

SOUTH AUSTRALIAN ADMINISTRATIVE LAW: 40 YEARS ON

I INTRODUCTION

It is often instructive to pause and look back at a little history to understand how contemporary law functions. This special issue for volume 40, issue one of the *Adelaide Law Review* offers an excellent opportunity to do that for administrative law. The *Adelaide Law Review* was established in 1960, but it was not until the 1970s that administrative law featured within its pages. In 1977 Michael Harris, then Senior Lecturer in Law at the University of Adelaide, surveyed recent developments in South Australian administrative law in an article in volume 6.¹ The 1970s was an important time for administrative law in Australia, and in 1977 the ‘revolution’ that came to be known as the ‘new administrative law’ was underway, at least at a Commonwealth level.² The 1970s were also a decade of major social and legal change in South Australia, but with the exception of the appointment of the first Ombudsman, administrative law reform would be a much slower process in this State. Despite some early recommendations by the Law Reform Committee of South Australia,³ judicial review of administrative action in South Australia did not follow the codification project commenced by the Commonwealth. With some procedural modifications, South Australia has preserved its common law foundations.⁴ The State offers an interesting vantage point from which to observe the waxing and waning of

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¹ Michael Harris, ‘South Australian Administrative Law: A Survey of Recent Developments’ (1977) 6(1) *Adelaide Law Review* 77.

² Michael Kirby, ‘Administrative Law Reform in Action’ (1978) 2(3) *University of New South Wales Law Journal* 203, 203. Australia’s Commonwealth level reforms were described in Canada as ‘an awesome leap toward changing its whole structure with regard to public administration’: Leslie Katz, ‘Australian Federal Administrative Law Reform’ (1980) 58(2) *Canadian Bar Review* 341, 341 quoting Canadian Law Reform Commission, *Seventh Annual Report*, (Report, 1977–8). The revolutionary nature of the reforms were mostly of interest to lawyers, the Administrative Review Council reported in its first annual report that ‘[t]he innovations were not accompanied by much publicity or popular debate, and perhaps they remain ill-understood’: Administrative Review Council, *First Annual Report 1977* (Report, 1977) Foreword.

³ Law Reform Committee of South Australia, *Relating to Administrative Appeals* (Report No 82, 11 April 1984).

⁴ In the form of orders ‘formerly available by prerogative writ’ for prohibition, certiorari, mandamus and quo warranto: *Supreme Court Civil Rules 2006* (SA) r 199.

the influence of statutory judicial review in other jurisdictions, the codification of grounds and the resurgence of jurisdictional error.

II AN EMERGING FIELD

In 1964 Lord Reid stated in the House of Lords: '[w]e do not have a developed system of administrative law — perhaps because until fairly recently we did not need it'.⁵ In the 1970s it was still necessary to commence an article on administrative law by recalling AV Dicey's⁶ 'vigorous denial of the very existence of the subject'.⁷ In his 1977 article Harris reassured his readers that

[t]he period of paranoia in which the very foundations of the common law were perceived as threatened by the detested bureaucracy and [the] equally detested ... *droit administratif*, has long-since gone, and for this we should be grateful. It is far healthier to face the reality of the presence and permanence of an administrative law system and to work for its improvement.⁸

Citing English scholar William Wade, Harris noted that 'the State has "seized the initiative, and has put upon itself all kinds of new duties"'.⁹ Wade was referring to the expanding role of governments in the 20th century with the expansion of regulatory control in many fields and the provision of 'elaborate social services'.¹⁰ Governments were no longer confined to the realms of 'defence, public order, [and] the criminal law'.¹¹ With the expansion of governmental activities¹² came the slow acceptance that the exercise of expanded public powers should come with obligations of accountability to external and independent review bodies.

This emerging field offered new opportunities for lawyers. When Harris was writing his 1977 article, administrative law was taught as an elective in the University of

⁵ *Ridge v Baldwin* [1964] AC 40, 72.

⁶ 19th century English constitutional theorist AV Dicey investigated the body of French law — *droit administratif* — that regulated government action in specialised courts, and compared it to English law. He concluded: "administrative law" ... is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs": AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889) 190.

⁷ Harris (n 1) 77.

⁸ *Ibid.*

⁹ *Ibid.*, quoting William Wade, *Administrative Law* (2nd ed, Clarendon Press, 1967) 1.

¹⁰ Wade (n 9) 1.

¹¹ *Ibid.*

¹² Commonwealth Administrative Review Committee, *Report* (Parliamentary Paper No 144, August 1971) 5 [15] ('*Kerr Report*').

Adelaide Bachelor of Laws¹³ and had been taught (on and off) since 1961.¹⁴ It was not to become a core course in the degree until 1985,¹⁵ when administrative law was seen as a ‘sunrise industry’ for lawyers¹⁶ and academics¹⁷ alike.

This ‘new’ field of administrative law was partially built on some very old foundations that were, in relation to judicial review, the system of common law prerogative writs.¹⁸ What was being recognised by the postwar English¹⁹ and Australian²⁰ textbook writers in the 1950s,²¹ and the law school courses of the following decades, was a discrete body of law known as ‘administrative law’. Once recognised, demands for reform soon followed.

III THE ‘NEW’ ADMINISTRATIVE LAW

The 1957 Franks Committee proposed significant changes to administrative law in England,²² but it took a few years for the possibility of reform to be considered

¹³ University of Adelaide, ‘Calendar of the University of Adelaide for the year 1977: Vol II Details of Courses’ (1977) 865, 877.

¹⁴ Originally a composite subject called Administrative, Local Government and Industrial Law, offered as an alternative to Mercantile Law II: University of Adelaide, ‘Calendar of the University of Adelaide for the year 1960’ (1960) 600, 822.

¹⁵ Administrative Law I, along with the basic principles, offered ‘an introduction to the “new administrative law”’: University of Adelaide, ‘Calendar 1985: Vol II Details of Courses’ (1985) 818, 824. ‘Administrative law [was] still not a required subject in many law degree courses’ at that time and the questions ‘what is administrative law’ and ‘why should [it] be taught?’ were still being asked: John Goldring, ‘Administrative Law: Teaching and Practice’ (1986) 15(1) *Melbourne University Law Review* 489, 489–90.

¹⁶ Emilios Kyrou, ‘Administrative Law: A Sunrise Industry for the Legal Profession?’ (1987) 25 (July) *Law Society of New South Wales Journal* 45.

¹⁷ Lindsay Curtis, ‘The Vision Splendid: A Time for Re-Appraisal’ in Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law: At the Twenty-Five Year Mark* (Australian National University Press, 1998) 36, 40.

¹⁸ For a history of the prerogative writs see: John Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 153–64.

¹⁹ See John Griffith and Harry Street, *Principles of Administrative Law* (Isaac Pitman & Sons, 1952).

²⁰ See Wolfgang Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, 1950).

²¹ In 1963, John Garner traced the first book to be published in England bearing the title ‘Administrative Law’ to one published in 1929 (Frederick Port, *Administrative Law* (Longmans, 1929) although it did not have the scope of the modern works: JF Garner, *Administrative Law* (Butterworths, 1963) v.

²² Committee on Administrative Tribunals and Enquiries, *Report* (Cmnd 218, 1957), 91–9.

in Australia. The beginning of Australian interest has been dated to 1965²³ when Justice Else-Mitchell delivered a paper on the Franks Committee to the Commonwealth and Empire Law Conference in Sydney²⁴ and a series of papers were also presented on ‘The Proper Scope of Judicial Review’.²⁵ The Administrative Review Council called the conference a ‘watershed in administrative law reform in Australia and ideas advanced there have become in time the conventional wisdom.’²⁶ A series of law reform committee reports followed in the early 1970s. The descriptor ‘new’²⁷ for Australian administrative law refers to the reforms implemented at a Commonwealth level that introduced ombudsmen, merits review by administrative tribunals, and statutory judicial review in response to the Kerr,²⁸ Bland²⁹ and Ellicott³⁰ Reports.³¹ Although not included in the original Kerr Report reforms, freedom of information later became the fourth element in this reform package.³²

The 1970s was a decade in which South Australia was renowned for its progressive law reform in fields such as Aboriginal rights,³³ anti-discrimination,³⁴ the decrimi-

²³ Administrative Review Council, *First Annual Report 1977* (n 2) 1; Michael Kirby, ‘Towards the New Federal Administrative Law’ (1981) 40(2) *Australian Journal of Public Administration* 103, 105.

²⁴ R Else-Mitchell, ‘The Place of the Administrative Tribunal in 1965’ in RA Woodman (ed), *Record of the Third Commonwealth and Empire Law Conference, Sydney Australia 25th August–1st September 1965* (Law Book Company, 1966) 65.

²⁵ RA Woodman (ed), *Record of the Third Commonwealth and Empire Law Conference, Sydney Australia 25th August–1st September 1965* (Law Book Company, 1966) 107–67.

²⁶ Administrative Review Council, *First Annual Report 1977* (n 2) 1 [1].

²⁷ GDS Taylor, ‘The New Administrative Law’ (1977) 51(12) *Australian Law Journal* 804; Kirby, ‘Towards the New Federal Administrative Law’ (n 23); John Goldring, ‘The Foundations of the “New Administrative Law” in Australia’ (1981) 40(2) *Australian Journal of Public Administration* 79.

²⁸ *Kerr Report* (n 12).

²⁹ Committee on Administrative Discretions, *Final Report of the Committee on Administrative Discretions* (Report, 1973).

³⁰ Committee of Review of Prerogative Writ Procedure, *Report of Committee of Review* (Parliamentary Paper No 56, 1973) (‘*Ellicott Report*’).

³¹ Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, September 2012) 28; Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law: At the Twenty-five Year Mark* (Australian National University Press, 1998).

³² Lindsay Curtis has suggested that the other Kerr Committee reforms ‘made freedom of information legislation inevitable in the end’: (n 17) 46.

³³ See eg *Aboriginal Lands Trust Act 1966* (SA); *Aboriginal and Historic Relics Preservation Act 1965* (SA); *Aboriginal Heritage Act 1979* (SA).

³⁴ See eg *Prohibition of Discrimination Act 1966* (SA); *Racial Discrimination Act 1976* (SA), *Sex Discrimination Act 1975* (SA); *Equal Opportunity Act 1984* (SA).

nalisation of homosexuality and the criminalisation of rape in marriage.³⁵ That progressive spirit did not extend to major reforms of administrative law. The Law Reform Committee of South Australia³⁶ produced a number of recommendations for reform of laws governing administrative action that were never implemented including data protection,³⁷ and the question of standing regarding public participation in environmental protection.³⁸ The State also had a mixed record in relation to implementing the administrative law reforms that were being pursued at a Commonwealth level at that time. South Australia was very early with the establishment of an Ombudsman's Office in 1972,³⁹ following Western Australia,⁴⁰ but ahead of the other Australian states,⁴¹ and the Commonwealth.⁴² Harris commenced his 1977 survey of recent developments in his *Adelaide Law Review* article with the newly established South Australian Ombudsman.⁴³

³⁵ See discussion in Chris Sumner, 'Don Dunstan's Law Reform Legacy' (2017) 39(9) *Bulletin (Law Society of South Australia)* 16, 18; Alex Castles and Michael Harris, *Lawmakers and Wayward Whigs* (Wakefield Press, 1987) 352–3, 356.

³⁶ The Law Reform Committee of South Australia was established in 1968 and operated until 1987 with Justice Howard Zelling as its Chair. The Committee produced 106 reports over that time. The current law reform body in South Australia is the South Australian Law Reform Institute which was established in December 2010 by a joint agreement between the University of Adelaide, the Law Society of South Australia and the South Australian Government and is based at the Adelaide Law School: Adelaide Law School, 'South Australian Law Reform Institute', *University of Adelaide* (Web Page, 24 April 2019) <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute>>.

³⁷ Law Reform Committee of South Australia, *Report of the Committee on Data Protection* (Report No 50, 1 February 1978). The Committee earlier recommended the introduction of a nominate tort of privacy in a 1973 interim report: Law Reform Committee of South Australia, *Regarding the Law of Privacy* (Interim Report, 1973).

³⁸ Law Reform Committee of South Australia, *General Rule of Standing in Environmental Matters* (Report No 97, 1987).

³⁹ *Ombudsman Act 1972* (SA).

⁴⁰ *Parliamentary Commissioner Act 1971* (WA). New Zealand had provided a model a decade before: *Parliamentary Commissioner (Ombudsman) Act 1962* (NZ). See also Jack Richardson, 'The Ombudsman's Place Among the Institutions of Government: Past, Present and Future' (2001) 8(4) *Australian Journal of Administrative Law* 183, 183; Harris (n 1) 79; Dennis Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in Matthew Groves (ed) *Law and Government in Australia* (Federation Press, 2005) 110, 110.

⁴¹ *Ombudsman Act 1989* (ACT); *Ombudsman Act 1974* (NSW); *Ombudsman (Northern Territory) Act 1978* (NT) as repealed and replaced by *Ombudsman Act 2009* (NT); *Parliamentary Commissioner Act 1974* (Qld) as repealed and replaced by *Ombudsman Act 2001* (Qld); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic).

⁴² *Ombudsman Act 1976* (Cth).

⁴³ Harris (n 1) 78–86.

The other ‘new’ administrative law reforms took much longer to arrive in South Australia. Despite early exploration of freedom of information (‘FOI’) in the 1970s⁴⁴ there was no follow-up⁴⁵ and South Australia was to become part of the 1990s group of Australian states that adopted this reform.⁴⁶ South Australia followed the New South Wales FOI model⁴⁷ and was ‘marginally ahead of FOI developments in Queensland, Western Australia and Tasmania’.⁴⁸

Despite recommendations by the Law Reform Committee of South Australia in 1984 for the establishment of a general appeals tribunal, similar to the Commonwealth Administrative Appeals Tribunal,⁴⁹ and the hopes of academic commentators at the time,⁵⁰ a South Australian administrative appeals tribunal took very much longer. As the Commonwealth Administrative Review Council noted ‘[i]n all Australian jurisdictions tribunals had been established whenever a need was seen without reference either to other existing tribunals, or to the place of the new tribunal in the overall pattern of government decision-making’.⁵¹ At the time the South Australian Law Reform Committee was researching for its 1984 report, there was an array of specialist appeal and review bodies,⁵² but no ‘one stop shop’ administrative review body was

⁴⁴ South Australia Working Party on Freedom of Information, Premiers Department, ‘Issues Paper on Freedom of Information’ (Discussion Paper, 1978).

⁴⁵ Howard Coxon, ‘The Freedom of Information Debate in Australia’ (1981) 8(5) *Government Publications Review* 373, 374.

⁴⁶ *Freedom of Information Act 1991* (SA). Rick Snell characterised the state statutes on a spectrum, from Victoria’s version 1.0 to Queensland and Western Australia’s version 1.3: Rick Snell, ‘Freedom of information: The Experience of the Australian States — An Epiphany?’ (2001) 29(3) *Federal Law Review* 343, 344.

⁴⁷ *Freedom of Information Act 1989* (NSW) as repealed and replaced by *Government Information (Public Access) Act 2009* (NSW).

⁴⁸ Vicki Evans, ‘Freedom of Information in South Australia’ (1993) 43 (February) *Freedom of Information Review* 2, 2.

⁴⁹ Law Reform Committee of South Australia, *Relating to Administrative Appeals* (n 3) 16. The Commonwealth Administrative Appeals Tribunal had commenced operation in 1976: *Administrative Appeals Tribunal Act 1975* (Cth); ‘About the AAT’, *Administrative Appeals Tribunal* (Web Page, 3 September 2018) <<https://www.aat.gov.au/about-the-aat>>.

⁵⁰ Castles and Harris (n 35) 382–3. In his 1977 Article Harris noted there were no plans for *Administrative Decisions (Judicial Review) Act 1977* (Cth) style reforms in South Australia, and that it would be necessary to wait ‘for a while longer’: Harris (n 1) 105.

⁵¹ Administrative Review Council, *First Annual Report 1977* (n 2) 1 [3].

⁵² A list of statutes from 1976–84 with rights of appeal or review was compiled by an Associate to Justice Zelling and included many very specialised bodies such as the Water Resources Appeals Tribunal, Poultry Farmer Licensing Review Tribunal, Business Franchise (Petroleum) Appeal Tribunal, and Handicapped Persons Discrimination Tribunal: Memorandum from Justice Howard Zelling to Law Reform Committee Regarding Administrative Appeals, 23 February 1984 (State Records of South Australia, GRS 6201, 1, Unit 4). This complex array of review bodies continued

forthcoming for South Australia.⁵³ Instead, the South Australian Government established a separate division of the District Court to deal with administrative appeals,⁵⁴ that provided a modified form of merits review.⁵⁵ It was not until 2015 that the South Australian Civil and Administrative Tribunal commenced operation.⁵⁶

Of the four accountability regimes in the federal ‘new’ administrative law that became models for reforms in the state jurisdictions, South Australia was an early adopter of the Ombudsman, but waited a decade to introduce freedom of information, and nearly four decades to introduce an administrative tribunal. When it comes to the fourth — statutory reform of judicial review — South Australia has watched from the sidelines as that reform has gone in, and perhaps out, of favour elsewhere. When Harris surveyed decisions of the Supreme Court of South Australia in 1977⁵⁷ he disclosed ‘a surprising number of administrative law cases’.⁵⁸ Those cases are of interest to a contemporary reader as a snapshot of the old prerogative writ system that the 1970s Kerr⁵⁹ and Ellicott⁶⁰ committees sought to reform. When Harris was writing, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*AD(JR) Act*) had only just been passed and it received only a brief mention in the article. From a contemporary viewpoint it is interesting that Harris explained the *AD(JR)* reforms in terms of the procedures associated with the remedies, rather than the listing of grounds that was to become influential.⁶¹

for decades. In 2003 ‘South Australia [had] at least 24 separate review or disciplinary tribunals: Opinion, ‘Review of the Administrative Appeals System Needed’ (2003) 25(4) *Law Society of South Australia Bulletin* 4.

⁵³ ‘Review of the Administrative Appeals System Needed’ (n 52) 4.

⁵⁴ *District Court Act 1991* (SA) as at 1 June 1995 included an Administrative Appeals Division with jurisdiction expressly conferred by statutes: s 8(3). This was amended to include a Disciplinary Division by the *Land Agents Act 1994* (SA) sch 3. See discussion in: Peter Johnston, ‘Recent Developments Concerning Tribunals in Australia’ (1996) 24(2) *Federal Law Review* 323, 325.

⁵⁵ *District Court Act 1991* (SA) pt 6 div 2 as inserted by *District Court (Administrative and Disciplinary Division) Amendment Act 2000* (SA). See: ‘Review of the Administrative Appeals System Needed’ (n 52) 4.

⁵⁶ *South Australian Civil and Administrative Tribunal Act 2013* (SA). The tribunal ‘opened its doors’ on 30 March 2015: ‘About SACAT’, *South Australian Administrative Appeals Tribunal* (Web Page) <<http://www.sacat.sa.gov.au/about-sacat>>.

⁵⁷ Harris (n 1).

⁵⁸ Curtis (n 17) 40.

⁵⁹ *Kerr Report* (n 12).

⁶⁰ *Ellicott Report* (n 30) 2–3.

⁶¹ Harris (n 1) 105–110.

IV STATUTORY JUDICIAL REVIEW REFORMS

The Kerr Report made recommendations for a modern system of administrative law in Australia concerning review of administrative decisions on the merits,⁶² the establishment of an Administrative Review Council and a General Counsel for Grievances (Ombudsman),⁶³ and legislation to simplify the procedure and ‘set out the legal grounds upon which [judicial] review may be granted’.⁶⁴

Both the Kerr⁶⁵ and Ellicott⁶⁶ Reports concluded that the existing procedures surrounding the judicial review prerogative writs were complex, unwieldy, rigid⁶⁷ and outmoded:

A perusal of the cases in which the prerogative writs have been involved shows that a great portion of the court’s time is frequently taken up with argument about whether the particular remedy involved is the correct one, or whether the decision sought to be reviewed is subject to review, or whether the correct court has been chosen, rather than with the substantial matter in dispute, namely, the correctness of the decision sought to be reviewed.⁶⁸

The recommendations in these reports led to the introduction of the *AD(JR) Act*,⁶⁹ and statutory judicial review was subsequently introduced along the same lines in the Australian Capital Territory,⁷⁰ Queensland,⁷¹ and Tasmania.⁷² The *AD(JR) Act*, and its state and territory equivalents, codified common law judicial review, and ‘introduc[ed] a simplified procedure for applying for review, a list of grounds and flexible

⁶² *Kerr Report* (n 12) 115 [17].

⁶³ *Ibid* 115–17 [22]–[32].

⁶⁴ *Ibid* 112 [390]. Another recommendation was a new Administrative Court to exercise a ‘general supervisory jurisdiction over administrative action’: at 76 [251]. This function was undertaken by the Federal Court when it was established in 1976.

⁶⁵ *Ibid* 20 [58].

⁶⁶ Ellicott Report (n 30) 2–3.

⁶⁷ See Administrative Review Council, *First Annual Report 1977* (n 2) 1.

⁶⁸ *Ellicott Report* (n 30) 3 [10]. At the time of Kerr Report ‘[n]o simplified procedure had replaced the prerogative writs as the means of obtaining judicial review of administrative action’: Ronald Sackville, ‘The Boundaries of Administrative Law – The Next Phase’ in Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (Australian National University, 1998) 86, 89.

⁶⁹ Taylor (n 27) 808.

⁷⁰ *Administrative Decisions (Judicial Review) Act 1989* (ACT).

⁷¹ *Judicial Review Act 1991* (Qld).

⁷² *Judicial Review Act 2000* (Tas).

remedies expressed in plain language'.⁷³ The other non-statutory judicial review jurisdictions have simplified the complex procedures formerly associated with the prerogative writs, without a full codification.⁷⁴

In 1984 the South Australian Law Reform Committee recommended that

there should be a right of approach to the Courts wider and more flexible than the present prerogative writ procedures, based on the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.⁷⁵

This proposal included the adoption of the enumerated grounds as listed in the *AD(JR) Act*.⁷⁶ The 'question of whether there is a case for the enactment of judicial review legislation in South Australia' was still being discussed 20 years later.⁷⁷

V SIMPLIFICATION WITHOUT CODIFICATION AND JURISDICTIONAL ERROR LIVES ON

The *Supreme Court Rules 2006* (SA) have reformed procedure⁷⁸ and provide for the making of orders for judicial review 'in the nature of an order formerly available by prerogative writ' for prohibition, certiorari, mandamus and quo warranto.⁷⁹ It is possible to trace the slow modernisation of these procedures over the years. For example, when introduced in 2006 rule 199 adopted an old formulation and referred to orders for judicial review by the Supreme Court made against 'another court or a tribunal that has a duty to act judicially'.⁸⁰ It has long been recognised that

⁷³ Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, 2012) 10. See also Margaret Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24(2) *Federal Law Review* 235, 281–2.

⁷⁴ In legislation or supreme court rules: *Administrative Law Act 1978* (Vic) s 11; *Supreme Court Act 1970* (NSW) s 69; *Supreme Court Civil Rules 2006* (SA) r 199 (2); *Rules of the Supreme Court 1971* (WA) ord 56. The Law Reform Commission of Western Australia recommended *AD(JR) Act* style reform in 2002, but this has not been implemented: Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions* (Project No 95, December 2002) 26.

⁷⁵ Law Reform Committee of South Australia, *Relating to Administrative Appeals* (n 3) 16.

⁷⁶ *Ibid* 51–3.

⁷⁷ See report of then Solicitor-General Chris Kourakis' paper presented to the 2003 Public Sector Lawyers Seminar: 'Review of the Administrative Appeals System Needed' (n 52) 4.

⁷⁸ Commencement of actions is by summons: *Supreme Court Civil Rules 2006* (SA) r 200A.

⁷⁹ *Ibid* r 199.

⁸⁰ *Supreme Court Civil Rules 2006* (SA) r 199, later amended by *Supreme Court Civil Rules (Amendment No 26)*.

references to administrative tribunals should be broadly interpreted as intended ‘to designate any decision making body whether a court, tribunal in the narrow sense, administrative decision maker or otherwise’.⁸¹ The current r 199 refers to orders against an ‘authority’,⁸² reflecting the reality that judicial review actions are brought against a wide range of administrative decisions made by executive government as well as tribunals.⁸³

Whilst the procedures for commencement of judicial review actions have been simplified, the Supreme Court rules have not made any substantive changes and the orders sought reflect the traditional forms of prerogative relief.⁸⁴

An order for judicial review is an order in the nature of an order formerly available by prerogative writ and includes

an order preventing an authority from acting beyond its jurisdiction or in contravention of the requirements of procedural fairness (*prohibition*);

an order setting aside the decision of an authority because of absence or excess of jurisdiction, jurisdictional error or error of law on the face of the record, failure to observe the requirements of procedural fairness or fraud (*certiorari*);

an order compelling an authority to perform a public duty (*mandamus*);

an order preventing a person from wrongfully exercising, or purporting to exercise, functions of a public character (*quo warranto*).⁸⁵

South Australia has not introduced other reforms to judicial review beyond these basic procedural changes. It has not imposed a general statutory duty on administrative

⁸¹ *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193, 230 [122] (Blue J) (*Maxcon No 2*).

⁸² Defined as: ‘a court, tribunal, decision maker or person or body exercising or purporting to exercise or having power to exercise administrative or judicial functions’: *Supreme Court Civil Rules 2006* (SA) r 198A(1).

⁸³ ‘The rigid distinction between the administrative and the judicial or quasi-judicial decision is no longer the touchstone of judicial review. The distinction has been eroded by statute [*AD(JR) Act*] as well as judicial comment. [*F.A.I. Insurances Ltd v Winneke* (1982) 151 CLR 342, 360]’: Sir Anthony Mason, ‘Future Direction in Australia Law’ (1987) 13(3) *Monash University Law Review* 149, 157.

⁸⁴ *Public Service Association of South Australia v Federated Clerks’ Union of Australia, South Australia Branch* (1991) 173 CLR 132, 140 (Brennan J), discussing the former *Supreme Court Rules 1987* (SA) r 98.01.

⁸⁵ *Supreme Court Civil Rules 2006* (SA) r 199.

decision-makers⁸⁶ to provide reasons.⁸⁷ Nor has South Australia expanded the record to include reasons for decisions (relevant to error of law on the face of the record)⁸⁸ as New South Wales⁸⁹ and Victoria⁹⁰ have done. Nevertheless, specific statutes may impose a duty to provide reasons⁹¹ and in so doing may incorporate those reasons into the record.⁹²

South Australia's uncodified judicial review system became a 'time capsule' that gave rise to the influential High Court decision *Craig v South Australia* ('*Craig*'),⁹³ one of a group of cases that have 'established a distinctly Australian [judicial review] jurisprudence'.⁹⁴ *Craig* concerned judicial review by the Supreme Court of South Australia of a decision of the District Court. The District Court judge had ordered a stay of proceedings in a criminal trial applying *Dietrich v The Queen*⁹⁵ because the defendant was unrepresented by counsel. The State of South Australia applied to the Supreme Court for judicial review arguing that the judge had made an error of law. By majority, the Supreme Court held that the District Court judge had not taken relevant considerations into account in relation to *Craig's* dealings with his assets,⁹⁶

⁸⁶ '[T]here is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions': *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 662 (Gibbs CJ) ('*Osmond*').

⁸⁷ Cf *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss 13–15; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13 ('*AD(JR) Act*'); *Judicial Review Act 1991* (Qld) pt 4; *Judicial Review Act 2000* (Tas) pt 5; *Administrative Law Act 1978* (Vic) s 8.

⁸⁸ *Maxcon Constructions Pty Ltd v Vadasz* (2018) 351 ALR 369, 373 ('*Maxcon*').

⁸⁹ *Supreme Court Act 1970* (NSW) s 69(4).

⁹⁰ *Administrative Law Act 1978* (Vic) s 10.

⁹¹ See, for example, *Building and Construction Industry Security of Payment Act 2009* (SA) s 22(3)(b) considered in *Maxcon* (n 88).

⁹² '[I]n accordance with the requirement imposed by s 22(3)(b) [*Building and Construction Industry Security of Payment Act 2009* (SA)] the adjudicator included his reasons as part of his determination': *Maxcon No 2* (n 81) 240 [155].

⁹³ (1995) 184 CLR 163.

⁹⁴ Robin Creyke and John McMillan, 'Administrative Law Assumptions ... Then and Now' in Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law: At the Twenty-Five Year Mark* (Australian National University Press, 1998) 1, 1. Creyke and McMillan also listed the following cases, all decided within a decade of each other and still influential today: *Kioa v West* (1985) 159 CLR 550 ('*Kioa*'); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ('*Peko-Wallsend*'); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 ('*Quin*'): at 1, n 1.

⁹⁵ (1992) 177 CLR 292 ('*Dietrich*').

⁹⁶ *South Australia v Judge Russell* (1994) 62 SASR 288, Matheson and Prior JJ ('*Russell*'). This was relevant to whether *Craig* was unable to obtain legal representation 'through no fault on his ... part': *Dietrich* (n 95), 315 (Mason CJ and McHugh J), discussed in *Craig* (n 93) 183.

and had misunderstood the legal test to be applied.⁹⁷ These errors, the majority held, amounted to jurisdictional errors and warranted an order in the nature of certiorari to quash the District Court's stay order.⁹⁸

Justice Matheson cited⁹⁹ the following passage from Lord Reid in *Anisminic v Foreign Compensation Commission* ('*Anisminic*')

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.¹⁰⁰

In turn, South Australia relied upon that passage in the High Court appeal by Craig.¹⁰¹ The House of Lords case of *Anisminic* concerned an administrative tribunal (the Foreign Compensation Commission), but the case had subsequently been applied to courts 'with the result that the distinction between jurisdictional error and error within jurisdiction has been seen as effectively abolished in England'.¹⁰² *Craig* gave the Australian High Court the opportunity to clearly state that the 'distinction has not ... been discarded in this country', and that *Anisminic* was not an authoritative statement of what constitutes jurisdictional error in Australia for inferior courts.¹⁰³ The High Court overturned the South Australian Supreme Court decision in *Craig*: if the District Court had made an error of law, it had not been jurisdictional and so was

⁹⁷ *Russell* (n 96) 298.

⁹⁸ *Ibid.*

⁹⁹ *Ibid* 297.

¹⁰⁰ [1969] 2 AC 147, 171.

¹⁰¹ *Craig* (n 93) 178.

¹⁰² *Ibid*, 178–9. The core concepts were 'in a state of flux' after *Anisminic*: John McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24(2) *Federal Law Review* 347, 374.

¹⁰³ *Craig* (n 93) 179.

not to be quashed by an order for certiorari. The High Court identified the ‘critical distinction which exists between administrative tribunals and courts of law’¹⁰⁴ when determining whether an error of law has been made within, or beyond, jurisdiction. The Court also emphasised the distinction between jurisdictional error and error of law on the face of the record.¹⁰⁵ Subsequent cases such as *Kirk*¹⁰⁶ have demonstrated how decisions of inferior courts may make jurisdictional errors, but the distinction between courts and administrative decision-makers, including tribunals, remains part of a distinctive Australian judicial review jurisprudence.

Craig was an important ‘reminder that the technicalities of jurisdictional error and error on the face of the record are alive and well’ in Australia.¹⁰⁷ This has been emphasised by the High Court in cases where a statutory privative clause has failed to oust judicial review because of the constitutional entrenchment of review for jurisdictional error.¹⁰⁸ Privative clauses remain valid and have been left with some limited work to do in relation to ouster of review for error of law on the face of the record.¹⁰⁹

The High Court also took the opportunity in *Craig* to reject arguments being made at the time that the ‘modern’ record included both the reasons for decision and the complete transcript of proceedings.¹¹⁰ If accepted, that would have ‘go[ne] a long way towards transforming certiorari into a discretionary general appeal for error of law’.¹¹¹ The High Court maintained that the record was limited to the ‘documents initiating and defining the matter in the inferior court and the impugned order or determination’,¹¹² thereby significantly restricting the availability of certiorari for error of law on the face of the record. Without access to the reasons as part of the ‘record’ it is very difficult to show error of law on the face of the record. It then becomes necessary to establish jurisdictional error to obtain an order to quash a decision (*certiorari*). The High Court left any expansion of the record to the

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 176.

¹⁰⁶ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (*‘Kirk’*).

¹⁰⁷ Sackville (n 68) 89, n 16.

¹⁰⁸ In both the High Court’s jurisdiction under s 75(v) of the *Constitution* and the supervisory role of the State supreme courts: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482–3 [5]–[6] (Gleeson CJ), 498 [53], 512 [98] (*‘Plaintiff S157’*); *Kirk* (n 106) 581 [98]–[99].

¹⁰⁹ *Plaintiff S157* (n 108) 507 [81]; *Kirk* (n 106) 581 [100]; *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 249 CLR 398, 413 [30] (French CJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248, 257 [30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Maxcon* (n 88) 371 [5].

¹¹⁰ *Craig* (n 93) 180–1.

¹¹¹ Ibid 181

¹¹² Ibid 180

legislature.¹¹³ This has been done in New South Wales and Victoria where reasons are part of the record,¹¹⁴ but not in South Australia — the birthplace of *Craig*.

Of course, by the mid 1990s when *Craig* was decided the *AD(JR) Act* had been operating for nearly 20 years with its simplified procedures, including abolition of the distinction between jurisdictional and non-jurisdictional errors of law. It is necessary to understand this traditional distinction to make sense of the *AD(JR) Act* s 5(1)(f) ground of review: ‘that the decision involved an error of law, whether or not the error appears on the record of the decision’. The decision in *Craig* illustrate[d] the significance of this apparently technical change in the pre-existing law’.¹¹⁵

Craig is one example of significant High Court precedent emerging from cases that originated in those states that have not opted for *AD(JR) Act* style statutory judicial review procedures.¹¹⁶ These jurisdictions have had an influence on the way the High Court has developed an Australian judicial review jurisprudence. However, the body of case law coming out of the High Court’s original jurisdiction¹¹⁷ reviewing decisions under the *Migration Act 1958* (Cth) has had the greatest impact on that development.

VI THE RESURGENCE OF JURISDICTIONAL ERROR

A battle for control over migration decisions for around three decades has led to a winding back of the judicial review reforms that came out of the ‘new’ administrative law reforms in one of the major case load areas for the federal courts. A series of amendments have attempted to limit access to judicial review before the Federal Court and the High Court in migration cases in a variety of ways: migration decisions have been excluded from the *AD(JR) Act*¹¹⁸ and *Judiciary Act 1903* (Cth) s 39B review;¹¹⁹ and at one point, a restricted code for judicial review was incorporated within the *Migration Act 1958* (Cth).¹²⁰ When faced with these restrictions, applicants have had to resort to the original jurisdiction of the High Court.¹²¹ The

¹¹³ Ibid 181.

¹¹⁴ *Supreme Court Act 1970* (NSW) s 69(4); *Administrative Law Act 1978* (Vic) s 10.

¹¹⁵ Sackville (n 68) 93, n 35.

¹¹⁶ Other examples include: *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Osmond* (n 86); *Quin* (n 94); *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; *Kirk* (n 106) and *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480.

¹¹⁷ *Constitution* s 75(v).

¹¹⁸ *AD(JR) Act* (n 87) sch 1.

¹¹⁹ *Abebe v Commonwealth* (1999) 197 CLR 510, 522 [20].

¹²⁰ *Migration Reform Act 1992* (Cth) which curtailed the grounds of review: Ibid 522 [19]. See discussion in Sackville (n 68) 88–9.

¹²¹ *Constitution* s 75(v); Administrative Review Council, *Federal Judicial Review in Australia* (n 31) 117 [6.12].

legislative response was then a ‘savage-looking’,¹²² and ultimately unsuccessful,¹²³ privative clause, and conferral of judicial review jurisdiction on the Federal Circuit Court that mirrors the High Court’s jurisdiction.¹²⁴ These many legislative changes in relation to migration decisions, and the large volume of migration cases,¹²⁵ have dominated federal judicial review for decades and have ‘led to the expansion of constitutional judicial review’¹²⁶ with its traditional writs of mandamus and prohibition.¹²⁷ This is a long way from the simplified statutory judicial review proposed by the Kerr and Ellicott Reports.

Battles over privative clauses have also contributed to the resurgence of jurisdictional error as a central concept in judicial review in Australia.¹²⁸ Privative clauses are statutory provisions that purport to prevent courts from judicially reviewing certain decisions. At a Federal level it was a privative clause introduced into the *Migration Act 1958* (Cth)¹²⁹ in an attempt to further limit judicial review of migration matters,¹³⁰ and at a state level a privative clause to oust review of industrial matters.¹³¹ The High Court has held that privative clauses cannot remove the constitutionally protected supervisory role of the High Court and the state Supreme Courts to review for jurisdictional error.¹³² This led one commentator to ask whether governments and legislatures have ‘shot [themselves] in the foot’ when enacting privative clauses.¹³³

¹²² Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (LawBook, 6th ed, 2017) 52.

¹²³ *Plaintiff S157* (n 108).

¹²⁴ *Migration Act 1958* (Cth) s 476(1). See discussion of these many migration law amendments in Aronson, Groves and Weeks (n 122) 52–3; John Basten, ‘Judicial Review: Can We Abandon Grounds?’ (2018) 93 (November) *AIAL Forum* 22.

¹²⁵ The Federal Court provided statistics to the Administrative Review Council 2012 review on the *AD(JR) Act* (n 87) and *Judiciary Act 1903* (Cth) s 39B applications to the Federal Court and the then Federal Magistrates Court (now Federal Circuit Court). The statistics show the significant impact the migration cases have had: see Administrative Review Council, *Federal Judicial Review in Australia*, (n 31) 65–71 [3.77]–[3.92].

¹²⁶ Administrative Review Council, *Federal Judicial Review in Australia* (n 31) 117 [6.11].

¹²⁷ Along with injunctions: *Constitution* s 75(v). The High Court can also grant certiorari as ancillary to mandamus or prohibition: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90–91 [14]; *Plaintiff S157* (n 108) 507 [80]–[81].

¹²⁸ James Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21(2) *Public Law Review* 77; Administrative Review Council, *Federal Judicial Review in Australia* (n 31) 17 [1.2].

¹²⁹ *Migration Act 1958* (Cth) s 474.

¹³⁰ See *Plaintiff S157* (n 108).

¹³¹ *Industrial Relations Act 1996* (NSW) s 179; *Kirk* (n 106).

¹³² *Plaintiff S157* (n 108); *Kirk* (n 106).

¹³³ Alan Freckelton, ‘Effect of Privative Clauses on Judicial Review of Immigration Decisions’ (2015) 22(2) *Australian Journal of Administrative Law* 87, 87.

According to the Administrative Review Council '[t]he primary lesson is that attempting to restrict or exclude judicial review entirely will not be successful'.¹³⁴ Another lesson might be that you risk ending up with a complex and entrenched system. The focus by the High Court upon jurisdictional error as a central organising concept,¹³⁵ and maintenance of its separation from non-jurisdictional errors of law that can be detected on the face of a very limited record,¹³⁶ have set boundaries for the scope of judicial review.¹³⁷ At the same time, jurisdictional error's constitutional protection makes it unassailable.

Jurisdictional error is at once central to Australian constitutional and common law judicial review, and at the same time a notoriously difficult and illusive concept.¹³⁸ In *Hossain*,¹³⁹ Kiefel CJ, Gageler and Keane JJ recently explained jurisdiction and jurisdictional error as follows:

Jurisdiction... refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have 'such force and effect as is given to it by the law pursuant to which it was made'.¹⁴⁰

Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.¹⁴¹

¹³⁴ Administrative Review Council, *Federal Judicial Review in Australia* (n 31) 118 [6.15].

¹³⁵ Spigelman (n 128).

¹³⁶ *Craig* (n 93).

¹³⁷ Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed) *Modern Administrative Law in Australia; Concepts and Context* (Cambridge University Press, 2014) 248, 262.

¹³⁸ Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153, 179. A concept that is 'being called on to do too much': John Basten, 'Jurisdictional Error After Kirk: Has it a Future?' (2012) 23(2) *Public Law Review* 94, 95.

¹³⁹ *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1 ('*Hossain*').

¹⁴⁰ Quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46].

¹⁴¹ *Hossain* (n 139) 7 [23]–[24].

What is clear from these passages is that it is statutory interpretation and the construction of the specific statutory power relevant to the case before the judicial review court that is central to the analysis, rather than external standards being imposed by the traditional grounds of review. That the scope of the authority which a statute confers includes conditions which the statute *impliedly* requires to be observed, provides opportunities to argue that Parliament intended the power to be exercised in compliance with traditional judicial review standards such as procedural fairness and reasonableness. Nevertheless, as Will Bateman and Leighton McDonald have argued, over the ‘last 40 (or so) years’ there has been a shift ‘away from an approach which gives prominence to the identification and articulation of “grounds of review” towards an approach which gives increasing emphasis to statutory interpretation and particulars’.¹⁴²

It might have been otherwise. Chief Justice Kiefel, Gageler and Keane JJ suggested in *Hossain* that:

[h]ad statutory mechanisms for judicial review (such as that contained in [the *AD(JR) Act*]) been enacted to cover judicial review of statutory decision-making more comprehensively, the terminology of jurisdiction and of jurisdictional error in its application to administrative action may well have fallen into desuetude in Australia. Indeed, there was a time in the 1980s and 1990s when the terminology was little used, and doubts were expressed even afterwards as to its continuing utility.¹⁴³

It was not to be. Whilst the migration cases have dominated the High Court’s attention and influenced the development of constitutional and common law judicial review, the *AD(JR) Act* has languished and its relevance and future are now questioned. Specifically, one of the defining reforms introduced by the *AD(JR) Act* — the codification of grounds — is being questioned, along with the common law counterparts.¹⁴⁴

There were high hopes for the *AD(JR) Act* reforms in the early days. Writing in its first annual report in 1977 the Administrative Review Committee foresaw ‘the development of a body of law which lays down a logical and practical basis for the Court’s review of administrative action’.¹⁴⁵ Initially the *AD(JR) Act* was very influential,¹⁴⁶ although it never did oust the common law remedial model.¹⁴⁷ A major substantive reform introduced by the *AD(JR) Act* was the codification of the common

¹⁴² Bateman and McDonald (n 138), 153. Bateman and McDonald have named these the ‘grounds approach’ and the ‘statutory’ approach.

¹⁴³ *Hossain* (n 139), 7 [21].

¹⁴⁴ Basten, ‘Judicial Review: Can We Abandon Grounds?’ (n 124) 29.

¹⁴⁵ Administrative Review Council, *First Annual Report 1977* (n 2) 12 [61].

¹⁴⁶ Matthew Groves, ‘Should We Follow the Gospel of the Administrative Decisions (Judicial Review) Act 1977 (Cth)?’ (2010) 34(3) *Melbourne University Law Review* 736, 739.

¹⁴⁷ Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 90.

law grounds, achieved by providing a list of grounds in sections 5 and 6.¹⁴⁸ The listing of the grounds of review was intended to provide certainty.¹⁴⁹

Writing in 1996 Robin Creyke identified the advantages of the ‘list’ of grounds of review in the statute:

A major advantage of the codification of the common law grounds of judicial review in the [*AD(JR) Act*] is that it has fostered the development of a discrete jurisprudence for each ground. ... By contrast, in jurisdictions which have not followed the codification route, the tendency has been to conflate the grounds into the categories identified in *R v Minister for the Civil Service; Ex parte Council of Civil Service Unions* [1985] AC 324, namely, procedural impropriety, rationality, legality and possibly proportionality. That approach arguably conceals rather than heightens awareness of the difference between the grounds of review.¹⁵⁰

Similarly writing in the 1990s, John McMillan was also optimistic about the *AD(JR) Act* approach to grounds of review, specifically because they provided standards that could be identified by government decision-makers

In the area of administrative review a chief requirement is that there must at the end of the day be some agreed standards to guide administrative decision making. Ambiguity will never be removed, but it can at least be contained.¹⁵¹

McMillan often expressed concerns about the legal standards imposed by judicial review courts (including jurisdictional error) that introduce uncertainty and do not have self-apparent meaning for administrators who must strive to act lawfully.¹⁵² Looking at the particularised *AD(JR) Act* grounds from the perspective of the courts, rather than the administrative decision-makers, Mark Aronson saw the weakening of the links between the grounds and the concept of jurisdictional error as more problematic:

The grounds nevertheless remain highly particularised, and to the extent that they sever the link with jurisdictional error, they offer no readily apparent principles to keep the court on the path of judicial review and away from merits review.¹⁵³

¹⁴⁸ The *AD(JR) Act* grounds are ‘substantially declaratory of the common law’: *Peko-Wallsend Ltd* (n 94) 39 (Mason J). See also *Kioa* (n 94) 566–7 (Gibbs CJ), 576 (Mason J), 625 (Brennan J).

¹⁴⁹ *Ellicott Report* (n 30) 6 [19]. For a discussion of the influence of early (mid 20th century) textbook writers on the development of grounds in judicial review see Bateman and McDonald (n 138) 160.

¹⁵⁰ Robin Creyke, ‘Introduction and Overview’ (1996) 24(2) *Federal Law Review* 221, 225, 225 n 12.

¹⁵¹ John McMillan, ‘Developments under the *ADJR Act*: The Grounds of Review’ (1991) 20(1) *Federal Law Review* 50, 81.

¹⁵² John McMillan, ‘Judicial Restraint and Activism in Administrative Law’ (2002) 30(2) *Federal Law Review* 335, 368.

¹⁵³ Mark Aronson, ‘Is the *ADJR Act* Hampering the Development of Australian Administrative Law?’ (2005) 12(2) *Australian Journal of Administrative Law* 79, 80.

An early criticism of the particularisation of the grounds in the *AD(JR) Act* was that it might lead to ossification while the common law could continue to develop. The inclusion of the final ground ‘otherwise contrary to law’¹⁵⁴ allowed for ‘judicial development of additional grounds’¹⁵⁵ as the common law developed. However, the ‘otherwise contrary to law’ ground has long been declared a ‘dead letter’.¹⁵⁶ The *AD(JR) Act* grounds have not evolved.

This itemisation of the review grounds had one practical advantage: ‘an educative effect for the profession’,¹⁵⁷ along with law students. Writing in 1986 Goldring was optimistic that ‘[t]he new administrative law [had] provided a structure for an administrative law course’ when compared with courses in the 1970s that ‘began with a study of the remedies, and then moved on to substantive grounds’ and effectively took students around in a circle.¹⁵⁸ As we have seen in the discussion above, with the resurgence of jurisdictional error — the circularity remains.

VII CONCLUSION

We began this dip into history by looking at administrative law reform from a South Australian perspective. South Australia offers an interesting vantage point from which to observe the waxing and waning of the influence of statutory judicial review and the particularisation of grounds because it was a reform project that was never adopted in this jurisdiction.

Reading Harris’ survey of 1966–76 Supreme Court of South Australia cases reviewing administrative acts, decisions and subordinate legislation in his 1977 *Adelaide Law Review* article, which he organised ‘according to general conceptual categories of administrative law ... doctrines, grounds and remedies for judicial review’,¹⁵⁹ is enlightening. Much of the survey is, as one might imagine after 40 years, quaintly historical and the cases themselves are no longer familiar. However, the underlying concepts are surprisingly recognisable today, which would, I think, be quite astonishing to the 1970s reformers who planned Australia’s ‘new’ administrative law.

¹⁵⁴ *AD(JR) Act* (n 87) ss 5(1)(j), 6(1)(j).

¹⁵⁵ *Ellicott Report* (n 30) 9 [41].

¹⁵⁶ Matthew Groves, ‘Substantive Legitimate Expectations in Administrative Law’ (2008) 32 *Melbourne University Law Review* 470, 518; Groves, ‘Should we follow the gospel of the Administrative Decisions (Judicial Review) Act 1977 (Cth)?’ (n 146) 757.

¹⁵⁷ Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (n 153) 91. It has also been called a ‘useful checklist’: Basten, ‘Judicial Review: Can we abandon grounds?’ (n 124).

¹⁵⁸ Goldring, ‘Administrative Law: Teaching and Practice’ (n 15) 504.

¹⁵⁹ Harris (n 1) 86.

