Overview of the 100th issue

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The Australian Institute of Administrative Law (AIAL) is celebrating this hundredth issue of its journal, *AIAL Forum*, with a specially commissioned set of articles by eminent public lawyers, many of whom have or had a formative connection with the Institute. The National Committee of the Institute expresses its sincere thanks to them for their willing participation.

The broad guideline for the authors was to consider current issues and future directions in administrative law. All have complied admirably. Their canvass covers that multiplicity of principles, remedies, and institutions which characterise the discipline.

There was one exception to the prospective theme — a history of the journal — undertaken by Robert Orr QC. His account, following extensive research and interviews with key figures in the AIAL's development, metamorphosed into a history of the AIAL. It will remain the definitive account of the evolution of the Institute and of its flagship journal.

A collection of this nature is an incentive to reflect on fundamentals, as evidenced in several of the articles. Bluemmel's, for instance, reminds us that the widespread use of social media, and the community's tolerance of COVID-19-induced interference by government with individual freedoms, if unchecked by administrative law accountability measures such as privacy laws, pose a threat to Australian democracy.

An inherent characteristic of administrative law is that it has dual constituencies: government; and the people. They are best served when the law achieves a balance between meeting governments' objectives and protection of individual rights. This fundamental aspect of the discipline is illustrated by the article by Justice Basten. Basten takes as his starting point the thesis by Bateman and McDonald[1] that justification for judicial review now turns on principles of statutory interpretation rather than grounds of review. While acknowledging that there are strong doctrinal grounds for this development, Basten has also discerned a weakness in the approach. Rules of statutory interpretation are focused on protection of individual rights and interests and too heavy a reliance on these principles gives insufficient emphasis to distributive justice. His assessment calls for a rebalancing of these competing foundational values.

Identification of fundamental principles also features in Justice Pritchard's article. She accepted the challenge for tribunals to identify their foundational philosophy with a valuable statement of that philosophy as it relates to amalgamated tribunals, now present in all the states and territories except Tasmania.[2] The value of that statement of principle is illustrated by her statistical analysis of the workload of those tribunals. That analysis graphically illustrates that these tribunals have departed significantly from the Commonwealth merit review tribunal model. Amalgamated state and territory tribunals are predominantly civil and protective management, not administrative review, bodies, since their administrative law

1 W Bateman and L McDonald 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153.
2 Tasmania has announced that its legislation for TasCAT will be introduced in 2020.

caseload comprise less than 5 per cent of their output. These figures call for a substantial realignment of administrative justice as it applies to amalgamated tribunals and will increasingly impact on their operation and future development.

Statistical information also features in the article by Groves, in his case as it has emerged in cases of apprehended bias. Use of statistics exemplifies the current emphasis on evidence-based decision-making if standards of proof are to be met. Whether courts are willing to accept this form of evidence in bias cases is illustrated by Groves's article. The case law relied on in the article, admittedly a limited selection, suggests some judicial reluctance to accept statistical evidence as indicators of judicial predisposition. That is not to suggest a similar reluctance in other circumstances but may highlight a need for more selective use of statistics and support from other forms of evidence in similar cases rather than relying solely on raw figures.

What the future holds for administrative law inevitably touches on the impact of machine learning, algorithms, and e-communications. The impact of these forms of technology is examined in the articles by McCabe and Pritchard. They detail the administrative law advantages and disadvantages of increased use of automated assistance in tribunal decision-making and the practical impact of their embrace of online interactions, including for mediated and hearing processes. As some of these changes are likely to continue indefinitely, they herald a significant alteration to the processes of administrative review.

A prominent theme of the articles is the need for better identification of principles of good administration and their improved alignment with administrative law. As the Administrative Review Council pointed out over a decade ago, '[i]n view of the high standards expected of public officers, mere compliance with the law alone is insufficient'.[3] This recognition of the high standards of behaviour expected of public officers extends to their organisations.

The organisational focus is apparent in the article by McMillan. He has thrown light on a hitherto little considered area of public administration — the need for increased attention to the allocation of names, powers, functions and jurisdiction of the oversight accountability bodies. This is not simply a call for enhanced organisational tidiness. It also affects the remuneration of their officers and their ability to interact with each other. The article suggests government legislation and practices need better to identify criteria for categorisation of classes of the existing oversight bodies and those created in the future.

Principled guidance is also the underlying emphasis in the Lim, Ng and Weeks article. Their article highlights disparities in the discretionary compensation schemes when individuals have suffered loss due to administrative action not otherwise amenable to administrative law redress. The article, like that of McMillan, indicates the need for discernment of criteria for eligibility for such schemes. Acknowledgment that these schemes are discretionary does not obviate that need. Fairness so demands. Fairness also demands enhanced transparency about such schemes. The paucity of information about the outcomes reached under the various schemes is illustrated by the limited information available in the few Commonwealth

3 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (rev ed, August 2000) 6.

agencies which publish statistics. Their discretionary nature does not prevent the need for information about whether they are operating effectively.

The need for improved analysis of key areas of public administration is another prevalent theme. Hitherto under-explored areas considered in the articles include the tension between private law contract and public law principles evident in government contracting. Seddon has examined the need for better synthesis of public and private law in this area. His article illustrates, as he says, ‘the difficulties encountered when the oil of public is mixed with the water of private’. He recommends that administrative lawyers look ‘broadly at the various issues’ and understand ‘that the public–private tension must be recognised, … considered and weighted’ if ascendancy to one at the expense of the other is to avoid controversy.

One important justification for the call for identification of criteria reflecting the dual interests operating in public law is that it provides the measure against which to assess, inform and shape laws and rules for the guidance of public law officials and of institutions. The focus on principles of good administration also reflects a focus on this deficiency.

The mothballing of the Administrative Review Council in 2015 may have indicated a view in some quarters that Australian administrative law had reached a plateau posing fewer challenges than those tackled in its evolutionary phase. The articles in this collection give the lie to that perception. They have thrown light on key elements of the discipline requiring novel solutions and renewed focus in the face of current and emerging issues. Their insights have served their community well and chart some of the issues which will be explored in the next one hundred editions of *AIAL Forum*.