially rather than taking the uncertain litigation route of applying for judicial review. Justice Davies decision is significant because it set a precedent in relation to the invocation of the Federal Court accrued jurisdiction that Hill J felt bound to follow in *NSWALC v ATSIC*.

In *NSWALC v ATSIC* the NSWALC was refused judicial review pursuant to both the Administrative Review Act and s 39B of the Judiciary Act and yet Hill J held that the accrued jurisdiction of the court had been enlivened, and therefore the application for equitable relief was able to be heard and decided in accordance with administrative law principles, per the common law. Justice Hill stated that he was reluctant to hold that the court's accrued jurisdiction had been attracted in this particular case, and did so only as a matter of comity.

I am presently inclined to the view that jurisdiction is only conferred upon the Court once there is conduct or a decision under an enactment capable of review. If there is not, then it seems to me that the Court's jurisdiction conferred by s 8 of the ADJR Act ought not to be attracted. A fortiori, no jurisdiction would arise under the accrued jurisdiction.

Ultimately, Hill J decided in favour of the NSWALC and issued a declaration that the ATSIC Board's decision to prioritise land purchases in the Northern Territory for the years 1995-96 and 1996-97 was an improper exercise of the power conferred upon ATSIC and should be set aside. Once NSWALC had navigated a route through the jurisdictional quagmire, Hill J's decision as to the 'merits' of the case, as he referred to his public law analysis of whether or not the ATSIC Board had erred in law, was relatively straightforward. He found that the ATSIC Board had acted so

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163 Ibid, 386. As the accrued jurisdiction had been invoked, Hill J concluded that he had jurisdiction, 'by virtue of s 21 of the Federal Court of Australia Act in relation to a matter in which it has original jurisdiction, to make binding declarations of right ... in a public law matter ... in favour of a person who has standing'.
165 'Merits' is the heading Hill J used to mark his consideration of the claim for judicial review once he had established that he could decide the matter exercising the courts accrued jurisdiction. It is an unusual choice of words given the merits review — legal review distinction within administrative law.
unreasonably, in the administrative law sense, in prioritising spending in the NT in preference to the other states and territories, that it amounted to an error in law.\textsuperscript{166}

This case is significant because it demonstrates the utility of the Federal Court’s accrued jurisdiction. In particular, it demonstrates how jurisdictional limitations inherent in pursuing judicial review via s 39B or via the Administrative Review Act can sometimes, be overcome by the Federal Court exercising its accrued jurisdiction and granting equitable remedies that predate the 1970 Reforms.\textsuperscript{167}

(c) Values Benchmarking

\textit{Legality and participation —}

The complex jurisdictional issues in this case could distract the reader from making the obvious observation. The unchallenged finding of the Federal Court was that the ATSIC Board had made an illegal decision, one so unreasonable that no reasonable person could make it, and yet the decision very nearly went un-reviewed for want of jurisdiction. The constitutionally protected right to seek judicial review proved ineffectual as did the simplified judicial review scheme designed to make accessing judicial review simpler. It is often argued that the jurisdictional limitations are in place to filter out cases that are beyond the purview of public law and which therefore should not be the subject of judicial review\textsuperscript{168} But in the case of \textit{NSWALC v ATSIC} there was an illegal decision involving millions of dollars, affecting thousands of citizens, made by a body whose power and role were dictated by statute, which was not amenable to judicial review. NSWALC’s only access to the courts (participation) to complain about gross unfairness and illegality was via a technical and circuitous route. It turned not only on Hill J’s decision to exercise the courts accrued jurisdiction but also on his willingness to consider the ‘merits’ of the case and to characterise the behaviour of the ATSIC Board as so unreasonable that


\textsuperscript{167} The pursuit of this matter by the NSW Land Council, was a high risk strategy and one suspects that the ultimate success of the application owes much to the advocacy of John Basten QC.

\textsuperscript{168} The case of \textit{Post Office Agents} (1988) 84 ALR 563 could perhaps be a case in point in that the existence of a contract used between commercial parties, prevents one of those parties from relying on public law remedies when the contract proves inadequate.
it constituted illegality. In reading the case as a whole, the impression one gleans is that Hill J was plugging gaps in jurisdiction in order to rectify a blatant injustice.

(d) Publicisation?

NSWALC v ATSIC is a one-off case and does not by itself provide evidence that the Federal Courts is exercising its accrued jurisdiction with a view to enabling citizens to bring outsourcing cases before the court (participation). Nor does it represent recognition by the Federal Court that it has positive jurisdiction to oversee outsourcing decisions for illegality. The case does suggest that applications for equitable remedies should more regularly be brought in conjunction with more traditional judicial review applications. It may also suggest that in egregious cases, the courts may use their equity jurisdiction to provide relief to applicants aggrieved by outsourcing decisions, in a manner that is consistent with administrative law values.

12 Concluding Comments on Publicisation Evidenced in Jurisprudence

Looked at collectively, the jurisprudence in this part should disincline any but the most desperate or most well-funded citizen from applying for judicial review in order to seek redress in relation to an outsourcing decision. The only case where the applicant was successful, and then only after a labyrinthine progression though the possible jurisdictions, was NSWALC v ATSIC and this may simply be an anomalous case. Certainly, none of the majority decisions demonstrate a development in jurisprudence that can be thought of as evidencing publicisation. Beyond these obvious comments, what insights can we glean about the judiciary’s general approach to interpreting its judicial review jurisdiction in terms of administrative law values when it comes to outsourcing?


170 Regarding the concept of ‘gaps’, see Mantziaris and McDonald, above n 117.
In chapter II it was noted that the administrative law value of participation was consistently coupled with the values of legality and fairness. In fact, the citizen-centric focus of the administrative review system was championed by the 1970s Reform Report committees as the best way of securing legality and fairness with respect to exercises of executive authority while at the same time providing for individual administrative justice.

This coupling of participation and legality is evident in the drafting of the Administrative Review Act yet, since outsourcing has become a prevalent mode of public administration, Parliament has not felt it necessary to extend the jurisdiction granted to the federal courts to ensure that outsourcing decisions are reviewable. The inference that can be drawn is that Parliament intends that an aggrieved citizen, affected by an outsourcing decision, should not be able to seek judicial review of that decision. In terms of values and outsourcing, it can be further inferred that Parliament intended an uncoupling of the administrative law values of participation and legality.

An uncoupling of participation and legality is similarly evident in the judicial review jurisprudence considered above, pertaining to jurisdiction. The jurisdiction of a federal court in relation to legislative judicial review focuses on the nature of the decision (‘administrative’, ‘made under enactment’ etc), and in relation to common law judicial review focuses on the nature of the decision-maker (‘officer of the Commonwealth’). But where is the citizen in this dynamic. A court’s decision that it has no jurisdiction can be interpreted as a decision that the citizen is not able to seek judicial review of the impugned decision. The court is not commenting on the legality or fairness of an impugned decision, simply on the citizen’s right to have their matter heard. In this respect, jurisdictional decisions can be characterised as decisions pertinent to the legal value of participation.

McMillan’s documentation of the relationship between Parliament and the judiciary and Taggart’s argument regarding judicial restraint suggest that for as

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171 Parliament may have decided that the executive was exercising adequate oversight through contract management, internal review mechanisms and the phalange of financial accountability checks and balances and that the provision of direct rights of review to citizens was therefore not warranted — but this is conjecture.

long as Parliament continues to insist that the administrative law values of participation and legality be decoupled with respect to outsourcing, federal court decisions are likely to follow-suit.

D Chapter III Conclusion

I have included a conclusion at the end of each of the benchmarking exercises and I do not need to repeat those conclusions except perhaps to observe that the first values benchmarking exercises, which focused on recent amendments to the Ombudsman Act and the FOI Act, identified evidence of publicisation. Additionally, the FOI values benchmarking exercising raised the important issue of whether or not the concept of publicisation was concerned with formally or substantively embedding values within new mechanisms. In the case of the FOI Act the question is whether the likelihood that he measures will be ineffectual in relation to outsourcing precludes the mechanism from being described as evidence of publicisation. The second values benchmarking exercise, which focused on the jurisprudence pertaining to the federal courts judicial review jurisdiction, did not provide evidence of publicisation except, perhaps, in the form of the form of judicial decision-making used by Kirby J in his minority decisions in Tang and Neat.

The mechanisms considered in the values benchmarking exercises were examples of public law responses to outsourcing and I have acknowledged that similar exercises undertaken in relation to private law mechanisms, while beyond the scope of this dissertation, are likely to also provide evidence of publicisation.

The benchmarking exercises presented in parts B and C allowed me to analyse and evaluate new mechanisms introduced in response to outsourcing, by reference to administrative law values. In the conclusion to this dissertation that follows, I will return to my overarching research question and in so doing will draw on the experience gained through conducting the benchmarking exercises.

173 Taggart, 'Australian Exceptionalism', above n 84, 5.
In conclusion to this dissertation I will return to my overarching research question and consider whether or not the concept of publicisation has demonstrated application and utility in the Australian context. Put another way, does the concept of publicisation provide a useful way of evaluating the adequacy of the disparate control, review and accountability mechanisms that apply in the context of outsourcing? Subject to one significant qualification and two observations, set out below my answer is 'yes'.

1 Qualification: Publicisation Needs to Deliver Administrative Law Objectives

The concept of publicisation is, in effect, a hypothesis that posits that relevant public law and democratic law norms can be extended through the process of privatisation. The hypothesis does not go on to posit that through embedding public or democratic norms in new mechanisms, public law goals will be attained. Certainly that is an inference that lies behind Freeman's hopeful advocacy of the publicisation of privatised government activity.

I would argue that public law norms, or administrative law values in the Australian context, are embedded in administrative law mechanisms specifically to ensure the attainment of specific administrative law objectives such as administrative justice and executive accountability. If administrative law values are embedded in new mechanisms, in such a manner that administrative law objectives are not extended, then these mechanisms should not be viewed as evidence of publicisation. My argument then, in the language of Freeman's hypothesis, is that public law norms become something other than public law norms if they are not linked to achieving public law objectives.

I appreciate that some may view this insistence on a link between administrative law values and administrative law outcomes as overly prescriptive and inappropriate given the thrust of publicisation is to recognise the equivalence of new mechanisms, and in particular private law mechanisms, for providing adequate checks and

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1 Ibid, 91.
balances in the context of outsourcing. Freeman herself has warned not to expect new mechanisms brought into existence in response to outsourcing to mirror or resemble those in existence in the public law system.² Such an insistence might simply be a variation on the argument that outsourcing should be brought back within the scope of the administrative law system. It is possible, however, to acknowledge that mechanisms may change form, and still deliver administrative law outcomes in the form of accountability of the decision-maker and administrative justice.

An example may serve to illustrate my point. A complaint handling hotline can be viewed as a mechanism that provides for citizen participation and the promotion of fair decision making. Those same values — participation and fairness — are embedded in the concept of merits review. The two mechanisms are obviously distinct but both can be said to manifest administrative law values and importantly, to provide for administrative justice and improved accountability of the decision-maker. It all comes down to the design of the mechanism and the appropriateness of the mechanism in the context of the decision being made. For example, if the complaint handling hotline was poorly manned, not empowered to solve complaints or didn’t provide feedback on the complaints to the decision-maker, then it would not deliver administrative law outcomes and should not be characterised as providing evidence of publicisation.

I would argue that the concept of publicisation would have very little utility, from a public law perspective, if the embedding of administrative law values in new mechanisms did not sound in the attainment of either executive accountability (either to the citizen or to another body) or administrative justice (either to the citizen directly or in the form of promoting just decisions).

2 First Observation - Willingness to Change Perspective

Freeman has put forward the concept of publicisation specifically to promote a dialogue between public law proponents who are not ideologically opposed to

privatisation, and pro-privatisers who are not ideologically opposed to the extension of public and democratic norms.

The concept of publicisation invites commentators, and in particular the group Freeman refers to as ‘public law proponents’, to approach the issue of outsourcing from a different perspective. Instead of focusing on the non-applicability of the administrative law system, one must be open to the possibility that new control and accountability mechanisms introduced in response to outsourcing – mechanisms that may be public or private may provide appropriate checks and balances on outsourcing because, embedded there within, are administrative law values. As the concept of publicisation is premised on the commentator being willing to change perspective, publicisation will be viewed as having no application or utility by those who are ideologically opposed to privatisation.

My first observation is that, to the extent that public lawyers in Australia oppose privatisation as a mode of public administration, the concept of publicisation will be dismissed as an impossibility or mere window-dressing. Those opposed to privatisation insist on the inherent ‘publicness’ of certain executive functions and would similarly insist that administrative law values are inherently public with no meaningful application outside of the public sphere.

3 Second Observation: Publicisation Does Not Insist on Citizen Participation

This observation overlaps with the qualification above but its focus is on the balance and relationship between the embedded administrative law values rather than the outcomes achieved through having those values embedded. An example will best serve to demonstrate my concern.

If a compliance officer was appointed to report to an agency overseeing an outsourcing project on the fairness and legality of a government contractor’s decision-making, could this mechanism be described as evidence of publicisation?

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3 Ibid, 90–1.
4 Ibid, 87-9. Public law proponents include those who are concerned about outsourcing as a mode of public administration because it is not, by and large, subject to the administrative law system.
5 Ibid, 84-7. One does not have to be pro-privatisation in order to utilise the concept; one simply needs to be, what Freeman terms, a ‘pragmatic privatiser’.
The mechanism (the appointment of the compliance officer) is designed to safeguard the legality and fairness of the decisions being made by the contractor and can, in that respect be said to embed those administrative law values. Depending on the resources and the powers granted to the compliance officer, the mechanism may result in improved accountability of the decision-maker to the executive. The mechanism can, I believe, be characterised as evidencing publicisation.

My observation is that the compliance officer mechanism does not couple legality and fairness with citizen participation and accordingly the accountability relationship that exists is between the contractor and the executive and not between the contractor/executive and the citizen. Publicisation does not insist that the values embedded in new mechanisms stay in the same relationship, or are balanced in the same way, as they are within the administrative law system. In particular the promotion of citizen participation, which is at the centre of the Australian administrative law system, does not need to be present in new mechanisms designed to provide control, review or accountability in the context of outsourcing. Mechanisms that provide evidence of publicisation can take a multitude of forms precisely because there is no necessity to design the mechanism around the citizen.

I am not suggesting that publicisation needs to prioritise embedding the administrative law value of participation in order for the concept to have application and utility to public lawyers. I am, however, emphasising that mechanisms that provide evidence of publicisation are not necessarily equivalent to the mechanisms provided through the administrative law system, which consistently prioritise the administrative law value of participation.

4. Themes from the 1970 Reform Reports

In the conclusion to chapter II I said that I would return to consider the themes that I extracted from the 1970s Reform Reports.

The intention of the 1970 Reform Reports was to realign the relationship between the citizen and the executive, in favour of the citizen, by prioritizing citizen participation. The intention of the New Public Management ('NPM') reforms was to improve efficiency within the executive through, amongst other things, increasing reliance on outsourcing as a mode of public administration. One of the effects of the
NPM reforms was to yet again realign the relationship between the citizen and the executive, but this time in favour of the executive. If, as Spigelman has argued, Australians shifted from subjects to citizens through being granted administrative law rights in the 1970s then it would seem that the NPM reforms, which took outsourcing decisions beyond the scope of the administrative law system, saw Australians shifting from citizens to consumers.

Publicisation attempts to move beyond a characterization of outsourcing which references what has been lost in terms of administrative law rights and to instead focus on what can be gained in terms of the extension of administrative law values. Outsourcing is subject to any number of control, review or accountability mechanisms, and evaluating these by reference to the concept of publicisation and administrative law values, is a constructive way for the administrative law discipline to engage with the phenomena of outsourcing and promote administrative law values and administrative law objectives. Publicisation can in this sense, be embraced as a concept that promotes a discourse on administrative law values not only within the administrative law discipline but with government and the broader Australian community.

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