

## MARK ARONSON: AN APPRECIATION

*Professor Michael Taggart\**



**It feels like a kind of ANZAC Day: a gathering of the Australian and New Zealand Administrative Law Corps to honour one of our greatest administrative law teacher/scholars. Mark has not fallen on whatever the academic equivalent of Gallipoli is and so the ‘Last Post’ will not sound tonight. But he has honourably discharged himself from full-time teaching and this is an occasion to give thanks for what we have received and to reflect on a remarkably successful career.**

It is preposterous, of course, that the eternally youthful Aronson – I think of him as the Peter Pan of administrative law scholars - should be an Emeritus Professor, no matter how richly deserved that title is.

Mark and I first met in Sydney twenty years ago. Three things struck me then: his passion for argument, his analytical mind and what I can only describe as his boyish and infectious enthusiasm. It was an International and Comparative Law gathering and fate threw us together at the same dinner table. I knew his work from the earliest edition of the ‘book’ (co-authored with Harry Whitmore);<sup>20</sup> Mark had no reason to know who I was.

My memory of the evening has dimmed over the years – of course, Mark’s is as sharp as a tack - but I distinctly recall animated discussion of two topics. We argued over whether Sir Owen Dixon was a bad writer and as such had been a bad role model for subsequent High Court judges. I took the affirmative and Mark, the negative (but he may have been playing Devil’s advocate).<sup>21</sup> At some point we moved on to the merits of Sir William Wade as an administrative law theorist<sup>22</sup> and I soon discovered that he had been Mark’s doctoral supervisor.

Mark was a force to be reckoned with – it was clear he had a mind like a steel trap, zero tolerance for sloppy thought and a finely tuned radar for bullshit. I liked him immediately.

Thereafter I kept an eye out for his work – I discovered he had another substantial string to his bow (a path-breaking book on *Litigation* that went through many editions) and of course, there was the Administrative Law ‘book’ for which he is justly famous. It simply got bigger and better over the years – new editions, a new name in 1996, new co-authors along the way but the constant has been Mark. His knowledge of the law is prodigious, his ability to process the outpourings of courts, tribunals and commentators is staggering, his technological competence is an obsession and his work ethic, immense. Frankly, I stand in awe of what he has achieved.

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\* *Alexander Turner Professor of Law, Faculty of Law, University of Auckland. This is a slightly revised version of a speech given on 25 May 2006 to mark the retirement of Professor Mark Aronson from full-time law teaching at the Faculty of Law, UNSW.*

Mark has made an indelible impression with these books, not only in Australia but also around the common law world. The work is expository – yes, dare I say it, it aims to be of use to judges, practitioners, governmental advisers and law students - but it is theoretically underpinned and sophisticated, and is based on an enormously wide reading of law in context and an astute appreciation of politics.

A few years ago, John McMillan surveyed the academic contribution to Australian administrative law and said this about the then latest edition: '[N]ow the most up-to-date book on the principles of Australian administrative law ... [it] deserves recognition as the gold medalist in the field, being contemporary, learned, entertaining, even opinionated, but throughout a masterful analysis of a huge body of Australian and English case law and academic writing. The frequent citation of the book by Australian courts attests to its value.'<sup>23</sup> I cannot put it any better.

Mark's writing style is distinctive, even when penning supposedly dry textbooks. Administrative lawyers can spot Mark's writing in an instant. He writes marvellously well, and with a mischievous sense of fun – it is clear he loves what he does. The passion for administrative law comes off every page.

I like the paraphernalia of books: prefaces, forewords, indexes and the like. My favourite non-legal index is to one of Gary Larson's books of 'Far Side' cartoons, where the entries in the Index under the letters A-S and U-Z are all blank but there are 150 or so entries under the letter T, each one beginning with 'The one about...'.<sup>24</sup> By far the best law book indexes for their impish sense of fun and irreverence are those in the Administrative Law 'book'. Many scholars leave this supposedly mundane task (often to their chagrin) to professional indexers, but not Mark. And the result is some wonderful entries. My favourites from the latest edition include:<sup>25</sup>

**black hole**, jurisdictional issue

**bugs**, standing [one looks expectantly for an entry '**bugs**, sitting' – but alas not there] cynicism

**drive-by rulings** [the text confirms that this is when judges shot from the lip rather than the hip]

**Cats**, too many [but too few cats seems not to have been litigated]

**plebs**, to Tories

**volvo drivers**

**Laws J**, nude [a sobering image: one would have thought a leaf from the least dangerous branch would have been available]

One of the icons of the New Zealand advertising industry is a long running campaign for a soft drink called 'Lemon & Paeroa', produced only in New Zealand. Making a virtue out of this uniqueness, an ad campaign declared the drink to be 'world famous in New Zealand'.<sup>26</sup> In the legal academy, as in some other parts of the University, it is hard to become world famous from places like New Zealand, or even in bigger countries like Canada or Australia.<sup>27</sup> The concerns and legal responses can seem so local, the conditions uncongenial to generalisation beyond one's borders, the publication outlets limited and parochial, and cultural cringe can hang on. One of Mark Aronson's many achievements is that he has become genuinely world famous from Australia, while writing about Australian law in books and journals published in Australia - no mean feat.

Mark has gained this reputation by writing his big and wonderful books on judicial review of administrative action. In other words, writing about that part of Australian administrative law most recognisable and instantly usable by the rest of the common law world. I marvel at the fact that his first administrative law article in a refereed law journal appeared at the tender

age of 49! (Surely a contender for *The Guinness Book of [Academic] Records*.) And what's more that was a piece I cajoled him into writing for a special issue of *Public Law Review*.<sup>28</sup> After that he got a taste for law review writing and penetrating articles followed on the most intractable parts of judicial review – nullity, unreasonableness and the distinction between law and fact, collateral challenge and jurisdictional fact.

In a broader context, Mark's life has coincided with the rise of the professional law school and the emergence of the career legal academic. When Australia's first association of law teachers was formed in 1946 – the year Mark was born - it had only 13 members drawn from five law schools (comparative figures at around this time are 130 full-time law teachers in the UK and 40 across Canada).<sup>29</sup> Mark joined UNSW Law School two years after its doors opened in 1971 and, apart from three years away on leave advising government, has spent thirty years here: playing his part in making UNSW one of the leading law schools in the southern hemisphere. It has been a lucky time to be a law teacher in 'the Lucky Country'.

Mark has been an inspiration not only to his many students – some of the best of whom have emulated him and become legal academics – but also<sup>30</sup> to those of us labouring in the administrative law vineyard. Speaking personally, Mark has helped me enormously – cheerfully putting aside his work to improve mine (often at very short notice), venturing to the frozen Canadian prairie to give the best paper at an international conference I organised (while on long service leave, to boot), keeping me informed of developments as they happen (almost before they have happened through his computer wizardry), involving me in his teaching and generously citing and using my work in his teaching materials and his books (along with the work of many others). Through all this contact over twenty years, Mark's honesty, decency, intelligence, collegiality and sensitivity has shone through. He is a good mate as well as an inspiration.

It is a truism in law that we all stand on the shoulders of others and they in turn stand on the bones of those that have gone before us. There is seldom, if ever, a radical breakthrough or paradigm shift, but we know that some jurists make a demonstrable and distinctive difference in their specialty. Mark Aronson has done that in administrative law and in the process has put Australian administrative law and this Law School on the world stage. We know there is more scholarship to come, but this is an occasion to say to Emeritus Professor Mark Aronson thank you and well done.

## Endnotes

- 1 (1993) 52 Aust J of Public Administration 208.
- 2 P O'Farrell, *UNSW - A Portrait* (1999) 88, 169. Professor J H Wootten was appointed foundation Dean in 1979.
- 3 (1945) 70 CLR 598.
- 4 But cf *Plaintiff 157/2002 v The Commonwealth* (2003) 211 CLR 476 at 499ff.
- 5 M Dixon, *Thirty Up, the Story of the UNSW Law School* (2001) 41.
- 6 Professor Harry Whitmore was later Dean from 1973 to 1976. See M Dixon, *Thirty Up*, 141.
- 7 ALRC 1, 1975.
- 8 ALRC 2, 1975.
- 9 M Dixon, *Thirty Up* (2001), 41.
- 10 Butterworths, 1976 (1st ed), 1979 (2nd ed), 1982 (3rd ed), 1988 (4th ed), 1995 (5th ed), 1998 (6th ed).
- 11 Law Book Co, 1978.
- 12 LBC Info Services (1st ed, 1996), (2nd ed, 2000), (3rd ed, 2004).
- 13 cf *Enever v The King* (1906) 3 CLR 969. See also ALRC 1, *Complaints Against Police*, Ch III, Vicarious Liability, pp 58ff.
- 14 ALR 68, *Compliance with the Trade Practices Act* (1994).
- 15 ALRC 46, *Grouped Proceedings in the Federal Court* (1988).
- 16 Re *Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 148 [58]. See also at 140 [37] fn 46; *Ousley v The Queen* (1997) 192 CLR 69 at 131 fn 270 (Aronson and Dyer,

- Judicial Review of Administrative Action*, (1996)); *Abebe v Commonwealth* (1999) 197 CLR 510 at 587 [223] fn 209 (Aronson and Dyer, *Judicial Review of Administrative Action* (1996)); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 129 [126] fn 175 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 116 [191 fn 158, 116 [192] fn 163, 117 [194] 169, 118 [195] fn 171, 123 [211] fn 186 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 359 [110] fn 110 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* (2001) 75 ALJR 808 at 813 [27] fn 15 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504 at 509 [22] fn 8 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 440 [173] fn 221 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 250 [96] fn 60 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1034-1035 [56] fn 57 and 58; 190 ALR 370 at 384-385 (Aronson and Hunter, *Litigation: Evidence and Procedure*, 6th ed (1998)); (2003) 211 CLR 441 at 472 [90] fn 92 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed, (2000)); *Griffith University v Tang* (2005) 221 CLR 99 at 133 [100] fn 133 (Aronson and Franklin, *Review of Administrative Action*, (1987)), 146 [142] fn [214]; *Ruddock v Taylor* (2005) 79 ALJR 1534 at 1560 [160] fn 145; 221 ALR 32 at 67 (Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004)); *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367 at 388 [96] fn 106; 223 ALR 171 at 194 (Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004)).
- 17 (2002) 211 CLR 441.
- 18 Cited in J D Heydon, 'Chief Justice Gibbs: Defending the Rule of Law in a Federal System', Inaugural Sir Harry Gibbs Memorial Oration, 26 May 2006, unpublished, 33 citing H T Gibbs, Sir Samuel Walker Griffith Memorial Lecture, 30 April 1984, 1.
- 19 Trail-blazing work in this respect has been performed by two other leaders in Australian administrative law. See Robin Creyke and John McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* and *ibid*, 'Judicial Review – An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82.
- 20 H. Whitmore & M. Aronson, *Review of Administrative Action*, Law Book Company Ltd, Sydney, 1978.
- 21 See generally D. Ritter, 'The Myth of Sir Owen Dixon' (2005) 9 *Australian Journal of Legal History* 249.
- 22 Sparked, if I recall correctly, by the review essays by Carol Harlow, 'Politics and Principles: Some Rival Theories of Administrative Law' (1981) 44 *Modern Law Review* 113 and Denis Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 *Oxford Journal of Legal Studies* 257.
- 23 J. McMillan, 'The Academic Contribution to Australian Administrative Law' (2001) 8 *Australian Journal of Administrative Law*, 214, 215.
- 24 G. Larson, *Weiner Dog Art: A Far Side Collection*, Andrews & McMeel, Kansas City, 1990.
- 25 M. Aronson, B. Dyer & M. Groves, *Judicial Review of Administrative Action*, Thomson, Sydney, 3rd ed. 2004), 'Index'.
- 26 Richard Wolfe & Stephen Barnett, *From Jandals to Jaffas: The Best of Kiwiana*, Random House, New Zealand, 2003, 48-9.
- 27 See also G. Huscroft & M. Taggart, "David Mullan: In Appreciation" in G. Huscroft & M. Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan*, University of Toronto Press, Toronto, 2006, forthcoming.
- 28 M. Aronson, 'Ministerial Directions: The Battle of the Prerogatives' (1995) 6 *Public Law Review* 77. I put to one side here the slightly earlier article – 'An Administrative Appeals Tribunal for New South Wales: Expansive Legalism or Overdue Reform?' (1993) 52 *Australian Journal of Public Administration* – as it is not in a law journal.
- 29 M. Chesterman, 'Legal Explorations in Different Lands' in G.P. Wilson (ed.), *Frontiers of Legal Scholarship: Twenty five years of Warwick Law School*, John Wiley & Sons, Chichester, 1995, 21, 31. For comparative figures, see W. Twining, "A Nobel Prize for Law?" in Wilson, *ibid.*, 46, 47 (U.K.) & M. Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43 *Osgoode Hall Law Journal* 223, 254 (Canada).
- 30 M Aronson "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed) *The Province of Administrative Law*, Hart Publishing, Oxford 1997.